Version as at 2 December 2009

Olla Podrida

LAW SHORT AND SHARP

FRANCIS BENNION

Author's Note

This version shows the book in the state it has so far reached. It ceased to be added to in my occasional column of the same title in *Criminal Law & Justice Weekly* when the final instalment of that column appeared on 27 June 2009. Thereafter the book is added to from time to time as I write new material.

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CONTENTS

TABLES

Cases

United Kingdom Statutes

United Kingdom Statutory Instruments

Introduction

On 11 October 2008 the oldest legal journal still being published in the United Kingdom, *Justice of the Peace* (founded 1837), started a monthly column of short topical pieces that I wrote under the title *Olla Podrida.* With the issue dated 3-10 January 2009, the journal changed its name to *Criminal Law & Justice Weekly*, which better suited the content as it had grown to be. I retained the copyright in these pieces, and they are now reproduced in this book, together with a number of similar pieces not published before.

The pieces reflect my current view of aspects of English law, after sixty or so years in practice of one sort or another (mainly in the field of legislation). There are some imaginative touches here and there, but I have striven to make all the facts given true and accurate in terms of actual events. By and large, the cases discussed are genuine ones. There is a serious underlying purpose, but wherever possible humour is introduced to lighten the tone. The collection is meant to be useful as well as amusing. To aid this an index, bibliography and tables are provided.

After writing a number of books on law, and many articles, I have reached the conclusion that there is room for a treatment which is serious, with flashes of humour, but is delivered in items with an average length of no more than five hundred words. On the wide spread of subjects with which it deals, this book is meant to offer an up to date and scholarly contribution, with radical edges. Sometimes it dares to say the unsayable or be rude about well-known figures. It may be thought controversial in places, saying what I believe needs saying. It includes fictitious characters who hold opinions which may or not be shared by me but are certainly held by large numbers of people living in England. Often these opinions would be regarded as being of a reactionary or right wing nature. I justify their inclusion on the ground that opinions are not necessarily correct just because they are held by people living at the present time rather than say a century ago.

I will now explain why I chose the title *Olla Podrida*.. This is a Spanish term deriving from two Latin words, *olla*, a pot, and *podrido*, the Spanish masculine for 'rotten' from the Latin *putridus*. Olla is pronounced, and sometimes spelt, *ollia*. Another variant is *olio*.

Spanish country folk had the practice of keeping a highly-seasoned stew going in a clay pot held over a fire. Into this, meat scraps, fish, vegetables and spices would be thrown from time to time. So we find Sancho Panza, the 'squire' of Don Quixote, saying:

> 'That big dish that is smoking farther off seems to me to be an olla podrida. Out of the diversity of things in such ollas, I can't fail to light upon something tasty and good for me.'[1]

A French variant is *pot-au-feu*.

The OED cites Tobias Smollett's *Humphrey Clinker,* written in 1771: 'He taught me to cook several outlandish delicacies, such as ollas, pepper-pots, pillaws . . .' Here by metonymy the olla or pot gives its name to that which is cooked in it. The OED has Henry Wadsworth Longfellow writing in 1843: 'Give a Spaniard his mass, his olla, and his Doña Luisa'.

From this, the meaning of olla podrida expanded to mean any assorted mixture or medley in which something good might be expected to be found. William Pearson, the eighteenth century astronomer, is quoted as writing 'All the conversations were in English . . . the whole olla podrida spiced with the latest gossip'.

In 1787 a periodical work called *Olla Podrida* began to be published in London. It ran to forty-four numbers, with the invocation to readers: 'Sit down and feed, and welcome to our table'.[2] In 1840 Frederick Marryat, known as Captain Marryat, published a book of ramblings and musings and called it *Olla Podrida*. In 1855 Ele Bowen published in Philadelphia a book

[1] Miguel de Cervantes, *Don Quixote*, Pt. II, ch. XLVII.
[2] Shakespeare, *As You Like It.*

on the Baltimore & Ohio Rail Road titled *Rambles in the Path of the Steam-Horse*. This he called ‘An off-hand Olla Podrida’.

And so it went on. Many more examples could be cited. We are in interesting company.

Chapter 1

1

My friend Igor, a White Russian Prince whose family were driven out by the Bolsheviks, is always asking me awkward questions about the British Constitution. In 1917 his family managed to get most of their vast wealth out of Russia just ahead of seizure by the revolutionaries, so Igor has time on his hands. He spends a lot of it studying our law for his own amusement.

Igor tells me that Lord Scott of Foscote, a retired Law Lord, has declared the Constitutional Reform Act 2005 to be unconstitutional. Igor does not know on what grounds His Lordship says this, but one thing Igor does know about the Act. 'What's that?' I ask. 'Well', he says, 'It has a lot of provisions about a Lord called the Lord Chancellor but they've appointed a Mister to be Lord Chancellor and he still calls himself that, Mister Jack Straw. How can a Lord be a Mister?' I confess to Igor that I don't know the answer to that, just as I don't know how a Mister can be a Lord.

'Is Mr Straw what is called a Jack in office?' Igor asks. I say he very well might be.

2

When drafting the Consumer Credit Act 1974 I did not foresee one curious outcome. It was made known in a 2008 case before His Honour Judge Simon Brown QC, sitting as a Judge of the High Court. The case was on five related claims concerning a Mr and Mrs Rankine and their financial affairs[1].

His Judgment makes clear that at the hearing Judge Brown was sorely tried by the conduct of the Rankines. The Judgment says they represented themselves, and were granted the usual indulgences to litigants in person by the court and the advocates appearing for the financial institutions. However the Rankines 'misused those indulgences . . . by producing blizzards of lengthy, argumentative and incoherent pleadings and witness statements'. In their evidence they were 'perversely and deliberately untruthful'. They used arguments that were 'pure sophistry' and made submissions 'totally without factual or legal merit'. In a blast at Mrs Rankine Judge Mason says:

> 'In my judgment, Mrs Rankine was deliberately seeking to be perverse and untruthful in seeking to avoid a substantial debt despite having all the benefits of equipment she expects the credit company to pay for on her behalf. Her behaviour in Court was perverse, argumentative and obstructive.'

That was not all. Many litigants in person plague the courts in the manner described. What was new to me was the final allegation that Judge Mason levels at Mr Rankine.

> 'Recently eight (I believe) claims arrived in various courts in the Birmingham Civil Justice Centre about the Rankines' financial affairs. These are just five of them and an undisputed schedule of debts amounts to £20,231.50 and £17,334.80 in the cases of Mr and Mrs Rankine respectively. During evidence. Mr Rankine boasted to the Court that they had managed to wriggle out of a further £65,000 of similar debts by raising Consumer Credit Act legal technicalities, leaving the financial institutions to write them off as bad debts rather than take the trouble and expense of litigating for dubious reward by enforcement against two individuals who are apparently on income support and exempt from paying court fees.
>
> It also emerged during evidence that Mr Rankine was seeking to make a business out of this by offering his services to others for percentage reward as a credit card buster

[1] The claims were Nos. 8BM40009-13.

with a website and publicity generated in the media about his "victory" in the Court of Appeal in one of his cases against MNBA.'

This sort of thing was not what was intended by those responsible for the enactment of the CCA. As Judge Mason points out, the Act was introduced to protect the individual who is unsophisticated in financial affairs and contracts with unscrupulous and sophisticated financial institutions. 'It was not designed to help individuals in the financial services business make money out of financial institutions through exploiting its undoubted technicalities.'

Well that was rather what I thought too, having I fear created many of the said technicalities.

3

Igor has given further study to the Constitutional Reform Act 2005 and comes back to me with another awkward question. 'It is reported that for 2008 there is a £90 million budget deficit in the financing of the courts' he says. 'Isn't that very serious?' I reply that it seems to me to be a very grave matter indeed. 'Well', asks Ivan, 'What will they do to the Lord Chancellor Mr Straw? Will they lock him up in the Tower of London?'

I say that this is unlikely, whereupon Igor says that they ought to because of the oath the Act requires. What oath? I ask. Igor says the Act requires a Lord Chancellor to swear an oath to 'discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible'.

Ivan seems to think that the Act is meant to be taken seriously, so that breach of the Lord Chancellor's oath should have harsh consequences. If they won't lock Mr Straw up in the Tower of London, what punishment will they give him? I confess I don't know. Probably none at all I would like to add, but refrain from doing so. I dread the tirade of puzzlement such an answer would cause to descend on me from Igor.

4

Modern governments often display delusions of grandeur. This is another way of saying that the fairly ordinary men and women who nowadays constitute the cream of our parliamentary contingent are prone to entertain such delusions. An example is the 2007 Green Paper titled *The Governance of Britain* (why not just 'Government'). This has led to the draft Constitutional Renewal Bill (more grandiloquence) which is presently being considered. The Green Paper is said to have been based on four 'key goals':

- To invigorate our democracy;
- to clarify the role of government, both central and local;
- to rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account; and
- to work with the British people to achieve a stronger sense of what it means to be British.

Well I have stared at these four so-called goals, over and over again. I have held them upside down and shaken them. I have squinted at them sideways. Still I can't make any sense of them. Words like 'hot air', 'flatulence', and 'puffed up' float around my brain. In the end I can't improve on the word I started with. Grandiloquence. The Oxford English Dictionary defines a grandiloquent person as 'characterized by swelling or pompous expression'. Yes, that'll do.

5

I decided to investigate Ivan's story that there is a £90 million budget deficit in the financing of the courts, having just seen a news report that the deficit is really £3 billion. There was nothing about it on the HM Courts Service (HMCS) website, where one would expect to find such things. I tried calling the HMCS Senior Press Officer Vincent Burke. I gave him my name and said I was a member of the Bar who was writing an article about the alleged deficit. He demanded particulars. Where had I read news of the deficit? What paper was I writing for? What was the address of my Bar practice? After he had run out of inappropriate, indeed impudent, personal questions Mr Burke gave me an official statement from the Justice Minister Lord Hunt:

> 'There is no a black hole in Her Majesty's Courts Service budget. There will be no impact from efficiency savings on the service provided to victims and witnesses or to the effective delivery of justice. As with any other Government department or agency there is a duty to ensure taxpayers' money is spent efficiently, and Her Majesty's Courts Service is committed to ensuring this happens.'

Pressed on this, Mr Burke said it was the only information that was being released on the matter of the alleged deficit. I said that 'black hole' was mere slang, and that I wished to know whether or not there really was a budget deficit and if so what is its amount and what period does it cover?

Mr Burke replied 'we have no further publicly available information on this matter'. He suggested I speak to Simon Steel in the Ministry of Justice Press Office if I wished to discuss it further. I did this, without result. Mr Steel merely repeated that Lord Hunt's statement was all the Government were prepared to say. If I wanted more I would have to ask the Press Office of HM Revenue and Customs. I decided to give up at this point.

As well as being Lord Chancellor, Mr Straw is also the Secretary of State in charge of the Ministry of Justice. Is it not remarkable that his own Press Officer declines to answer properly an inquiry concerning Mr Straw's alleged failure to carry out his statutory duty? Frustrated by this I decided to probe the story further.

I discovered from the internet that on 4 September this year the London *Times* published a report headlined 'Courts face closure as judges are told of £90m shortfall in collection of fees'. There was no mention of Lord Hunt's 'black hole', but the report began:

> 'The criminal courts are facing their biggest cash crisis in decades after a warning to judges and magistrates of a £90 million shortfall in the budget for the justice system. Judges and magistrates in England and Wales have been told of the emergency, which is likely to result in trial delays, cancelled court sittings and redundancies.'

Surely such a report in the prestigious *Times* ought to be taken seriously, and answered properly, by the minions of the Ministry of Justice? I asked Mr Burke when Lord Hunt's statement was made, as he had omitted this information. He replied:

> 'Lord Hunt's statement was made on 3 September 2008 in response to press enquiries on the subject. It was not made in the House of Lords and so there is no Hansard reference.'

The dates suggest that the 'press enquiries' emanated from the *Times*. Yet its report did not mention Lord Hunt's statement. All very mysterious.

6

I occasionally buy collections of old letters from bookshops or at auction sales. They cost next to nothing and invariably include interesting missives. The other day I acquired a

collection of copy letters from the recent past. Each is headed ‘From the Rt. Hon. Earl Forsooth K.G.’. The address shown is Montmorency Castle, Rutland. I suspect the name to be a pseudonym because I can’t find it in *Debrett*. However I have checked that the letters deal with actual events, so I decided to publish some of those that are of legal interest. Here is the first.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

Rutland

31 July 1997

Mr Magnus Magnusson

Dear Mr Magnusson,

Living with bats

I am writing to you about the item in today’s *Daily Telegraph* concerning the Chief Constable, Mr William Wilson, who was driven from his home by an infestation of thousands of bats. You are mentioned as chairman of Scottish Natural Heritage, which complained to the Procurator-Fiscal about Mr Wilson’s wholly understandable rejection of these unpleasant creatures. You must be held responsible for the most bizarre action against a householder I have heard of in years.

The bats roosted in the roof of the house, and in the end occupied every room. Because he naturally attempted to eject these repellent reptiles, Mr Wilson fell foul of a ludicrous statute which protects them even in such circumstances. Nothing objectionable to Mr Wilson would have been done about this if your busybody organization had not reported him to the authorities. The newspaper item says of Mr and Mrs Wilson-

> ‘The couple have been living with bats for the past five years, and sought the advice of Scottish Natural Heritage two years ago when the animals came indoors. During hot weather earlier this month the smell in the £140,000 house became unbearable. Scottish Natural Heritage has reported Mr Wilson for failing to follow its advice not to disturb the bats. He was told that the animals would leave once their young had been taught to fly.’

Have you not heard that under our law a man’s house is his castle? This ancient, sensible principle was even known to Roman law. It is expressed in the Latin maxim *domus sua cuique est tutissimum refugium* (a man’s house is his safest refuge). I’m sure that must have come up in ‘Mastermind’.

The least you can do now is resign from this absurd organization calling itself Scottish Natural Heritage. First however you should give it a good telling-off and see that the excellent Mr Wilson is suitably compensated.

Yours faithfully,

Forsooth

Chapter 2

1

The legal principle most often forgotten or overlooked by prosecutors and others is *de minimis non curat lex*, the law pays no attention to trifles.[1] It was the first thing I learnt on my honours degree course at Balliol. My blind bachelor tutor Sir Theodore Tylor taught us a mnemonic which caused him great hilarity:

> There was a young fellow named Rex
> who showed little sign of his sex.
> When charged with exposure
> he replied with composure
> *de minimis non curat lex.*

De minimis was the answer in the recent case of *McMillan*, though it was not mentioned in the report[2]. The claimant alleged misbehaviour by the arresting officer, who merely 'took the [drunken] claimant by the arm to escort her out of the garden'. The allegation was dismissed on the ground that the officer was acting within the bounds of 'generally acceptable standards of conduct'.

A recent Scottish case cried out *de minimis*, but again it was not mentioned in the report. Ray Kutscher-Byrne was convicted of an offence under the Wildlife and Countryside Act 1981. He owns a house on the banks of the River Doon in Ayrshire. It was being threatened by the collapse of the river bank and he obtained permission to shore this up. In the course of the work two freshwater pearl mussels, a protected species, were found attached to the river bank. One was dead. The sheriff admonished Mr Kutscher-Byrne, the lowest level of punishment available. He now has a criminal record, and should never of course have been prosecuted.[3]

A criminal record is also now possessed by retired postmistress Alma Harding, who chastised a boy of 13 with some rolled-up papers to stop him vandalising a village green. She now has a conviction for battery.[4] I duly lodged an objection:

> 'Sir – When Alma Harding reproved a boy with rolled-up papers (report, 25 February 2009) it was a trifling matter, as the magistrates showed by giving her an absolute discharge. They should instead have acquitted her under the rule that the law pays no attention to trifles – *de minimis non curat lex*. It is not widely known that this rule applies in such cases.'

In response my Ulster friend His Honour Judge John Martin sent the shortest email I have ever received: 'Well said'.

2

The noted parapsychiatrist Dr Barney Bulimia has asked me to join his support team. He tells me they are currently working up arguments for his newest project, which is to secure an upward adjustment of the sexual age of consent to 21. The good doctor claims this to be the answer to the gymslip mother and other problems of teenage sexuality.

It will be remembered that Dr Bulimia was one of the expert advisers to the Home Office on the content of the Sexual Offences Act 2003. Having secured part of his object of suppressing adolescent sexuality by law, he is anxious to go on and complete the good work. It is not enough; he says, to have reached the position that any sexual expression whatever by a young

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[1] See *Bennion on Statutory Interpretation* (5th edn, 2008), s. 343.
[2] 172 JPN (2008), p. 646.
[3] Reported in *The Daily Telegraph*, 30 September 2008.
[4] Reported in *The Daily Telegraph*, 25 February 2009.

teenager, even kissing, constitutes a criminal offence. It is vital to continue this reform right up the age range.

The Bulimia school apparently thinks youngsters should be encouraged to binge on food so as to get their minds off sex. I have told him I will think about his request.

3

The *New Law Journal* for 19 September 2008 published an item saying that in *Oxonica Energy v Neuftec*[1] Peter Prescott QC, sitting as a High Court Judge, criticised a boiler-plate term in a contract as 'exceedingly hard to interpret'. He quoted the 17th century French poet and lawyer Nicolas Boileau:

> Ce que l'on conçoit bien s'enonce clairement,
> Et les mots pour le dire arrivent aisément.

This precept can be translated (accurately if clumsily) as 'That which one conceives well enunciates itself clearly, and the words for saying it come easily'. This, said Mr Prescott, is the secret of drafting legal documents, and lawyers should have it framed and displayed on their desks.

I'm not sure what old Nicolas (full name Boileau-Despreaux) would have made of that. He meant his precept as advice to poets, and included it in his book *L'Art Poetique*[2].

4

Bars in Minnesota have, says the *Daily Telegraph*, 'discovered a loophole to resist the public smoking bans sweeping the world'[3]. People love to discover what they think is a loophole in a law, whereupon they try to drive a coach and horses through it – usually unsuccessfully. This propensity is so familiar that the Commonwealth Association of Legislative Counsel (of which I am privileged to be a member) calls its occasional journal, *The Loophole*.

The Minnesota supposed loophole seeks to exploit a well-intentioned provision whereby performers in theatrical productions are exempted from the smoking ban. It works like this, according to the report.

Bars stage *faux* theatrical productions with cigarettes as props. The owners print playbills encouraging patrons to come in costume. They are then treated as actors and permitted to smoke on the bar premises. They are said to be playing themselves in a historical drama set at a time before the smoking ban was introduced. The Rock Bar in St Paul calls such a production *Before the Ban*.

I doubt myself that they will get away with it. The so-called loophole seems to fall within the words Lord Rodger of Earlsferry applied to another similar attempt:

> 'The notion of a fraud upon an Act, acting *in fraudem legis*, is ancient. Although the outer limits of the doctrine remain notoriously difficult to define, this case at least falls squarely within its scope.'[4]

[1] [2008] EWHC 2127.
[2] I, 153.
[3] *The Daily Telegraph*, 3 August 2008.
[4] *R v J* [2004] UKHL 42, [2005] 1 All ER 1 at [64].

5

The recent dumbing-down of the once great newspaper the London *Times*, which used to be proudly known as the Thunderer, is illustrated by the fate of two letters I sent them on the same theme. The first was published; the second was not. Here is the first letter, published on 28 December 1995:

> 'Your report (12 December 1995) that the Home Secretary asked the police and the Crown Prosecution Service to change prosecution policy in a certain area is disturbing. He told them they should treat any 'have a go' hero more sympathetically. Mr Howard has no right to tell these officials any such thing: it is not his business. His interference (even though some may like the idea behind it) is unconstitutional. The British constitution entrusts the Attorney General, not the Home Secretary, with the oversight of prosecution policy. This accords with the Attorney's function as the paramount non-party-political guardian of the public interest in matters concerned with law. That function was confirmed by the Appellate Committee of the House of Lords only last year in *Brookes v DPP of Jamaica* [1994] 1 AC 568 at 579. For very good reason, the exercise of the prosecutive power is constitutionally separate from the exercise of the executive, legislative, and judicial powers.
>
> Some functionaries within the enforcement system, notably the police, are regarded as part of the Executive. Others, namely the courts, exercise the judicial power of the state. In addition there are the independent wielders of the prosecutive power, or power to put persons on trial. Under the constitutional arrangements now prevailing in England, prosecution policy stands apart. That is a vital safeguard, which Mr Howard should respect. It means that governments cannot decide whom they wish to try. It also means that courts cannot decide who shall appear before them. Their sole function is to try whoever it is they find arraigned. I see no sign that the present Attorney General is aware of his responsibilities in this connection. In his capacity as guardian of the prosecutive power, he is supposed to stand aloof from the Executive. Why then has he not stood out against the presumptuousness recently displayed by the Home Secretary?'

Admittedly the *Times* shortened the above slightly, but they did think it worth publishing. Not so with the following, which I sent to them on 18 October 2008:

> 'There is cause for concern in your report that the Government is drawing up guidelines whereby fruit and vegetable traders who sell their produce using imperial measures will not be prosecuted. You quote John Denham MP, whom you describe as 'the Innovation Secretary', as saying: 'It is hard to see how it is in the public interest, or in the interests of consumers, to prosecute small traders who have committed what are essentially minor offences. I would like to see an end to this kind of prosecution, which is why I have asked for new guidance to be introduced.'
>
> This is an innovation too far. For very good reasons, the exercise of the prosecutive power of the state is constitutionally separate from the exercise of the executive, legislative, and judicial powers. The British constitution entrusts the Attorney General, not the Executive, with the oversight of prosecution policy. This accords with the Attorney's function as the non-party-political guardian of the public interest in matters concerned with law.
>
> This constitutional principle regarding prosecutions has been accepted since the Campbell Case in 1924, when its interference in the prosecutive process brought down the first Labour Government. The principle means that governments cannot decide whom they wish to try and whom they wish to see escape justice.'

Their failure to publish this illustrates the way the *Times* has abdicated as the Thunderer. Its readers still include experts in many fields of the national life, but it no longer wishes to capture their expertise for its once-esteemed letters page. The contributions published on that

page are now on the tabloid level. In fact they are outdone by those published by the *Daily Mail*.

6

The Prime Minister Mr Gordon Brown has set up what is described as an 'economic war cabinet'[1]. Its proper name is the National Economic Council (NEC) and it comprises 17 Ministers of the Crown, the Chair being Mr Brown. He has called it 'a new way of governing'[2]. This strikes me as overweening and sinister.

My friend Prince Igor is a student of the British Constitution. He asks whether Mr Brown is authorised to alter the precious constitution off his own bat in this fundamental way? I say no, of course he isn't, but that won't deter him. The official handout says that the NEC

> '. . . will work to help people and businesses to deal with the current economic uncertainties. It will coordinate efforts to help families deal with higher food and energy prices as we work with our International partners in managing the world's scarce natural resources, and provide the forum on how to equip the country for the future by making the right investments in education, skills, science and infrastructure.'

That busybody activity is nowadays part of the ordinary business of government. Mr Brown tries to dress up this 'new way of governing' by calling it a Cabinet Committee. But of course Cabinet Committees are part of the existing way of governing, and there is nothing new about them.

Mr Brown can't have it both ways, though as usual he tries to.

7

In an article[3] I referred to the preparation of a Criminal Code by the Law Commission. I should have mentioned that the Commission have recently concluded that the project is not realistic, and have removed it from their programme[4]. They say:

> 'With forty-two years' experience of seeking to codify the law, the Commission has taken the opportunity of the Tenth Programme to reappraise whether projects with codification as their principal outcome are realistic and whether effort and resources should explicitly be given to achieving that outcome.'

Odd that it should take 42 years for the Commission to wake up to the need to ensure that their codification projects are realistic. Even odder that a statutory body should express such doubts about a process they are required by statute to perform. Does not this body set up to reform our law realise that it is guilty of contravening its legal duty? It should arouse outrage, but don't look for that from our current supine legal generation.

The Commission blame 'the increased pace of legislation, layers of legislation on a topic being placed one on another with bewildering speed, and the influence of European legislation'. Evidently codification is another victim of the constant law-churning against which I have often inveighed.[5]

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[1] *The Daily Telegraph*, 4 October 2004.
[2] *Ibid.*
[3] 172 JPN (2008) p. 619.
[4] See the Law Commission's Tenth Programme of Law Reform, Law Com No. 311 (2008), www.lawcom.gov.uk/docs/lc311.pdf.
[5] See, e.g., 'Law-Churning and the Sociologists', 172 JPN (2008) p. 228, www.francisbennion.com/2008/010.htm.

8

It is not generally known that the 2012 London Olympics are backed by a penal Act of Parliament, the London Olympic Games and Paralympic Games Act 2006. This authorises restrictions on advertising which have attracted criticism. It is reported that normally innocuous words such as Game, Medals, Gold, 2012 and Summer cannot be combined in advertising around the Olympics, with anyone flouting the law facing a fine of up to £20,000.[1] The Chartered Institute of Marketing (CIM) says few traders appreciate the constraints of the legislation, and face a rude awakening when they discover they have broken the law. The CIM attacks the Act as 'draconian', warning that

> 'An advertisement for sun tan lotion, for example, with the strapline "Get bronze in 2012" would be found to be in contravention of the Listed Expressions element of the Act.'[2]

Tobacco advertisers fear that a different form of censorship is threatened. Denis Campbell of *The Observer* says 'Government plans that would force tobacco firms to sell cigarettes in plain, unbranded packets could be the most powerful tool yet unleashed in the war on smoking'[3]. He reports Deborah Arnott, director of the health campaigning charity Ash, as saying, with remarkable lack of originality, that plain packing is an idea whose time has come. She adds:

> 'The industry knows that plain packs spell the death knell to industry profitability. [It] cannot survive without recruiting replacements for the 100,000 UK citizens its products kill each year. Most of these new smokers are children and young people, who our research shows find plain packs much less attractive.'

9

At the Club the other day my old friend Sir Merryweather Merriedew QC (universally known as Merry) was controversially holding forth as usual. 'I have practised in the courts as counsel for over sixty years', said Merry, 'and I can confidently say that the truth is best discovered without their use'.

'You mean by just having litigants in person?' I asked.

'Precisely' said Merry. 'I'll give you an example at random from the Family Court.'

Merry told us that he was, as counsel for the husband, cross-examining the wife, who described how the husband constantly called her names.

Wife Then he called me a rabbiting Irish cottage woman.

Counsel That was just in the heat of the moment was it not?

Wife It was not.

(*Counsel hastily passes on.*)

'You see how it is', Merry remarked. 'Counsel is really hamstrung, and produces nothing helpful to his client.' He went on to give us a sample of a similar interchange where the husband represented himself.

Wife Then you called me a rabbiting Irish cottage woman.

Husband That was the truth, wasn't it?

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[1] *The Observer*, 21 September 2008.
[2] *Ibid.*
[3] *Ibid.*

Wife It was not.

Husband Well let's take it in turn. One, you like rabbiting, don't you?

Wife (unconvincing) I do not.

Husband Don't people avoid you in the street because once you start they can't get away from your rabbiting?

Wife They do not. Why only yesterday . . . (rabbits on until stopped by Judge).

Husband Two, I called you Irish. You are Irish by birth aren't you?

Wife That I am, and will be till my dying day.

Husband Although you changed your nationality to British when you came to live in England?

Wife stares at him without speaking.

Husband Three, your forebears lived in Irish cottages?

Wife There's nothing wrong in that.

Husband And you've always constantly told me that all you ever wanted was to live alone in a bedsit?

Wife (hesitant) Yes.

Husband My Lord, I rest my case.

10

Here is another from my collection of indignant letters written by the Rt. Hon. Earl Forsooth KG.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

Rutland

14 January 2005

The Editor
The Sun

Sir,

I notice that your disgusting rag has again been traducing His Royal Highness Prince Henry Charles Albert David, commonly known as Prince Harry. This time it is over what he wore at a private fancy-dress party on the excellent theme of 'Colonials and Natives'. In your issue for 13 January 2005 a large front-page headline reads 'Harry the Nazi', which is grossly impertinent. Next to it is placed an unauthorised photograph of His Royal Highness wearing slacks and a short-sleeved shirt, both beige, with a swastika insignia on his left arm.

In *The Sun Newspaper Online* on 16 January you compound your offence by writing that 'Prince Harry's not the brightest star in the royal firmament', which again is disrespectful. You go on to say he is to be given a tutorial on the Holocaust by the Chief Rabbi, Dr Jonathan Sacks. This cannot be true. I happen to know that Dr Sacks is an honourable man, who would not dream of committing such presumption.

You have got the matter completely out of proportion. There is a long tradition of wearing this kind of costume at fancy-dress parties, and Prince Harry is a stickler for tradition. He

hired the costume from a shop which had it in stock, and no doubt frequently hired it out to customers. Why should the fact that one of these customers happens to be Prince Harry make any difference? He is surely entitled to a private life? Indeed it is one of his human rights to have one. My chap Vencible tells me that Article 8 of the European Convention on Human Rights, which is part of our law, says that everyone has the right to respect for his private life and that this applies to Prince Harry as much as to any other British citizen.

You suggest the incident makes Prince Harry unfit to be admitted to the Royal Military College at Sandhurst for training, yet Vencible tells me he has seen photographs in the *Daily Mail* for 15 January 2005 of a fancy-dress parade at Sandhurst where cadets are dressed as Nazis. One young man, with fake Hitler moustache, is giving a Sieg Heil salute with arm raised. Another cadet wears jackboots and a Nazi SS uniform with swastika armband. So much for Sandhurst.

The *Sunday Telegraph* for 16 January reminds us that *The Producers*, currently playing to packed houses in London, features a spoof musical *Springtime for Hitler* where the cast are all dressed in Nazi uniforms. Prince Charles and his partner Camilla Parker-Bowles recently attended a performance of this and laughed along with the rest of the audience. What signal did that give Prince Harry? asks the newspaper. It adds that dressing up as Nazis belongs to a long British comedy tradition, starting with Charlie Chaplin in *The Great Dictator* and continuing with shows like *Dad's Army*, *'Allo 'Allo* and *Fawlty Towers*.

I myself served in the Grenadier Guards throughout Hitler's War and I remember that we mocked the Fuerher's idiots, as did the whole British people. It was jeering at him as Lord Haw-Haw that neutralised the effect of the traitorous William Joyce and his pitiful propaganda broadcasts.

So get real, if I may borrow a phrase frequently used by my grandchildren when visiting the Castle. In an earlier age, I may say, you would have been hung from the Castle battlements if any of my ancestors had got hold of you.

Yours faithfully (to the Crown),

Forsooth

Chapter 3

1

Within a residential area of Southampton, in Hythe, said Moses LJ in an appeal by way of case stated[1], the Manleys own and operate kennels known as the Howling Dog Kennels. In these, at the time of the judgment, there were 24 huskies, dogs in pairs. Mrs Manley and her husband are highly successful in the breeding, showing and racing of Siberian Huskies. But, as the name of the kennels reveals, the dogs unfortunately make a noise. There are certain times of day when, spontaneously, what is described as pack howling reaches a level which, as was found as a fact both by the District Judge and by the Crown Court, amounts to a nuisance.

Readers of *Justice of the Peace* were indebted to Neil Parpworth for an interesting article on this case[2]. Two things struck me forcibly when I read what he wrote.

The first thing was that reg. 2(2)(c) of the Statutory Nuisance (Appeals) Regulations 1995[3], provides that it is a ground of appeal for the defendant to show that 'the best practicable means were used to prevent, or to counteract the effects of, the nuisance'. So where the best practicable means fail of effect, so that the neighbours are still plagued by what was in this case insufferable noise, it's just too bad. They must suffer it without legal redress. That doesn't strike me as justice, though Moses LJ had no comment to make on it.

The other thing that struck me most forcibly was the impudent name that the Manleys chose to give their kennels. They might just as well have called them the Public Nuisance Kennels, because premises where 24 huskies are kept in a residential district are practically certain to be that. Talk about cocking a snook at the neighbours! Again, Moses LJ did not comment.

2

One of the first things New Labour did on attaining power was to pass the Civil Procedure Act 1997. Section 6(1) of this provides for the setting up of the Civil Justice Council, which it describes as 'an advisory body'. This sounds harmless enough. A purely advisory body would not possess any executive or legislative powers. But wait.

Switch to 22 October 2008, when the Treasury announced the following:

> 'The Master of the Rolls has today approved the Civil Justice Council's new protocol for the courts in mortgage repossession cases. This sets out clear guidance on the steps that lenders are expected to take before bringing a claim in the courts to ensure that repossessions are a last resort. Lenders will now be expected to demonstrate that they have tried to discuss and agree alternatives to repossession when borrowers get into trouble with their mortgage repayments. If a case reaches court, lenders will be required to tell the court precisely what they have done to comply with the protocol.'[4]

This uses s. 6(1) to go well beyond the giving of advice: it attempts to effect a major change in the law. But does it succeed? I suggest that the purported protocol is ultra vires and void.

The same Treasury announcement contains the following statement by Yvette Cooper, the Chief Secretary of the Treasury: 'We need to make sure we help those who might be hardest hit in the tougher times ahead, ensuring repossession is the last resort not the first'. 'We' here refers to the Treasury, a branch of the Executive. This is legislation by the Government.

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[1] *Manley & Anor v New Forest District Council* [2007] EWHC 3188 (Admin) at [2].
[2] 172 JPN (2008), pp. 784-786.
[3] SI 1995/2644.
[4] See Treasury website http://www.hm-treasury.gov.uk/press_108_08.htm.

That impression is confirmed by a message in the same announcement by the Justice Minister Bridget Prentice, who says: 'The new Civil Justice Council protocol forms part of a wider package of measures which demonstrate this Government's commitment to provide the best possible support to debtors and vulnerable borrowers'.

We are supposed to live under the rule of law. This is not law, but Government ukase. For those unfamiliar with that word I give the OED definition: 'An order or regulation of a final or arbitrary nature'. The OED gives the following as an example: 'The Empress of Russia issued an ukase, whereby various taxes are abolished'.

Yvette Cooper MP may be surprised to find herself likened to the Empress of all the Russias.

3

There are nowadays fads and fancies in law, which used not to be the case (truly, law is too important for that). One of these is for having a new Bill of Rights for the United Kingdom, simply (as my White Russian friend Prince Igor puts it) because the idea is fashionable and imagined to be 'with it'. Apparently there is also going to be an additional one for Northern Ireland. The *Observer* published an item headed 'Failure to share housework to be a breach of partner's rights'.[1] The paper said it had obtained a draft of a Bill of Rights for Northern Ireland which is to be enacted by the Westminster Parliament in pursuance of the Good Friday Agreement. It is alleged to include the following:

> 'All workers, including those working in the home or in informal employment, are entitled to rest, leisure, respite and reasonable limitation of working hours, as well as appropriate provision for retirement.'

This carries social engineering by Government to remarkable lengths. It parallels the announced intention of Prime Minister Gordon Brown to introduce a new Bill of Rights for the whole United Kingdom. On 16 January 2008 I received an invitation from Roger Smith, head of *Justice*: 'Would you be interested in attending a short discussion between myself and Jack Straw [the Lord Chancellor] on the subject of a Bill of Rights, to take place at the *Guardian* Newsroom, opposite the *Guardian* main building in Farringdon Road, from 9.30-11 am on Monday morning 21 January?' I declined, adding that I would however like to send through him the following message to the Lord Chancellor:

> 'On no account inflict a new Bill of Rights on us. Practising lawyers in that field love the idea, it promises more work. The said work will (if the thing happens) be for everyone else an unproductive nuisance.
>
> More than that, it will inevitably mean more power to the judges and less practical democracy. It will clash with the Human Rights Act 1998 and the new European Charter of Fundamental Rights (which already clash with each other).
>
> The tangled complexity of the legal system that now operates in this country (also bearing in mind the effect of devolution) is already intolerable from the point of view of knowing and teaching the law and administering justice. I can see no advantage to anyone, except certain lawyers, in piling on another layer in the form of a new Bill of Rights.
>
> The extraordinary thing is that no one has said what would be in a new Bill of Rights, or why we are supposed to need it. It seems to be embraced in a thought-free way as being the latest must-have fashion accessory.'

Undeterred by this, Mr Straw has recently tried to get Cabinet approval for the new Bill of Rights. Apparently the Cabinet are not having it. According to a report, the Prime Minister's high-profile plan to introduce a 'Bill of rights and responsibilities' is in disarray following a

[1] *The Observer*, 30 March 2008.

cabinet revolt. Ministers have warned him that his proposed charter laying out the rights and duties of citizens is unworkable and 'could pave the way for a deluge of court cases'[1].

The report adds that the Government's legal advisers warned of 'massive difficulties', questioning how social and economic rights could ever be justiciable and doubting whether a new right to equality is necessary given also that the Government was also promoting an equalities Bill.

So there's hope for us yet. Igor says it will be a close-run thing though. (His command of English idiom is growing.)

4

In the United States the naming of an Act (whether formal or informal) is regarded as having political significance. William Safire discusses what he calls acronymania, or the naming of legislation based on acronyms, and the effect of calling the post 9/11 rallying enactment the Patriot Act by an acronym from the slogan Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.[2]

In the United Kingdom the short title of an Act is normally devised by the drafter of the Act without particular attention to its political effect.[3] It is felt by drafters that the selection of the wording should follow normal practice and not be designed to score party-political points.

The two viewpoints came into collision over the wording of the short title to the Tenants' Rights, Etc (Scotland) Act 1980, which has recently come into prominence in a radio programme.[4] The politician in question was Sir Malcolm Rifkind MP. I put it in Rifkind's own words:

> 'The draft Bill came from the parliamentary draftsmen and the Bill was headed Housing (Scotland) Bill and I thought that's a very uninteresting title, not something that is very politically stimulating, so I sent back a note saying If they didn't mind I'd rather it be called the Tenants' Rights (Scotland) Bill because I not only thought that met the Government's political objectives but I knew that it would be particularly irritating for the Labour party to have to vote against something called 'tenants' rights'.
>
> I got a message back from the draftsmen saying, no, that would not be possible. All Scottish housing legislation had always been called Housing (Scotland) Bills and in any event although its main purpose was tenants' rights there were other things in it. So I said 'OK, I offer you a compromise' and the compromise, which was the one they, without any great enthusiasm, had to accept, was that it became known as the Tenants' Rights, Etc (Scotland) Bill and it is now the Tenants' Rights, Etc (Scotland) Act. So ministers had the last word I'm relieved to say.'

In fact ministers did not have the last word. The provisions Rifkind wished to trumpet constituted Parts I and II of the 1980 Act. Seven years later another Act took these provisions into itself and repealed them as they stood in the 1980 Act. This later Act was a consolidation Act. Its short title was the Housing (Scotland) Act 1987.

The function of an Act of Parliament is to lay down the law, not be a vehicle for politicians' grandstanding. There are reasons for the drafter's preference for the form 'Housing (Scotland) Act'. It is short and snappy, and accurately descriptive. Where a short title has been used before in a series, it is important to show that the present Act is part of that series, i.e. is *in*

[1] *Sunday Times*, 2 November 2008.
[2] William Safire, *The Right Word in the Right Place at the Right Time* (NewYork: Simon & Schuster 2004), p 5.
[3] See *Bennion on Statutory Interpretation* (5th edn, 2008), p. 737.
[4] Shaun Ley in *The Westminster Hour*, BBC Radio 4, 7 December 2008.

pari materia with the earlier Acts. Furthermore the series may have been given the collective title 'The XYZ Acts [year] to [year]'. This is convenient for reference, though not always actually used. Where used it needs to be maintained.

Those are sober technical factors which told against what the simple-minded Rifkind insisted on doing. The state of the Statute Book was just that little bit the worse – for a time.

5

Voyeurism has never been a crime at common law. By the Sexual Offences Act 2003 Parliament made it a crime for the first time in our history. In 2007 various people took leave of their senses by treating as criminal voyeurism under the Act the photographing of *a showering man wearing bathing trunks*. The convicted victim was a man named Kevin Bassett.

Our Judges once firmly proclaimed the superiority of common law over statute. Peter Landry said:

> 'The common law exists as a result of a natural sequence which hardened first into custom and then into law. It did not come about as an act of will, as an act of some group aware only of the instant moment, unaware of the nature and history of man. It came about as a result of a seamless and continual development. Through processes we can hardly begin to understand; it evolved along with man.'[1]

I wish this attitude of respect for the common law still prevailed among our judiciary. Many of them now accept the crudity of legislation meekly and uncritically. One such is Lord Justice Hughes, who did however quash Mr Bassett's ridiculous conviction[2]. In the Court of Appeal he gave the only judgment. I would have liked it to run on the following lines.

It is preposterous and ridiculous that anyone should be held guilty of criminal voyeurism for photographing a man wearing bathing trunks having a shower. If the 2003 Act appears to require that it should be closely scrutinized to see if there is any way out. One exit would be by applying the commonsense construction rule.[3] Another would be resort to the presumption that Parliament does not intend an absurd result.[4] Particularly relevant is the presumption against an anomalous result.[5]

Next, it is desirable to examine carefully the precise words in the Act that seem to lead to the preposterous and ridiculous result. They are the following, found in s. 68(1)(a): 'the person's genitals, buttocks or breasts are exposed'. In the court below Judge Plumstead had held that 'breasts' here included male breasts. This was because the word 'person' includes both males and females. However that is only where the context does not otherwise require. In this case, in relation to the word 'breasts', the context plainly does otherwise require. The plural word is not normally applied to males, and the bare chest of a male, unlike the bare breast of a female who has reached puberty, is not regarded as having erotic attributes.

In ruling thus in the judgment I would also have castigated the author of this sloppy wording.

Hughes LJ did none of these things. Moreover he committed the solecism of misusing the term 'begs the question'[6], which properly refers to the logical fallacy known as *petitio principii*. He also transgressed in saying that the definition in s. 68(1) 'does carry the

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[1] Peter Landry, *The Common Law: Tradition and Stare Decisis* (2004). Accessed on 27 October 2008 at http://www.blupete.com/Literature/Essays/BluePete/LawCom.htm.
[2] *R v Bassett* [2008] EWCA Crim 1174. See 172 JPN, p. 708.
[3] See *Bennion on Statutory Interpretation* (5th edn, 2008) s. 197.
[4] *Ibid.*, s. 312.
[5] *Ibid.*, s. 315.
[6] Paragraph 8 of the judgment.

difficulties inherent in such definitions'[1]. As a legislative draftsman of wide and long experience, I can assure him that the difficulty was caused by bad drafting, and is not in any way 'inherent in such definitions' if they are properly drawn.

Why didn't our enacting process get rid of the nonsense of saying 'the person's . . . breasts are exposed' with its obvious difficulties in relation to male persons (or even female persons when they have not attained puberty)? What was our famed revising chamber doing? Why do so many of our Judges seem to know little or nothing about the common law principles of statutory interpretation?

One last complaint about Hughes LJ's judgment. It does not mention the name of the judge he is reversing, which I had to get from a newspaper report.[2] This is an unwelcome break from former practice.

6

In a 2006 article I criticised Lord Bingham of Cornhill, the Senior Law Lord, for calling the citizen's historic right to bring a private prosecution an anomalous historical survival which is of questionable value and can be exercised in a way damaging to the public interest.[3] This judicial comment was particularly questionable in view of the fact that the right has been carefully preserved by a modern Act of Parliament[4].

Other legislation upholding a private right of this kind is rule 32.14 of the Civil Procedure Rules. It allows a private citizen, with the permission of the court, to bring proceedings for contempt of court against a person 'if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth'.

Allowing a recent appeal against refusal to give permission to a private citizen to bring proceedings for contempt under CPR 32.14, Lord Justice Moore-Bick, giving the judgment of the Court of Appeal, said:

> 'When the court gives a private person permission to pursue proceedings for contempt against a witness who is alleged to have told lies in a witness statement it allows that person to act in a public rather than a private role, not to recover damages for his own benefit, but to pursue the public interest.'[5]

He added that the conclusion of the judge below that proceedings for contempt in the present case would be unlikely to promote the integrity of the legal process or respect for it in the future was unacceptable. While only prominent examples that are widely reported in the press can be expected to make an impression on the public at large, that ignores the fact that the pursuit of contempt proceedings in ordinary cases may have a significant effect by drawing the attention of the legal profession, and through it that of potential witnesses, to the dangers of making false statements. His Lordship went on:

> 'If the courts are seen to treat serious examples of false evidence as of little importance, they run the risk of encouraging witnesses to regard the statement of truth as a mere formality. That is not a matter which the judge appears to have taken into consideration. In my view the prosecution of proceedings for contempt in the present case would be likely to have a salutary effect in bringing home to those who

[1] Paragraph 14.
[2] *The Daily Telegraph*, 16 May 2008.
[3] See F A R Bennion, '*Jones v Whalley*: Constitutional Errors by the Appellate Committee', 170 JPN (4 November 2006) pp. 847-850, www.francisbennion.com/2006/039.htm.
[4] See Prosecution of Offences Act 1985 s. 6(1).
[5] *KJM Superbikes Limited v Hinton* [2008] EWCA Civ 1280 at [11].

> are involved in claims of this kind, of which there are many, the importance of honesty in making witness statements and the significance of the statement of truth.'[1]

The growing importance of this right of private persons to move to commit for contempt of court is shown by an accident case where for the first time insurers were allowed to proceed under CPR 32.14 against a claimant who had 'overstepped all appropriate boundaries . . . in falsely filling out her claims for state benefits'.[2]

7

The Rt Hon. Earl Forsooth K.G. holds forth about a schoolgirl who gave herself airs.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

Rutland

21 December 2004

Miss Henrietta Lacey

Dear Miss Lacey,

Juvenile arrogance

As the friend and patron of a number of distinguished barristers I am writing about your impudent letter in the *Times*.

You should have felt honoured at having been accorded the high privilege, at the mere age of sixteen, of a week's work experience in barristers' chambers. Instead you childishly object to having been expected to make the tea, and clearly show you think others should have made the tea for you. You resent having been asked to run errands. What arrant nonsense!

I suppose this is not really your fault; clearly you have been badly brought up. You should know that even pupils in chambers, who are qualified barristers with years of arduous training, expect to be treated as dogsbodies. That has long been considered part of the process of being licked into shape at the Bar.

Instead of grumbling in this puerile way, if you possessed any of the right qualities you would appreciate having had the rare opportunity (at sixteen!) to get the feel of barristers' chambers, and meet some of the august people involved. Humility, not insufferable arrogance, would have been a becoming attitude for you to adopt.

From what you write it seems you expected to handle a brief in the High Court on your first day in chambers. I do hope that in the course of time you manage to grow up.

Yours faithfully,

Forsooth

[1] *Ibid.* at [23].
[2] *Walton v Kirk* [2009] EWHC 703 (QB) *per* Coulson J at [130].

Chapter 4

1

The Foreign Secretary David Milliband said 'The British Government abhors torture and would never authorise it or condone it'.[1] He forgot the ticking bomb syndrome. I too abhor torture, but I do not forget the ticking bomb syndrome. Let me explain.

I ask you to set your imagination to work, very seriously. Think hard of the people you love most in the world. Perhaps they are your wife or husband, your children and your parents. Let's say there are six of them altogether. Now suppose that you are told one day that these six people are being held hostage by a terrorist whom I will call X.

Later you learn more. X has been captured and is being held by the police. He has told them that the hostages are confined in a building whose location he refuses to divulge. There is a bomb in the building, with a timing device. This has already been started, and the bomb is due to explode in fifteen minutes.

The police continue to question X, with increasing urgency. They send parties far and wide to find the building. You wait with mounting anxiety, panic even.

In these circumstances would you not want the police to torture X if necessary in order to extract the necessary information from him?

That is the ticking bomb syndrome. It is meant to stand for all the possible situations where the use of torture is arguably justified in order to avert the risk of something a great deal worse. It is not a notion I have invented: it is a classic in philosophy. Why did our Foreign Secretary not recognise it?

I would argue that, where there is 'a clear and present danger' of this sort, then necessary torture is excusable. The law would allow it as an exception under the doctrine of necessity.[2] I put that phrase 'a clear and present danger' in quotes because it has a history. Justice Oliver Wendell Holmes used it in the famous U.S. Supreme Court decision of *Schenck* 249 U. S. 47 (1919). It was a free speech case under the first amendment to the U.S. Constitution. Holmes said:

> 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic'.

He held that the first amendment did not apply where 'the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent'. I suggest that equally the prohibition of torturing a person should not apply where torture is necessary to prevent or end a clear and present danger arising from the conduct of that person.

In his book *Why Terrorism Works*[3] Alan M. Dershowitz, a professor of law at Harvard, suggested that in a ticking bomb case torture should be legal if permitted by an *ad hoc* judicial order. Mr Milliband should consult the Attorney General on the wisdom of introducing such a law in Britain.

2

When a jury is told by the judge that it must only convict if it has no reasonable doubt of guilt, what exactly does that mean? I would be inclined to say that it equates to what I call 'real doubt' when speaking of the legal meaning of an enactment.[4] Or it might be said that a

[1] Letter in *The Observer*, 15 February 2009.
[2] For this see *Bennion on Statutory Interpretation* (5th edn, 2008), s. 347.
[3] Yale University Press, 2002.
[4] See *Bennion on Statutory Interpretation* (5th edn, 2008))s. 3.

doubt is reasonable if one can give a convincing reason for it. In a new book[1], James Q. Whitman, a professor of law at Yale, goes deeper.

According to reviewer Theo Hobson[2], who is not a lawyer, Whitman says that to understand the concept of reasonable doubt in the jury connection we must drop the assumption that it was developed as the best way to get at the truth, since it actually emerged as the best way of sharing the moral and religious burden of sitting in judgment on one's fellows. This burden arose from Christ's instruction to his followers to 'judge not, that ye be not judged'[3].

This instruction made the early Church deeply unsure whether the legal work of judges and juries could be accommodated within the Christian ethic. The culture gradually solved the dilemma by ritualizing the criminal trial. It became a solemn event in which the court and the community formally took responsibility for inflicting punishment on a convict.

Juries evolved from groups of local witnesses. But medieval people were reluctant to play a role that was likely to contaminate them with blood-guilt, and also make them blood-feud targets. The fear survived into later times. A seventeenth century pamphlet warned that to be a juror was potentially 'to build yourself a mansion in Hell'. But justice required that, instead of being on the spiritually safe side and acquitting the guilty, the juror had to be nudged into convicting despite religious qualms.

Whitman says that these qualms had to be accommodated; and the concept of reasonable doubt was part of the 'moral comfort' that jurors needed. Controversially, Whitman adds that 'we have embarked on the hopeless project of transforming an old moral comfort procedure into a modern factual proof procedure'.

Why the professor calls it 'hopeless' I do not know. Such transformations are a familiar part of cultural evolution. We can agree when Hobson reports Whitman's conclusion:

> 'But jurors should be kept in touch with the theological roots of the trial. They should be reminded that their function is not simply to decide whether or not someone is guilty of a crime, but also to share in the responsibility of worldly judgment.'

3

The consulting editor of *Criminal Law & Justice Weekly*, Adrian Turner, recently wrote two Comments on the late Sir John Mortimer QC.[4] In the second he said he was grateful to those who corresponded with him about the first, and then went on to mention Mortimer's 'bag of tricks' as an advocate.

Adrian Turner got this term from an email I sent him, in which I congratulated him on his first Comment and went on to refer to a long-ago article of mine about one of Mortimer's successful trials at which I was present on behalf of the Defence of Literature and the Arts Society (of whose executive committee I was a member).[5] Mortimer was defending the proprietors of a vulgar magazine called *Libertine*. In my email to Adrian Turner I said:

> 'The acquittal was achieved by the well-known advocacy skills of John Mortimer. When I congratulated him in the robing-room at the end of the trial he shrugged modestly and said: "I just deployed for the umpteenth time my well-worn bag of jury-pleasing tricks".'

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[1] *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2009).
[2] TLS, 6 February 2009, p. 7.
[3] Matthew 7.1. It continues: '2. For with what judgment ye judge, ye shall be judged, and with what measure ye mete, it shall be measured to you again'.
[4] 2009, pp. 42 and 66.
[5] The article was published in *New Statesman*, 18 February 1977, www.francisbennion.com/1977/003.htm.

This chimes with the description anti-pornography campaigner Mary Whitehouse gave of John Mortimer and his entourage: 'Mortimer's travelling circus'.[1]

In his second Comment Adrian Turner, drawing on my email, says that, while he would not question the sincerity of Mortimer's belief that criminal defenders are vital champions of jury trial, he is 'equally sure that even he would have felt some discomfort about the reliance on the use of theatre and a bag of tricks to bemuse juries'. He goes on to argue that there is a need to display more sophistication and integrity than simply 'throwing bricks' at the other side, and to reduce reliance on pure theatre to influence juries.

I feel uneasy about this, as not really portraying what the John Mortimer I knew was about. Arguably he was just defending his clients by deploying brilliant advocacy. Surely there is still room for that in our forensic system.

4

Bye, baby bunting
Daddy's gone a-hunting . . .
Nursery rhyme

The question of what exactly Daddy did when he went a-hunting came before the Administrative Court in a 2009 case[2]. In a private prosecution brought by the League Against Cruel Sports, Anthony Wright, the Huntsman of the Exmoor Foxhounds, was fined £500 for hunting a wild mammal with a dog, contrary to the Hunting Act 2004 s 1. The case stated asked the court to rule whether hunting a wild mammal with a dog includes the mere searching for a wild animal for the purpose of stalking or flushing it, which is all that Mr Wright had been doing.

The court's answer was no. It said that the Act's purpose was the composite one of preventing or reducing unnecessary suffering to wild mammals, overlaid by a moral viewpoint that causing suffering to animals for sport is unethical and should be stopped. The question whether a person hunts a wild mammal with a dog is 'heavily fact specific'.

> 'A wild mammal which is never identified as a quarry does not suffer. If it is said that searching for a wild mammal has a potential for causing suffering to wild mammals generally, an answer is that hunting wild mammals is not banned absolutely and searching for them for the purpose of exempt hunting is permitted.' (Paras. 36, 37.)

The case stated also asked whether the combined effect of the 2004 Act and the Magistrates' Courts Act 1980 s. 101 is such as to place a burden on the defendant to prove the exemptions set out in Schedule 1 to the 2004 Act. Again the answer was no, so Mr Wright's conviction was quashed.

The judgment contains important dicta and citations on the exceptions rule, which Lord Wilberforce described as 'the orthodox principle (common to both the criminal and the civil law) that exceptions, etc, are to be set up by those who rely on them'[3]. In particular the dicta and citations related to art 6 of the European Convention on Human Rights and the distinction between the 'persuasive' and 'evidential' burdens on an accused.

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[1] See John Sutherland, *Offensive Literature: Decensorhip in Britain, 1960-1982* (Rowman & Littlefield Publishers, Inc., 1983). This gives an extensive account of the *Libertine* trial (see pp. 160-163).
[2] *Director of Public Prosecutions v Wright* [2009] EWHC 105 (Admin).
[3] *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107 at 130. See *Bennion on Statutory Interpretation* (5th edition, 2008) , pp. 1092-1094.

5

I have started reading James Boswell's *Johnsoniad*, as Thomas Carlyle called it, otherwise known as his *Life of Samuel Johnson*. I will record any snippets that catch attention as relevant to our time, gallantly refraining from adding comment of my own. Here are some fragments relating to the period from Johnson's birth in 1709 to his being a student at Oxford in 1728.

Samuel Johnson's father was a bookseller in Lichfield and 'a citizen so creditable as to be made one of the magistrates'. Asked how he had achieved his knowledge of Latin, Johnson said:

> 'My master whipped me very well. Without that I should have done nothing . . . I would rather have the rod to be the general terror to all, to make them learn, than tell a child, if you do thus, or thus, you will be more esteemed . . . A child is afraid of being whipped, and gets his task, and there's an end on't; whereas, by exciting emulation and comparisons of superiority, you lay the foundation of lasting mischief . . .'

As a boy Johnson 'might, perhaps, have studied more assiduously; but it may be doubted, whether such a mind as his was not more enriched by roaming at large in the fields of literature . . . The flesh of animals who feed excursively, is allowed to have a higher flavour than that of those who are cooped up. May there not be the same difference between men who read as their taste prompts, and men who are confined in cells and colleges to stated tasks?'

As an undergraduate at Pembroke College Oxford, Johnson neglected attendance on his tutor. 'Mr Jorden asked me why I had not attended. I answered, I had been sliding on Christ Church meadow.'

> BOSWELL That, Sir, was great fortitude of mind.
> JOHNSON No, Sir, stark insensibility.

6

The following are extracts from the judgment of the Court of Appeal in an immigration case.[1]

'By judgments dated February 21 2007 we granted AM permission to apply for judicial review of certain interlocutory decisions and indeed the final decision of Immigration Judge Sacks relating to AM's appeal under section 82 of the National Immigration and Asylum Act 2002. We thought it arguable that certain interlocutory decisions which had resulted in AM not being able to put in the evidence of two witnesses, and which had refused her an adjournment on the grounds of ill health so that she could not give evidence herself, had prevented a fair hearing. We thought it was arguable that his final decision, to dismiss her appeal on the ground that her version of events was not credible, had been reached in breach of natural justice . . .

> **(a) The decision not to allow a video or telephone link for the taking of evidence from key witnesses**

. . . far from being prepared to reconsider the position, the immigration judge seems to have reacted in a quite unjudicial way . . . When the matter came on for hearing on August 11 the immigration judge made clear that he was not prepared to hear any argument, stating that his decision was a judicial decision and he was 'entitled to exercise his discretion as he thought fit'.

[1] *R (on the application of AM (Cameroon) v Asylum & Immigration Tribunal & Another* [2008] EWCA Civ 100.

Comment

. . . it was a clear breach of natural justice for the immigration judge to make up his mind to refuse to reconsider without hearing argument.

(b) The manner of behaviour in court

. . . At some stage during this period the judge banged his fist on the table. The judge does not remember this but it is not only the evidence of Bridget McVay, supported by Mr Bell and AM herself, but also that of Mr Craven the HOPO. Mr Craven thought it was banged in frustration, whereas the others thought it was in irritation. AM says that at this stage in the light of the judge's refusal to listen to her counsel and the banging of his fist she became afraid of the judge and she was frightened that she was not being given a fair hearing. She left the court feeling unwell.

Comment

Sometimes, as a judge, one can feel a sense of frustration or irritation but it is vital at such times that one curbs such feelings and remembers the overriding importance of acting fairly and being seen to act fairly. Refusing to listen and banging a fist whether in frustration or irritation is quite unacceptable conduct.

(a) Attitude to medical evidence During this period also, in refusing an adjournment, the immigration judge described the medical report relating to AM's health as "mere supposition" . . . This would not only add to the impression that the judge was not viewing the case with an open mind but would obviously cause serious anxiety to a person who did have a serious condition as AM clearly did.

(b) The adjournment and hearing of 18th August

AM left the court. Outside court she collapsed and had to be taken to hospital . . . [In the words of Judge Sacks, dealing with the question of adjournment] 'I considered that the evidence within the file, including all statements by the Appellant, all documentary evidence, all the objective evidence and all other relevant documents enabled me to deal with this appeal in the absence of the Appellant without, in my opinion, the Appellant being prejudiced.'

Comment

1. To suggest that the appeal could be dealt with in AM's absence and without the evidence she wished to call without the appellant being prejudiced, when the issue was her credibility, is not a view any reasonable judge acting fairly could take.

2. Not to take any heed of statements even though supplied late when AM had not given evidence herself is indicative of an unbalanced view towards AM's appeal.

3. Not to have adjourned at least to September, which was all that was asked, was unfair . . .

4. What appears to have happened is that the immigration judge felt that his authority was being challenged; and he also thought, at least initially, that someone was attempting to pull the wool over his eyes . . .

Conclusion

. . . The position of immigration judges is not easy. Applications for adjournments must be commonplace and by the rules they are encouraged to resist them. Applications based on the grounds of ill health have to be scrutinised with care. But at all times, in seeking to carry out that difficult task, the judge must remember above all that those who come before them must feel that justice has been fairly administered. In seeking to carry out that difficult task on this occasion this judge fell below what is required.'

7

In the following letter from my archive Lord Forsooth gets cross about European elections.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

Rutland

3June 1999

The Rt Hon Michael Howard MP
Leader of Her Majesty's Opposition

Dear Sir,

There are European elections soon, and the Castle has received a leaflet from your lot. There is a great deal wrong with it. I will pick out just two things.

It is plastered with a clever-clever slogan: 'In Europe, but not run by Europe'. This manages to be irritating in a number of ways. What is the use of merely being *in* Europe? Why should we object to being run by 'Europe' so long as we have our proper share in its decision making? Do we in fact have that proper share? The leaflet raises such questions but does nothing to answer them.

I was enraged to see the following statement in your leaflet: 'In this election you can vote for a party list, but not for an individual party candidate'. Why was this not accompanied by a remark such as: 'The Conservative Party is very sorry about this. We did our best to oppose it, but Mr Blair insisted'. Was it because it would have been untrue?

I cast my eye down the list of eleven Conservative candidates for whom I am invited to vote *en bloc*. I know most of them personally. Some are good eggs; others I would not touch with a bargepole. Why on earth should I be expected to vote for the whole mass of them, without the opportunity to differentiate? That is not my idea of democracy. A better name for it would be gerrymandering.

Yours faithfully,

Forsooth

Chapter 5

1

There is a piece above about reasonable doubt in relation to jury trials.[1] Since writing it I have come across clause 41(5) of the Coroners and Justice Bill, which says that the jury must assume that a certain defence is satisfied 'unless the prosecution proves beyond reasonable doubt that it is not'. So the phrase 'reasonable doubt' will be found in at least one Act of Parliament, which seems to put paid to Lord Goddard CJ's attempt to change the formula in 1952:

> 'If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of guilty, that is much better than using the expression "reasonable doubt" and I hope in future that it will be done.'[2]

Clause 43 of the Coroners and Justice Bill provides for the common law defence of provocation to be replaced by clauses 41 and 42 (partial defence to murder: loss of control). Professor J. R. Spencer reported widespread opposition to this change.[3] He also reported general dislike of the mandatory life sentence for murder, which he describes as a 'problem'. Yet, he complained, 'the Government will have none of this, and insist that the corner-stone of any reform of the law of murder must be the retention of the mandatory life sentence, this being necessary, they believe, to "retain public confidence".'

Professor Spencer went on to allege that 'the mandatory life sentence has, regrettably, acquired the status of a totem'. Unfortunately he did not give the reason for this, which is that the promise of a mandatory life sentence was used as an attempt to pacify those (still apparently a majority of the British people) who opposed the abolition of the death penalty. Consider the following extract from the debates on what became the Murder (Abolition of Death Penalty) Act 1965:

> *Mr Deedes* There is a school of thought . . . which says that if we abolish hanging we must be sure that the alternative is so horrible as to provide almost an equivalent deterrent.[4]

Professor Spencer said that in the Coroners and Justice Bill the Government are 'tinkering ham-fistedly' with the law of provocation, but did not give any reason for this condemnation. Nor did he give the Government's reason for the change from provocation to loss of control. As these matters are very important I will set out at some length the reasons as stated by the Minister Maria Eagle. They do not strike me as 'ham-fisted', but rather as displaying a considerable amount of care and precision.

'. . . in a small number of murder cases the existing partial defence of provocation is too generous to those who kill in anger and is poorly tailored to killings in response to fear . . . we seek to address the concern by abolishing the partial defence of provocation and replacing it with a new partial defence where a defendant kills as a result of loss of self-control attributable to one of the triggers that I will describe.

I emphasise that the new loss of self-control partial defence is intended to have a higher bar than the current provocation defence . . . The triggers are fear of serious violence, words or conduct that cause the defendant to have a justifiable sense of being seriously wronged and constitute circumstances of an extremely grave character, or a combination of those . . .

. . . loss of self-control need not have been sudden, as it would need to be under the current defence . . . the jury must be satisfied that a person of the defendant's sex and age, with a

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[1] See pp. 22-23.
[2] *R v Summers* [1952] 36 Cr. App. R. 14 at 15.
[3] See 173 *Criminal Law & Justice Weekly* (14 March 2009), pp. 165-167.
[4] HC Deb 24 March 1965, vol. 709 col. 503.

normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted as the defendant did . . .

. . . the defence will not be available when a person acts from a considered desire for revenge or when the defendant incites someone to do or say things for the purpose of providing them with an excuse to use violence . . . the fact that something done or said constituted sexual infidelity is to be disregarded . . .'[1]

2

Should Professor Roger Ingham, an advisor to the UK Government's Teenage Pregnancy Unit, be in that position when he admits he doesn't know what morals are? This question arises from his performance on a recent edition of *The Moral Maze*[2].

Before discussing that I should interpose a remark I made about the Sexual Offences Bill, now our basic law on the subject in the shape of the Sexual Offences Act 2003.

> 'A primary objection to the Bill is that the Government's proposals are not based on any discernible system of morals and values. They are grounded in a low view of human sexuality. They display sex-negativism - or even sex hate - in many obvious or indirect ways. While some sexual acts are obviously immoral and criminal, the vast majority are innocent and healthy A few others are on the borderline. Here there is a grey area, which needs to be addressed very carefully by those who lay down the criminal law for our nation. The proposals in the Bill fail to do that.'[3]

This was ignored by those in charge of the Bill.

Earlier, I had written a book on the subject of sexual morals generally, proposing a code of ethics.[4] I tried to get those in charge of the 2003 Bill to take some interest in the code, but without success. They preferred what they called a value-free approach; but criminal law should surely be based on values approved by society.

Professor Ingham does not think there are any generally-approved sexual values, as shown by the following extracts from an interchange on *The Moral Maze* between him and Melanie Phillips about a Government pamphlet.

MP	Do you think that sex education is a proper arena for moral, specifically moral, guidance?
RI	I'm not quite sure if I want to get drawn into talking about morals because I don't know what they are.
MP	Well, this is a programme about morals, and we are asking the question whether there should be moral guidance [by parents], because of course the controversy over this pamphlet is that parents should not impose a moral view on their children.
RI	What the pamphlet is saying is that if parents try to impose things on children, children will stop communicating.

[1] HC Pub. Bill Com. Deb, 3 March 2009, col. 431.
[2] BBC Radio 4, 25 February 2009.
[3] F A R Bennion, *Sexual Ethics and Criminal Law* (Lester Publishing, Oxford, 2003), p. 9, www.francisbennion.com/2003/00102.htm.
[4] F A R Bennion, *The Sex Code: Morals for Moderns* (Weidenfeld & Nicolson, 1991), www.francisbennion.com/book/sexcode.htm. For the Code of 60 precepts see www.francisbennion.com/1991/005/295.htm.

MP	Does that mean in your view that parents should not tell their children the difference between right and wrong in terms of sexual behaviour?
RI	No, they should say what their own particular values are, not what is right or wrong.
MP	So they shouldn't tell their children that it is right or wrong in terms of their sexual behaviour?
RI	What do their children feel comfortable doing . . . Parents can say it is wrong to pressure a girl to have sex, to purposely get her drunk, to purposely coerce her and so on.
MP	Why does a parent tell a child don't steal but not tell a child don't have sex until you're grown up?
RI	Because there's all the difference in the world between having sex and stealing.

This shows that, though Professor Ingham may say he doesn't know what morals are, this is not entirely true. There are evidently some moral values he respects. But elsewhere in the debate he said:

> 'If you talk to people with very strong Christian values they will say what is moral is what I believe to be right and wrong. If you talk to people with other sets of values they will say *that's* what I believe is wrong.'

This shows that Ingham really knows perfectly well what morals are. The trouble is that there is not now a single set of accepted moral values in British society, but several sets (including some largely amoral sets) that overlap only to a limited extent if at all.

These variations are exacerbated when one considers wider society, as Ingham does in *Promoting Young People's Sexual Health*, a book part-edited by him[1]. Particularly interesting in this respect is chapter 12, which he wrote with Susannah Mayhew. It considers the links between research and the policy process in various countries. It says that the treatment of adolescent sexuality should be research-based, adding:

> 'A crucial component of increasing the chances of getting research results put into practice is that there are shared – or at least agreed – values and/or goals between the parties involved.'[2]

What really troubles me is Ingram's suggestion in *The Moral Maze* that parents should be guided in sex discussions with offspring on 'what their children feel comfortable doing'. If children are troubled about some sexual activity they may well not 'feel comfortable' about any aspect of it. What they need is wise guidance and advice based on factors that are beyond their juvenile experience. They may indeed want to be told what is right and wrong.

Here it is relevant to mention another source of disquiet. Under the 2003 Act any sexual activity willingly undertaken by an underage child of ten or over, even with an age mate, constitutes a criminal offence by the child. Why are children not told this by people in Professor Ingram's position?

There is one person who is not afraid of pronouncing on right and wrong: Labour MP Tom Harris. His blog of 4 March 2009 said:

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[1] Roger Ingham and Peter Aggleton (eds.), *Promoting Young People's Sexual Health: International perspectives* (Routledge, 2006).
[2] Page 217.

> ‘Teenage girls shouldn’t be having underage sex. Why? Because it’s wrong.
>
> Teenage girls shouldn’t choose to have babies as an alternative to getting an education and a career. Why? Because it’s wrong.
>
> Parents shouldn’t teach their children that a lifetime on benefits is attractive or even acceptable. Why? Because it’s wrong.’

His heading was ‘The return of morality’.

3

Samuel Johnson suffered from hypochondriasis, known as the English malady. James Boswell said: ‘The powers of his great mind might be troubled, and their full exercise suspended at times; but the mind itself was ever entire . . . there is surely a clear distinction between a disorder which affects only the imagination and spirits, while the judgement is sound, and a disorder by which the judgement itself is impaired.’

‘Dr Adam Smith . . . once observed to me’, Boswell went on, ‘that ‘Johnson knew more books than any man alive’. He had a peculiar facility in seizing at once what was valuable in any book, without submitting to the labour of perusing it from beginning to end.’ Johnson said of his friend Gilbert Walmsley: ‘His acquaintance with books was great, and what he did not immediately know, he could, at least, tell where to find’.

Johnson said: ‘A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably and usefully employed, than in examining the laws and customs of foreign nations’.

In 1734 Johnson, aged 25, offered to write a column for the *Gentleman’s Magazine* in which he would insert ‘loose pieces, like Floyer’s, worth preserving’. This was a reference to an article by Sir John Floyer titled ‘Treatise on Cold Baths’ which had been published in the magazine. It is not known whether the offer was taken up.

Sir Joshua Reynolds once asked Johnson how he had attained his extraordinary accuracy and flow of language. ‘I early laid it down as a fixed rule to do my best on every occasion, and in every company, to impart whatever I knew in the most forcible language I could put it in, and by constant practice, and never suffering any careless expressions to escape me, or attempting to deliver my thoughts without arranging them in the clearest manner, it became habitual to me.’

As *The Rambler* was entirely the work of one man [Johnson] there was such a uniformity in its texture as very much to exclude the charm of variety; and the grave and often solemn cast of thinking which distinguished it from other periodical papers made it, for some time, not generally liked.

Johnson told Boswell, with an ‘amiable fondness’, a little pleasing circumstance relative to *The Rambler*. Mrs Johnson [his wife], in whose judgment and taste he had great confidence, said to him, after a few numbers of *The Rambler* had come out ‘I thought very well of you before; but I did not imagine you could have written anything equal to this’.

4

The preamble to the Parliament Act 1911 stated:

> ‘Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament:

> And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation:
>
> And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords:'

This suggested that when at long last an Act was passed reforming the House of Lords the 1911 Act would have done its work and should be repealed, or treated as repealed. Arguably the House of Lords Act 1999 was such a reforming Act. Lord Saatchi had some interesting views on this, which he ventilated in a 2007 debate I have just come across.[1]

Lord Saatchi: My Lords, my purpose today is to seek an undertaking from the Government that, if any Bill is sent up to your Lordships' House to create a wholly elected Chamber, such a Bill will contain a specific provision to repeal the Parliament Act 1911. Without such an undertaking, your Lordships' House should not concur with the wish of [the House of Commons] for a wholly elected House. It can be implied, and I would do so, that the repeal of the Parliament Act 1911 took place with the passage of the House of Lords Act 1999, which removed the hereditary Peers from your Lordships' House . . . I draw your Lordships' attention to section 80 of Bennion's *Statutory Interpretation*, which describes the doctrine of implied repeal :

> 'Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them.'

In his commentary on the Code, Bennion states that:

> 'If a later Act cannot stand with an earlier, Parliament (though it has not said so) is taken to intend an amendment of the earlier. This is a logical necessity, since two inconsistent texts cannot both be valid without contravening the principle of contradiction. If the entirety of the earlier Act is inconsistent, the effect amounts to a repeal of it.'

The inconsistency between the Parliament Act 1911 and the House of Lords Act 1999 is evident from examination of the [preamble] to the 1911 Act . . . The record seems to show that the motivation and raison d'être of the Parliament Act 1911 arose from the then hereditary nature of your Lordships' House.

[The Liberal Prime Minister, Mr H H Asquith] spelled out the motive for the Parliament Bill. Speaking of the hereditary House of Lords, he said:

> 'Let it not be our master. So say we. It is because it has been our master . . . because it enslaves and fetters the free action of this House, that we have put these proposals before the House and we mean to carry them into law'.[2]

The [preamble] to the Parliament Act 1911 makes it clear that the offence complained of—in other words, insufficient respect from your Lordships' House for the elected House—was an offence committed by an hereditary House of Lords. That offence, against what we now in common parlance call the primacy of the House of Commons—the phrase has been used many times in this debate—was to be remedied, as we know, by strict time limits on our delaying power, a blanket disqualification of your Lordships' House in public finance, and the vouchsafing of all fiscal authority to another place, so that with regard to all money Bills we

[1] HL Deb. 13 Mar 2007 col. 637.

[2] HC Deb. 2 Mar. 1911 col. 584.

could look but not touch. In effect, the Parliament Act 1911 ultimately gave power to [the House of Commons] to override decisions of your Lordships.

We know that the House of Lords Act 1999 made this House not hereditary. According to the then Leader of the House, the noble Baroness, Lady Jay, it made it 'more democratic, more legitimate'. Thus it can be argued that according to the doctrine of implied repeal, that made the Parliament Act 1911 obsolete. So either the 1911 Act has already been repealed by virtue of its inconsistency with the later Act of 1999, or else it should be repealed in any future Act that puts our House on to an elected basis.'

5

When in the late 1950s I drafted the first constitution of the Republic of Ghana my instructions consisted of a note hand-written on one side of a sheet of paper by the President, Kwame Nkrumah. Therefore much of the constitution's content was necessarily of my own devising, including the statement in article 8(3) that 'The President shall be . . . the Fount of Honour'.

This was first implemented by the Honours Warrant 1960[1], which I also drafted (this time under full instructions). It apparently remains in force, despite several changes of constitution. Dusuru Bamba writes:

> 'Unfortunately for our subsequent Presidents, we chose not to include the expression fount of honour in the 1969, 1979 and 1992 Constitutions. Evidently, the President lacks the express power to institute and grant his newly minted Grand Order of the Star and Eagles of Ghana.'[2]

Apparently there is confusion in Ghana over this question of *vires* concerning an honour which controversially is limited to heads of the state. Dusuru Bamba goes on:

> 'Is someone mounting a challenge in the Supreme Court? I have my doubts it will get very far . . . Meanwhile, I think I deserve to be an awardee under Ato Kwamena Dadzie's honour category of the Grand Order of Vultures and Rats of Ghana.'

Which goes to show that you should follow precedent unless good reason is shown against it. And no, I do not have any information about the Grand Order of Vultures and Rats of Ghana.

6

I wrote recently to Lord Forsooth saying I hoped he did not mind that I was publishing some of his letters (acquired from a second-hand bookstall). I ventured to put some questions to him about his title. He replied in typical style.

[1] For details see F. A. R. Bennion, *The Constitutional Law of Ghana* (Butterworths, 1962), pp. 132-133.
[2] Web article at www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=146931.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

Rutland

12 February 2009

F. A. R. Bennion Esq.
Forthright Towers
Bovey Tracey
Devon

Sir,

I have received your letter. I ought to sue you for every penny you've got for breach of copyright, but such petty spite is beneath me. So carry on if you really feel you have to.

You have the impudence to ask where my title came from. If you look in the dictionary (by which I mean the only one worth looking in, the *OED*), you will see that the title has an honourable origin, as you would expect. It comes from the Old English word meaning in truth or truly.

Then the *OED* spoils it by adding 'now only used parenthetically with an ironical or derisive statement'. It quotes Samuel Pepys: 'By and by comes Mr Lowther and his wife and mine, and into a box, forsooth, neither of them being dressed' and Samuel Taylor Coleridge: 'He reproaches me with treachery, because forsooth I had not sent him a challenge!'

If I were today asked to accept an honour I would humbly beg leave to decline. Too many damned rascals and rogues are getting them handed out on a plate. But I of course had no choice in the matter. My title descended to me from long, long ago when things in England were very, very different.

Yours faithfully,

Forsooth

Chapter 6

1

Jumping into the MPs' expenses row is a popular pastime. I have engaged in it myself (see below). Dr Rowan Williams, the Archbishop of Canterbury, got into it with an article in *The Times* of 23 May 2009. He said the point has now been adequately made, and the continuing systematic humiliation of politicians threatens to carry a heavy price in terms of our ability to salvage some confidence in our democracy. But if you stop before the full facts have been revealed you will never be sure that that confidence is not misplaced.

Most of the Archbishop's article was based on the false premise that the recalcitrant MPs have not actually broken any rules. He rightly said that 'What can I get away with without technically breaching the regulations' is not a good basis for any professional behaviour that has real integrity. But that is not in fact the basis operating here.

In a letter to *The Times* published on 25 May 2009 I suggested as a former parliamentary counsel (Westminster)that in fact rules *were* broken. The House of Commons Green Book sets out the position. It contains a large number of detailed rules, which perhaps were not broken. But these are expressly made subject to specified overriding principles, which in many cases were broken. It expressly says: 'When making claims against parliamentary allowances, Members must adhere to these principles'. Many did not. The main overriding principles are:

- Claims should be above reproach.
- Claims must only be made for expenditure that it was necessary for an MP to incur to ensure that he or she could properly perform his or her parliamentary duties.
- MPs must ensure that claims do not give rise to, or give the appearance of giving rise to, an improper personal financial benefit to themselves or anyone else.
- MPs are committed to openness about what expenditure has been incurred and for what purposes.
- MPs should avoid purchases which could be seen as extravagant or luxurious.

Another who has commented in the MPs' expenses row is Adrian Turner, consultant editor of *Criminal Law & Justice Weekly*. He did so in a comment published on 16 May 2009 where he describes as 'moonlighting' the carrying on of outside careers by MPs, and says it should not be allowed. I disagree. We should remember that Parliament began as the occasional calling together by the king of the magnates and yeomen of the kingdom so that they could advise him on current issues. Their advice was worth having because of their experience and knowledge of relevant areas of the country's life.

The most useful MPs today are those with knowledge and experience acquired through careers in business, industry, commerce, education, law, the armed forces and so on. The least useful are those who entered politics straight from university and have never done anything else. Mr Turner would require a useful MP to suspend his or her career while serving in Parliament, but this would reduce their usefulness. It would also be unfair in damaging, perhaps destroying their careers. Some MPs have only a short time as such.

The nation gets the MPs it deserves. Every MP is drawn from the populace, so it is not surprising if an MP has the same moral standards as the generality. That does not excuse failures by individual MPs, who should strive to rise above the common level.

Finally I would say, with reforms in mind, that it is a mistake to give MPs allowances related to actual items of expenditure which require production of receipts. Instead they should be given a specified sum, fixed at what is considered reasonable, in respect of each matter - for example the need for an MP with a distant constituency to spend some nights in London.

Whenever it is necessary to produce receipts in a climate where openness is insisted on there will inevitably be controversy.

2

Sometimes a non-lawyer throws a penetrating light on a corner of the law. I am thinking of Will Hutton, prolific author, chief executive of the Work Foundation, and a governor of the LSE. In a recent article[1] he threw light (without meaning to) on the current judicial tendency to equate justice with what is called 'fairness'. Thus Lord Browne-Wilkinson said that however widely a power is expressed in a statute 'it does not authorise that power to be exercised otherwise than in accordance with fair procedures'[2].

This is not only a judicial tendency. The Government called its consultation paper on the Equality Bill now before Parliament *A Framework for Fairness*[3]. The opposite of fairness is unfairness, and the responsible minister Ruth Kelly wrote in the paper of the desire of Labour governments to 'remove unfairness'.[4]

This sort of language supposes that we all know what fairness is; and that it is something fixed and certain, like Sir Edward Coke's 'golden and straight metwand of the law'[5]. But, says Hutton, this is not so. 'Fairness can be used to justify any position on the political spectrum . . . and Labour has not managed to build a consensus over what is "fair".'

The non-lawyer Hutton suggests that fairness has four dimensions. There is the fairness of equity, embedded in our DNA and manifested even by young children. There is the fairness of need: if unfortunate, I should be compensated for the bad luck of life. There is the fairness of merit: I have worked hard and deserve reward. Lastly there is the fairness of proportionality: I have a similar job to yours but do it better, so I deserve extra reward.

What is more, says Hutton, in a given case these four dimensions can operate unevenly. On the particular facts, one dimension may trump another – which adds to the uncertainty. To some extent the law takes account of this variability. Thus in an Australian case on appeal from a tribunal, where the tribunal had decided against a literal application merely because that would have been 'unfair', the court held this was not enough. The tribunal ought to have identified 'a construction of language, however slight or tenuous, which could be preferred to the obvious and literal meaning'[6].

Staying with the law, we find that Lord Mustill said that fairness is 'essentially an intuitive judgment'[7]. He added that the standards of fairness are not immutable, and are not to be applied by rote identically in every situation[8]. In law there may be a private dimension of fairness and also a public dimension. Thus in relation to the right to a fair trial conferred by art. 6 of the European Convention on Human Rights 'a balancing exercise has to be carried out which takes into account the importance of what is at stake for the state on the one hand and the defendant on the other'[9].

Hutton prompts lawyers to realise that fairness is no fixed metwand but a concept that can have troublesome variability.

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[1] "Life may not be fair, but that's no excuse for an unjust society", *The Observer*, 3 May 2009.
[2] *Pierson v Secretary of State for the Home Department* [1998] AC 539 at 573.
[3] *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, HM Government, June 2007.
[4] *Ibid*., p. 6.
[5] 4 Inst. 41.
[6] *Secretary, Department of Social Security v Clear* (1991) 23 ALD 22 at 27.
[7] *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at 560.
[8] *Ibid.*
[9] *Attorney General's Reference (No 4 of 2002)* [2003] EWCA Crim 762, [2004] 1 All ER 1 at [41].

3

In an earlier piece[1] I asked you to set your imagination to work and imagine you are told one day that the six people you love most in the world are being held hostage in an unknown place by a terrorist who has started a bomb ticking. Would you not want the police to torture the terrorist if they had to in order to extract the necessary information from him? That is the ticking bomb syndrome. I return to it because of an article by Con Coughlin that has since appeared.[2]

I argued in the previous piece that where there is a clear and present danger of this sort it is wrong to dismiss necessary torture out of hand, since the law would allow it under the doctrine of necessity.[3] Con Coughlin's article also asks for imagination, but of a different kind.

> 'Imagine the scene. The intelligence service of a foreign country has detained a suspect who holds vital information about a planned terrorist attack against Britain. But this foreign country has scant regard for human rights or the Geneva Convention, and the suspect has been badly tortured.'

The article goes on to explain that, while British intelligence officers would be desperate to interview such a suspect, they are under strict instructions not to do this where a suspect may have been tortured by foreign agents. It is, says Coughlin, an article of faith in British intelligence that torture is counter-productive, as well as being unlawful.

Coughlin's article concludes by saying that British intelligence and security officials are becoming increasingly concerned that obsession over torture could seriously compromise national security. This is because, as he puts it, 'British officers will not be allowed access to information from any suspect who claims maltreatment, irrespective of how important it might be to preventing a major terrorist attack'.

4

Question: When is an accident not an accident? Answer: when it happens on an aeroplane. A thing which infuriates non-lawyers is the way the law takes a simple word like 'accident' and uses it in a thoroughly perverse way, to the astonishment and confusion of the citizen.

The Carriage by Air Act 1961 sets out the Montreal Convention 1999. You may wonder how an Act of 1961 manages to set out the words of a convention entered into 38 years later. Was the drafter psychic? No, the Act was amended.

Article 17.1 of the Montreal Convention provides for compensation for damage sustained in the case of the bodily injury of a passenger caused by an accident which took place on board an aircraft. In 2004 Beverley Anne Barclay sustained damage in the case of the bodily injury caused to her by an accident which took place on board an aircraft. She claimed damages under the Montreal Convention. Did she get them? Well, no, she did not.

The case is reported as *Barclay v British Airways plc*.[4] The agreed facts were as follows. In order to reach her seat the claimant passed sideways to her right between the reclined seats ahead and the first seat in her row. In order to do so she had to lean slightly backwards. As she lowered herself into her seat, with her body weight towards the right, the claimant's right foot suddenly slipped on a strip embedded in the floor of the aircraft and went to the left. Upon slipping the claimant heard and felt her knee 'pop' and as it gave way it struck the armrest. This meant that the claimant sustained 'bodily injury'.

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[1] See p. 19 above.
[2] *The Daily Telegraph*, 28 March 2009, p. 5.
[3] For this see *Bennion on Statutory Interpretation* (5th edn, 2008) , s. 347.
[4] *Barclay v British Airways plc* [2008] EWCA Civ 1419.

The Court of Appeal rejected her claim, holding that she had not been in an 'accident'. Well I would call that occurrence an accident, and so no doubt would you. Why did the Court of Appeal decide differently? I give the answer in the words of that most able judge Lord Justice Laws.

> 'There was no accident here that was external to the appellant, no event which happened independently of anything done or omitted by her. All that happened was that the appellant's foot came into contact with the inert strip and she fell. It was an instance . . . of "the passenger's particular, personal or peculiar reaction to the normal operation of the aircraft".'

Article 17(1) says 'The carrier is liable for damage sustained in case of . . . bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft'. On a literal reading, the condition was satisfied. Following case law, the Court of Appeal held that it was not.

I would not advise an appeal.

5

Can the British Crown pardon an offence that was committed and punished abroad? On first principles, the answer must be no. I cannot pardon an offence you committed against another person; that is for the other person to do (if they so decide). Country A cannot pardon an offence committed against the laws of country B; that is for the authorities in country B to do (if they so decide). It stands to reason. Nothing is law that is not reason said Sir John Powell, speaking of common law.[1] The royal prerogative of pardon arises under common law.

This prerogative power springs from the historical fact that crimes within the realm of England fell to be redressed by pleas of the Crown instituted against a breach of the royal law. The King had power to pardon what was an offence against his own laws, but *non potest rex gratiam facere cum injuria et damno aliorum* (the king cannot grant a favour to one person to the injury and damage of others).[2]

Where a foreign state is involved, first principles bring into play the comity of nations. This was respected under Roman law.[3] In the famous case of the *Parlement Belge* Brett LJ (later Lord Esher) framed the principle of jurisdictional immunity as being the consequence of 'the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state'.[4] In a modern case Lord Justice Staughton said: 'Parliament is not assumed, in a criminal enactment, to have intended to regulate conduct outside this country'.[5] Many similar dicta could be cited.

These 'first principles' were not taken into account in an article by Dr Roderick Munday on the Michael Shields case.[6] Nor are they mentioned in the case Dr Munday discusses in his article[7]. In that case the Administrative Court held that Her Majesty (through the Home Secretary) had power to grant a pardon to the British subject Michael Shields, who had been convicted by a Bulgarian court of attempted murder of a barman at Varna in Bulgaria following a football match in which Liverpool FC were engaged.

Strangely, the judgment says the British authorities have 'a power under Article 12 of the Convention' to grant a pardon in the case. This is a reference to the Convention on the

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[1] *Coggs v Bernard* (1703), 2 Ld. Raym. Rep. p. 911.
[2] 3 Inst. 236.
[3] Poste, *Gaius* i. Introd. 3: 'The salutary but sanctionless code called the comity of nations'.
[4] (1880) 5 LRPD 197 at 214.
[5] *BBC Enterprises Ltd v Hi-Tech Xtravision Ltd* [1990] 2 WLR 1123 at 1127.
[6] 173 *Criminal Law & Justice Weekly* (21 March 2009), 181-186.
[7] *R (on the application of Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin).

Transfer of Sentenced Persons 1983. In fact the power (if it exists, which is doubtful) derives from the royal prerogative, not the convention. This is symptomatic. The court lost sight of the true nature of the power, and so failed to investigate the 'first principles' referred to above.

Whether or not the power to do so exists, to grant a British pardon in this case would undoubtedly cause offence to the Bulgarian authorities. It would not "respect the independence and dignity" of the Bulgarian judicial system, which has exhaustively considered all relevant matters. There would be no question of granting such a pardon if Michael Shields were not held in custody in England under international removal arrangements designed simply to be merciful to prisoners held abroad. It seems that to grant it would be an abuse of those arrangements.

Update On 9 September 2009 the Ministry of Justice issued a statement by Mr Jack Straw MP, Lord Chancellor and Secretary of State for Justice, including the following:

> 'I have concluded, having looked carefully at all the evidence now available, that Michael Shields is telling the truth when he says he is innocent of the attempted murder of which he was convicted in Bulgaria. That being so I have recommended to Her Majesty the Queen that he should be granted a free pardon. Mr Shields is being released from prison today and will return home to his family a free man.'

See also the law report *R (on the application of Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin) , [2009] 3 All ER 265.

6

In his lifetime Dr Samuel Johnson was accused of using too many long words, usually from the Latin. James Boswell retorted: 'That some of them may have been adopted by him unnecessarily may, perhaps, be allowed; but, in general they are definitely an advantage, for without them his stately ideas would be confined and cramped. "He that thinks with more extent than another, will want words of larger meaning"[1]'.

Johnson 'was very much offended at the general licence by no means "modestly taken" in his time, not only to coin new words, but to use many words in senses quite different from their established meaning, and those frequently very fantastical'. Here Boswell inserts a poem by John Courtenay, a biographer of Johnson, which names prominent people whose literary style was influenced by Johnson. It includes a passage relating to Boswell himself.

> Amid these names can BOSWELL be forgot,
> Scarce by North Britons now esteem'd a Scot?
> Who to the sage devoted from his youth,
> Imbib'd from him the sacred love of truth;
> The keen research, the exercise of mind,
> And that best art, the art to know mankind.

'Johnson writes like a teacher. He dictates to his readers as if from an academical chair. They attend with awe and admiration; and his precepts are impressed upon them by his commanding eloquence. Addison's style, like a light wine, pleases everybody from the first. Johnson's, like a liquor of more body, seems too strong at first, but, by degrees, is highly relished.'

Johnson himself analysed the style of Joseph Addison who, like Johnson, attended Lichfield Grammar School and, with his friend Richard Steele, became famous for founding *The Spectator* in 1711. Boswell reports that Johnson said of Addison:

[1] Samuel Johnson, *The Idler* (1758-60), No. 70.

> ‘What he attempted, he performed: he is *never feeble*, and he did not wish to be energetick; he is never rapid, and he never stagnates . . . Whoever wishes to attain an English style, familiar but not coarse, and elegant but not ostentatious, must give his days and nights to the volumes of Addison’.[1]

Later Boswell tells a story which shows a very different side of Johnson. It describes events that occurred a year or two after his beloved wife died.

‘One night, when two young men Topham Beauclerk and Bennett Langton, had supped at a tavern in London, and sat till about three in the morning, it came into their heads to go and knock up Johnson . . . They rapped violently at the door of his chambers in the Temple, till at last he appeared in his shirt, with his little black wig on the top of his head instead of a night-cap, and a poker in his hand . . . “What, is it you, you dogs! I’ll have a frisk with you” . . . they sallied forth together into Covent Garden, where the greengrocers and fruiterers were beginning to arrange their hampers, just come in from the country.

Johnson made some attempts to help them; but the honest gardeners stared so at his figure and manner, and odd interference, that he soon saw his services were not relished. The three friends then repaired to one of the neighbouring taverns, and made a bowl of that liquor called *Bishop*,which Johnson had always liked . . . They did not stay long, but walked down to the Thames, took a boat, and rowed to Billingsgate . . .

David Garrick being told of this ramble, said to him smartly “I heard of your frolick t’other night. You’ll be in the Chronicle”. Upon which Johnson observed, “*He* durst not do such a thing. His *wife* would not *let* him!”.’

7

Surprisingly often one finds a judgment opening with the words ‘The surprisingly novel issue in this appeal is . . .’ It is surprising that the issue is novel because it is the sort of obvious point one would expect to have become settled law years ago. Yet one can find no authority to that effect. The point is so obvious that no one has thought it worth litigating.

Is Blaggs, who informs the police that Bloggs has committed a dire offence, liable to be sued by Bloggs in libel or slander if Bloggs convinces the police he is pure as the driven snow, so that no prosecution results? Why of course not, says my learned friend Sir Merryweather Merriedew QC at the club, where we discuss such matters. The processes of justice could not function were it otherwise. It’s as plain as the nose on your face.

Merry’s law is not as sound as you might think from his title and impressive bearing. I lead him into the club library and show him the report of a recent Court of Appeal case, *Westcott v Westcott*[2]. The judgment of Lord Justice Ward begins:

> ‘The surprisingly novel issue in this appeal is whether a person who makes a complaint to the police, thereby instigating a police investigation which does not lead to a prosecution, can shelter behind the defence of absolute privilege if a claim is brought against her in defamation; or whether such a complaint should be protected by qualified privilege so that the defence will only be defeated if the claimant can establish malice.’[3]

This all arises, continues Lord Justice Ward, out of a sad and sorry domestic dispute which has now blown up out of all proportion.

> “A marriage breakdown, difficulties over contact arrangements, and, with emotions inevitably running high, a blazing row between the wife, her husband and her parents-

[1] Johnson’s italics.
[2] *Westcott v Westcott* [2008] EWCA 818, [2009] 1 All ER 727.
[3] Para. 1.

> in-law led to the wife complaining to the police that her father-in-law had assaulted her and her child and to father-in-law bringing a retaliatory claim for defamation of his blameless character . . . What a great shame for these intelligent parties that the public have been invited into their drawing room."[1]

Counsel for the defendant, a magistrate, dug up an 1883 dictum of Lord Justice Fry to the effect that, if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty.

> 'It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions.'[2]

Lord Justice Ward said it was not clear what protection the law gives where the maker of the statement to the police is never required to reduce it to writing or to give evidence in a court of law. 'It may be surprising', he said, 'that the matter has not yet arisen for authoritative determination'.[3] He referred to another case where Lord Justice Brooke had said the matter would have to be decided on some other occasion. Lord Justice Ward grimly added: 'This is it'.

And so it was. The elusive point of law has now been settled. No action for defamation lies in such cases. The informer enjoys absolute privilege.

8

It is notorious that in England animals are more highly regarded than children. We have the Royal Society for the Protection of Animals (RSPCA) but merely the National Society for the Protection of Children (NSPCC). In 1963, when I was in the Parliamentary Counsel Office (Westminster), I drafted the following spoof Bill on this topic.

A

BILL

To confer better protection on children, and proper protection on animals.

Be it enacted etc.

Protection of children

1. Any enactment now applying to animals shall from the passing of this Act instead apply to children.

Protection of animals

2. Any enactment now applying to children shall from the passing of this Act instead apply to animals.

Interpretation

3. In this Act-

'children' means the offspring under sixteen of human parents;

'animals means the offspring of any age of any other parents.

Short title

[1] Para. 3.
[2] Para. 13.
[3] Para. 15.

4. This Act may be cited as the Children (Better Protection) Act 1963.

9

There is a growing need to seek out and grasp the jurisprudential basis of the common law or Global method of statutory interpretation, based as it is on common law principles prevailing through most of the English-speaking world. This need is strengthened by the fact that it is now understood that the whole basis of our law is interpretative.

Some politico-philosophical colouring for analysis of the common law or Global method can be based on Ronald Dworkin's seminal book *Law's Empire*. In Dworkin's view law as integrity is 'a distinct political virtue'. It supposes that people are entitled to a coherent and principled extension of past political decisions even when judges profoundly disagree about what this means. In other words integrity takes rights seriously.

The claims of law as integrity can be divided into two more practical principles, the principle of integrity in legislation (which asks those who create law by legislation to keep that law coherent in principle) and the principle of integrity in adjudication (which asks those responsible for deciding on the legal meaning of legislation to see and enforce it as coherent in that way).

No aspect of law as integrity has been so misunderstood as its refusal to accept the popular view that there are no uniquely right answers in hard cases at law. Dworkin's thesis can be criticised as linking law as integrity to standards which are too vague and leave too much to the vagaries of individual judges. It ignores the importance of legal policy. Linked to this criticism is one of Dworkin's apparent view that there are no objective rules of statutory interpretation. 'A judge must ultimately rely on his own opinions in developing and applying a theory about how to read a statute.' This is heresy.

Dworkin's theory also needs modification in its reliance on 'our' community. The simple idea that a body of law serves one culture and one community no longer applies in the multicultural, pluralistic Britain of the twenty-first century. So a particular item of our law now needs to be interpreted according to the demographic group in which it holds sway, whether the European Union, the nations who have ratified the European Convention on Human Rights, the United Kingdom, or a devolved area inside the United Kingdom.

There is what David Robertson calls a 'level of analysis problem'. The concise analysis, relying on a few well-known rules such as the mischief rule, prevails, he says, at the level of overt and public judicial argument. The detailed analysis deals with the hugely complex and detailed mass of rules and techniques underlying this. The two levels should correspond, but it is doubtful if they do.

10

The law is reason, free from passion, said Aristotle. Reason proceeds by logic. Logic says either the European Convention on Human Rights ('the Convention') applies in a country or it does not. If it does apply in country A, says logic, the people of A are entitled to its benefits. Equally, if the Convention does not apply in country B the people of B are not so entitled. So far, so straightforward.

If X and Y, persons of country B, come to country A, have no other right to remain there, and are to be deported to country B, can they claim under the Convention to remain in A? This conundrum arose in a 2008 case ('the Lebanon Case')[1]. Country A was the United Kingdom

[1] *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

and country B was Lebanon, in which Sharia law is in force. The two people concerned were the appellant EM, a mother married in Lebanon under Sharia law and AF, her son of 12. Lord Hope of Craighead said:

> 'Sharia law as it is applied in Lebanon was created by and for men in a male dominated society. The place of the mother in the life of a child under that system is quite different from that which is guaranteed in the contracting states by article 8 of the Convention read in conjunction with article 14. There is no place in it for equal rights between men and women. It is . . . the product of a religious and cultural tradition that is respected and observed throughout much of the world. But by our standards the system is arbitrary because the law permits of no exceptions to its application, however strong the objections may be on the facts of any given case. It is discriminatory too because it denies women custody of their children after they have reached the age of custodial transfer [seven years] simply because they are women. That is why the appellant removed her child from that system of law and sought protection against its effects in this country.'

It might be thought that in logic the question was whether or not EM and AF, being physically located in a Convention country even though belonging to a non-Convention country, should be treated as persons to whom the Convention in all its fullness applied. Many British people might out of humanity prefer that they should be so treated. But there are dicta in other cases saying things like:

> '. . . article 3 does not place an obligation on the contracting state to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the contracting states.'[1]

> '. . . on a purely pragmatic basis, it cannot be required that an expelling contracting state only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.'[2]

Such thinking as that might lead us to suppose that EM and AF would be held to be altogether outside the Convention. Logically it must surely be either one thing or the other.

But our laws do not work logically, and that is why they are so unbearably complicated. In the Lebanon Case the House of Lords, reversing the Court of Appeal, held that the Convention does apply in such cases *but in a very watered-down, weakened way*. Logic did not enter into it.

11

This time I am printing from my archives the letter from Lord Forsooth objecting to the quashing of the 1952 conviction of Derek Bentley for the murder of P.C. Miles.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

Rutland

1 August 1998

[1] See Lebanon Case, para. 9.
[2] See Lebanon Case, para. 11.

The Rt. Hon. Jack Straw M.P.
Home Office

Dear Home Secretary ,

Rewriting history in the Court of Appeal

The Times front page on 31 July 1998 carried the untruthful banner headline 'Bentley is innocent'. Its law report for that day spelt out how the Court of Appeal, headed by Lord Bingham of Cornhill CJ, had overturned not only the Derek Bentley murder conviction but also a fundamental principle of English law. My law man Vencible tells me that this is expressed in the maxim *res judicata pro veritate accipitur* (a thing adjudicated is to be received as true). Related maxims are *interest reipublicae res judicata non rescindi* (it is in the national interest that judgments be not rescinded) and *interest reipublicae ut sit finis litium* (it is in the national interest that legal proceedings be not protracted). These maxims indicate that once normal appeal procedures have been exhausted a case should not be reopened except for compelling reasons. These exist where a convict is languishing in prison when new evidence suggests the conviction may be unsafe. That was not the position with the late unlamented Bentley.

What was that expensive collection of highly trained lawyers doing, mulling at public expense over the long-ago trial of a long-dead reprobate youth? The short answer, says Vencible, is that they were responding, as the law required, to a reference from the Criminal Cases Review Commission made under section 9 of the Criminal Appeal Act 1995. The full answer involves rather more than that.

The Court of Appeal ordered that Bentley's conviction of murdering P.C. Miles on the night of 2 November 1952 be quashed as unsafe. The sole grounds for this were defects they found in the summing up by the late Lord Goddard CJ, whom Lord Bingham acknowledged to have been 'one of the outstanding criminal judges of the century'.

It is not my contention that the Court of Appeal were wrong in law in their finding that Bentley's conviction was unsafe. I am not in a position to judge that. My assertion is that they had no business to be considering the matter. Bentley was tried by the standards of his day. I well remember the public feeling at the time, and the anger aroused by the foul murder of P.C. Miles at the hands of Bentley's warehouse-breaking accomplice the 16-year old thug Christopher Craig. Bentley too was armed, with what his executioner Albert Pierrepoint called 'a knuckle-duster with a vicious spike upon it - in itself a lethal enough weapon'. But it's history now. What are we doing resurrecting it? Here are some more questions.

The appeal was lodged 'on behalf of' the deceased Bentley by his niece Maria Bentley-Dingwall. Why should his niece have the right to put the law in motion in this way? Suppose there had been no niece, nor any other surviving relative? It is a mere accident that in 1998 there are any known relatives of the long-dead Bentley. Jurisdiction should not hang on such accidents.

At the time, Bentley brought an appeal against his conviction. It was heard by the Court of Criminal Appeal (now abolished) and dismissed. Bentley was then hanged. Under the long-standing policy of the law, that should have been an end of the matter. Why does our generation think it has the right to overrule the generation in whose lifetime the events happened? I call it impudence.

The Bentley jury sat in the days when qualifications were required for jury service. It was not, as now, open to every 18-year old school leaver with or without O levels. The Bentley jury sat in the days when a jury's verdict had to be unanimous. Nowadays dissent is allowed.

So the jury of mature citizens of those post-war days sat in court, heard the evidence, assessed the demeanour of the witnesses, and unanimously found Bentley guilty. Half a century later the Court of Appeal, relying only on paper records and sitting in a different age, presumes to say their verdict is 'unsafe'. Why should this be?

It happened because today's Court of Appeal think the experienced Lord Goddard did not instruct the jury adequately on the burden of proof resting on the prosecution and the fact that they had to be satisfied of guilt beyond reasonable doubt. The Times untruthfully proclaims 'Bentley was innocent'. Why was this untruthful? Because quashing a verdict of guilt as 'unsafe' is very far from saying that the accused was innocent. The overwhelming likelihood is that despite any supposed deficiencies in the judge's direction, the 1952 jury came to a true and fair verdict on the evidence as they were sworn to do.

Awareness of the unreal nature of what he was about comes through in the judgment of Lord Bingham. He rules that in considering anything like the Bentley appeal the liability of a party to a joint enterprise has to be determined according to the common law as now understood, not as understood in 1952. The conduct of the trial and the direction of the jury have to be judged according to the standards which the court would now apply and not according to 1952 standards. Worse, the safety of the conviction also has to be judged according to the standards which the court would now apply. Finally Lord Bingham said:

> 'Where between conviction and appeal there have been significant changes in the common law . . . the approach indicated requires the court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time.'

It is scarcely necessary to say more to indicate what a travesty this so-called appeal was, but one point may be added. The reasoning behind the appeal would have applied equally if the 1952 Home Secretary, Sir David Maxwell-Fyfe, had responded to public pressure and reprieved Bentley. If that had happened Bentley would by now, like his accomplice Craig, have served his prison sentence and been long at liberty. Would it really be right that a man with his record should have his conviction retrospectively quashed nearly half a century later and thereafter rank as a victim of gross injustice entitled to massive compensation from today's taxpayers? I think not.

Should we excuse the Court of Appeal in *Bentley* because they were merely performing a function wished on them by Mr Blair's brand new statute? Again, I think not. There is nothing in Lord Bingham's judgment to show that he and his two colleagues found their task in any way objectionable.

Our generation needs to be reminded of that pregnant saying of L. P. Hartley's in *The Go-Between*. The past is a foreign country: they do things differently there. Or to put it even more succinctly: you can't change history, and you shouldn't even try.

Yours faithfully,

Forsooth

Chapter 7

1

The long-running saga of MPs' expenses has taken another turn. {Parliament:Members of} Now the press is complaining about a process many people seem not to have heard of, redaction. Those who follow my writings will not have been surprised, because I used the term in a recent article.[1] It is more or less equivalent to editing.

Uproar was caused when around 16 June 2009 details of MPs' expense allowances for a recent period were published officially with large areas blacked out or redacted. This redaction was authorised by a 2008 order which amended the Freedom of Information Act 2000.[2] The official explanatory note said that the order excluded from the Act information as to any residential address of an MP, or as to forthcoming or regular travel arrangements for MPs, or as to the identity of any person who delivers good or provides services to MPs' addresses. The sole justification given was that without the amendment MPs' ability to speak freely would be inhibited for security reasons.

Earlier the House of Commons Commission had unsuccessfully appealed to the High Court against an Information Tribunal ruling demanding inclusion of MPs' addresses when expenses information was published. The order amending the 2000 Act was made in defiance of the view of the High Court.[3]

For what amounts to an executive order to amend an Act of Parliament in this way is a growing constitutional outrage. It is convenient for the executive but inimical to the dignity of Parliament. It also, as here, allows the executive to override a decision of the court. What has become of the separation of powers?

2

To find out the legal rule or rules laid down or followed in a judicial decision we are supposed to look at what is called the *ratio decidendi* or reason of the decision. The law would be simplified if judges took more care to ensure that this is clearly set out in their judgments. Lord Bingham of Cornhill said:

> "First, whatever the diversity of opinion the judges should recognise a duty, not always observed, to try to ensure that there is a clear majority ratio. Without that, no one can know what the law is . . ."[4]

Where it involves the legal meaning of an enactment it would be best if the judge used the method known as interstitial articulation[5].

In this connection it would also be of great advantage if, where the court consisted of two or more judges, they combined their efforts so as to produce a single agreed judgment. {judge:judgment of} As Dr Roderick Munday says (though I am not sure that he entirely believes it):

> ". . . a well-crafted unitary judgment can promote a degree of legal clarity, enabling successor courts – and, indeed, the profession at large – to comprehend the courts' statement of law more readily . . . if one seeks after an intelligible layman's law,

[1] "Complex Legislation: Is Redaction the Answer", 18 *Commonwealth Law Journal* (April 2009), p. 23, www.francisbennion.com/2009/011.htm.
[2] Freedom of Information (Parliament and National Assembly for Wales) Order 2008 (SI 2009 No. 1967).
[3] *Daily Telegraph*, June 20, 2009.
[4] "The Rule of Law", Sixth Sir David Williams Lecture, 2006.
[5] See *Bennion on Statutory Interpretation* (5th edn, 2008), s. 179.

composite judgments can make the law more accessible to its subjects, who have to comply with it."[1]

If in a rare case any judge was unable to concur in a draft judgment of the court the answer would be a dissent (whether reasoned or not). This would tend to reduce the authority of the single judgment, but that is a price worth paying.

Where a multi-judge court produces individual reasoned judgments, as is commonly the case with the Appellate Committee of the House of Lords, it is almost impossible for the reader to work out the *ratio decidendi* of the decision. This is an unnecessary flaw in our jurisprudence, and should be remedied without delay.[2] It is particularly troublesome where Judges in a multi-Judge court differ among themselves on what the *ratio decidendi* is. This happened for example with the 2008 House of Lords decision in *R (on the application of Bapio Action Ltd & Anor) v Secretary of State for the Home Department & Anor*[3]. Two of their Lordships decided the case on the ground that guidance given by the Secretary of State was not in accordance with the relevant law. Another two chose as their ground the fact that relevant persons had been deprived by the guidance of a legitimate expectation. The fifth dissented, on grounds that are not entirely clear.

Another, comparatively minor, blemish on our highest court is occasional carelessness and sloppiness in the wording of opinions. An editorial in the *Statute Law Review*[4] complains of this in relation to the 2008 decision in *Spencer-Franks v Kellogg Brown and Root Limited and others*[5]. There were five Law Lords and each delivered his own reasoned opinion. The case concerned the Provision and Use of Work Equipment Regulations 1998[6]. Lord Hoffmann called them for short "the equipment regulations". The short name given by Lord Rodger of Earlsferry and Lord Mance was "the 1998 Regulations". Lord Carswell chose "PUWER 1998" as a short name. Lord Neuberger did not allocate any short name but called them "the 1998 Regulations" anyway.

This complaint may appear trivial, but such irrational variations add to the already manifold difficulties of statute users. It is not too much to ask that they be ironed out, and consistency produced, before judgments are permitted to see the light of day.

In his complaint the editor of the *Statute Law Review* produced another oddity from the same case. Lord Carswell says[7] "As my noble and learned friend Lord Rodger of Earlsferry has pointed out in paragraph 6 of his opinion . . ." But there is no paragraph 6 of the said opinion, which begins at paragraph 30. Not really good enough.

3

The law is reason, free from passion, said Aristotle. Reason proceeds by logic. Logic says either the European Convention on Human Rights ("the Convention") applies in a country or it does not. If it does apply in country A, says logic, the people of A are entitled to its benefits. Equally, if the Convention does not apply in country B the people of B are not so entitled. So far, so straightforward.

If X and Y, persons of country B, come to country A, have no other right to remain there, and are to be deported to country B, can they claim under the Convention to remain in A? This conundrum arose in a 2008 case ("the Lebanon Case")[8]. Country A was the United Kingdom and country B was Lebanon, in which Sharia law is in force. The two people concerned were

[1] "Suppressing Dissent" 173 JPN (December 20/27 2008) 830 at 832.
[2] According to Dr Munday (*op. cit.*) it is well on the way to being remedied.
[3] [2008] UKHL 27.
[4] 29(3) *Statute Law Review* (2008) pp. iii, iv.
[5] [2008] UKHL 46.
[6] Provision and Use of Work Equipment Regulations 1998SI 1998/2306.
[7] Paragraph 68.
[8] *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

the appellant EM, a mother married in Lebanon under Sharia law and AF, her son of 12. Lord Hope of Craighead said:

> "Sharia law as it is applied in Lebanon was created by and for men in a male dominated society. The place of the mother in the life of a child under that system is quite different from that which is guaranteed in the contracting states by article 8 of the Convention read in conjunction with article 14. There is no place in it for equal rights between men and women. It is . . . the product of a religious and cultural tradition that is respected and observed throughout much of the world. But by our standards the system is arbitrary because the law permits of no exceptions to its application, however strong the objections may be on the facts of any given case. It is discriminatory too because it denies women custody of their children after they have reached the age of custodial transfer [seven years] simply because they are women. That is why the appellant removed her child from that system of law and sought protection against its effects in this country."[1]

It might be thought that in logic the question was whether or not EM and AF, being physically located in a Convention country even though belonging to a non-Convention country, should be treated as persons to whom the Convention in all its fullness applied. Many British people might out of humanity prefer that they should. But there are dicta in other cases saying things like:

> ". . . article 3 { does not place an obligation on the contracting state to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the contracting states."[2]

> ". . . on a purely pragmatic basis, it cannot be required that an expelling contracting state only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention."[3]

Such thinking as that might lead us to suppose that EM and AF would be held to be altogether outside the Convention. Logically it must surely be either one thing or the other.

But our laws do not work logically, and that is why they are so unbearably complicated. In the Lebanon Case the House of Lords, reversing the Court of Appeal, held that the Convention does apply in such cases *but in a very watered-down, weakened way*. Logic did not enter into it.

4

Plagiarism by students is a constant source of worry to law school authorities. Recently I received some notes on this from my friend Jeffrey Barnes, Senior Lecturer and Director of Teaching and Learning at the School of Law, La Trobe University Australia. He asked for my comments. What should I say?

It is a complicated subject. The body of learning attached to any scholarly topic is like an old garden. Its soil is a mixture bearing traces of human activity going back many years. Most of this is now anonymous and untraceable. Some names are still remembered; most are lost. A new student is planted in this academic soil. Ultimately it is hoped he or she will add a portion of humus to it. In Charles Darwin's book *Earthworms* he said: "Year after year the thrown-up castings cover the dead leaves, the result being a rich humus of great thickness". So scholars are like Darwin's earthworms. It is a suitably humbling analogy.

In examinations students are mostly expected to produce samples from the academic soil rather than original work of their own, though they will try to express it in an original fashion.

[1] Lebanon Case, para. 6.
[2] See Lebanon Case, para. 9.
[3] See Lebanon Case, para. 11.

If in the course of this they repeat, verbatim and without acknowledging the author, formulations they have memorized they are not to be blamed. They may be remembering the words but not their origin. Or they may feel uncertain of the origin. Or of course they may remember the origin perfectly well but suppress it. Who is to tell?

It is different when in course work s pass off an extended passage as their own when it is copied word for word from elsewhere. That indeed should be treated as punishable plagiarism. Short of it, the student should be given the benefit of the doubt. Student life is stressful enough.

The above was written before I read Jeffrey's notes. He usefully adds that universities should "draw a clear line in misconduct law and policy between forms of cheating and dishonesty on the one hand, and conduct which is poor scholarship on the other". Also he includes the following quotation:

> ". . . the depiction of plagiarism as a moral issue can actually encourage plagiarism. Within the humanities plagiarism often happens when students, faced with the fear that they haven't provided enough of their "own ideas", try to play down the extent to which their essays derive from borrowed material. More often than not, what's really expected of these students is some demonstration of an ability to sift through a body of published ideas and to piece together a selection of discussions and arguments relevant to the topic, with the aim of reaching a conclusion of some kind."[1]

Jeffrey's notes do not include a reference to computer systems for detecting plagiarism, though he may want to add this.[2]

5

Following the election of Boris Johnson as Conservative Mayor of London from 5 May 2009, there is now an Etonian triumvirate embracing Johnson, David Cameron (leader of the Conservative Opposition) and George Osborne (Shadow Chancellor of the Exchequer). Some jeer at this expensively-educated trio as "salesmen". What is it that Eton College really gives its pupils? In pursuit of the answer I picked up *The Oppidan*, a novel by Sir Shane Leslie which I have owned for years and not found myself able to read. I noted that the dedication was

> TO E. S. P. HAYNES
>
> AN OPPIDAN TO A COLLEGER

The subject of this dedication, who died in 1949, was a family solicitor with an office in Lincoln's Inn. I picked up his book *The Lawyer*[3], which again I have owned for years and not found myself able to read. It is a book of reminiscences. I began to read it at last, quickly discovering that it bears the Etonian stamp. Perhaps, I thought, this book will give me what I am looking for. Having now finished it, I feel moved to share with readers some random gleanings.

Haynes's tutor as a Colleger at Eton was the famous Henry Elford Luxmoore, and they kept in touch later. I struck gold at once. Haynes says that Luxmoore was a disciplinarian in the best sense. He preserved discipline while discussing everything with his pupils on a footing of intellectual equality. "His disapproval was quite as polite when I was fifteen", says Haynes, "as when I was forty-five". Then comes the crucial passage. Haynes says:

> "I cannot help feeling that this wonderful courtesy towards youth – and especially callow and self-confident youth – may have had much to do with Etonian success in

[1] Robert Briggs**Error! Bookmark not defined.**, 'Shameless! Reconceiving the Problem of Plagiarism' (2003) 46(1) *Australian Universities' Review* 19 at 21.
[2] A useful website giving many arguments and sources is at *http://cyberdash.com/plagiarism-detection-software-issues-gvsu.*
[3] E. S. P. Haynes, *The Lawyer: A Conversation Piece* (London, Eyre & Spottiswoode) 1951.

> public life . . . Looking back . . . on thirty years of studying various types of humanity, I have seen Etonians succeed where Balliol men have failed, and the success has been due to a quite genuine urbanity which has not ruffled any inferiority complex which might otherwise have come into play . . .”

Now I will mention another Eton luminary, Edmond Warre. He was Headmaster during Haynes’s time as a pupil, and later Provost. I had a third unread Eton volume, the life of Edmond Warre by C. R. L. Fletcher[1]. I took it down.

Warre was a notable scholar, winning the Newcastle Scholarship as a boy at Eton and later a double First in Classics at Balliol. At the age of 23 he was summoned to return to Eton as a temporary master to deal with an emergency. A House whose Housemaster was stricken with a long illness had put in a substitute who failed to control the boys. In Fletcher’s words, Warre was sent for to “curb the unruly flock”. Fletcher goes on:

EDMOND WARRE.
Circa 1858.

> “He accepted, and within a week had restored order in a House which has been described as “not far from pandemonium” when he took it over; and this was effected not by punishments but by his own force of character . . . culprits would say, “It’s a good deal worse to be *talked to* seriously by Warre than to be flogged by Hornby (James John Hornby, the then Headmaster); he doesn’t get angry in the ordinary sense of the word, but he makes you feel such an infinitesimal worm.”[2]

The photograph shows Warre as a young man at this time. One can well understand how the recalcitrant boys of 1860 were cowed by his force of character. I wonder if there is any young Englishman like this flourishing today – in Eton or elsewhere.

6

That incorrigible old sexist Earl Forsooth puts back on the shelves of the East Library at Montmorency Castle an ancient book he has just been reading. It is bound in full calf, and dated 1558. Its author is John Knox, and its title is *The First Blast of the Trumpet Against the Monstrous Regiment of Women*. His Lordship moves to the silken bellrope and pulls vigorously. When the footman appears the Earl barks “Inform my amanuensis that I require her presence here immediately”. The footman bows and withdraws. Later the Earl dictates a letter.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

[1] London: John Murray, 1922.
[2] *Op. cit.*, p. 45.

Rutland

14 April 1999

R. D. V. Knight Esq.
The Secretary, Marylebone Cricket Club
Lord's Ground
London NW8 8QN

Dear Knight,

I am writing to tender my resignation as a member of the Marylebone Cricket Club, which I have always known as a club exclusively for gentlemen. I shall strive to remember it like that. It may throw light on my reasons for resignation if I now set out the text of a letter I wrote to the Times on 25 August 1998. Of course, it was not published.

"As an MCC member of many years' standing I feel bludgeoned and dragooned, not to say brain-washed. My club, till now well-known as a gentleman's club, last February canvassed its members on the question of admitting ladies to membership This absurd proposal, supported I regret to say by the Committee, received insufficient votes. So that was that for a few years more (or so we all thought).

Not so at all. Today I received from the MCC an expensively produced brochure announcing the holding of a further ballot before the year is out. The brochure is evidently designed by the Committee to convince recalcitrant members such as myself to change their minds. It tends all one way.

If we do not about face we are to be branded as reactionary, sexist and not of the modern world. The media will sneer, it tells us. The Labour Prime Minister will not be pleased. Lottery money will not be forthcoming.

O my Hornby and my Barlow, long ago!

It was *Mister* Hornby and *Mister* Barlow who inspired those immortal lines, not Janet Hornby and Elsie Barlow (they would have been at the back of the pavilion cutting sandwiches).

"It is little I repair to the matches of the Southron folk. [Dashed fella must have come from Lancashire!]

> Though my own red roses there may blow [What did I tell you?]
> For the field is full of shades as I near the shadowy coast,
> And a ghostly batsman [They call them batters now] plays to the bowling of a ghost,
> And I look through my tears on a soundless-clapping host
> As the run-stealers flicker to and fro, to and fro
> Oh my Hornby and my Barlow long ago!"

Well I'm looking through my tears at the mess they've made of dear old Lords, I can tell you. As the dead MCC members gaze down from paradise there's a soundless-clapping host, you can bet your boots on that. And what are they saying to each other? Something on the lines of: "Why do these silly asses think they know better than we did?" James Love wrote a poem as long ago as 1765 which gave the traditional, proper view:

> "Hail Cricket! glorious, manly British game,
> First of all Sports! be first alike in Fame!
> To my fix'd Soul, thy bust Transport bring,

That I may feel thy raptures while I sing!"

Note that word *manly*. Not much used nowadays. Lord Harris, once captain of England, said of cricket:

"To play it keenly, honourably, generously, self-sacrificingly, is a moral

lesson in itself, and the classroom is God's air and sunshine. Foster it, my brothers, so that it may attract all who can find the time to play it. Protect it from anything that would sully it ,so that it may grow in favour with all men."

Nothing about fostering it *my sisters*, or growing in favour with *all women.*

I end with lines on the Eton and Harrow match by C. A. Alington of my own old school Eton.

"Lose another, and that's the end of it,
Why not call it a harrowing day?
Harrow's lips are at last on the cup,
Harrow's tail unmistakably up,
And Eton can only pray
For a captain's heart in a captain's breast,
And some decent batting among the rest,
And sit and shiver and hope for the best-
If those two fellows can only stay!"

I rather think being a captain is a man's game. But so's cricket, really. Don't you think?

Yours faithfully,

Forsooth

Chapter 8

1

The best writers are complex

Philip Johnston complained in a *Daily Telegraph* Comment piece on 16 November 2009 that the Government tells us 'who to like and who not to'. I suggested in a letter on that day (not published until 23 November, no doubt while it was checked for accuracy) that Charles Dickens had it right in *The Life and Adventures of Martin Chuzzlewit*:

> ' "Every man", said Mr Pecksniff, "has a right, an undoubted right, (which I, for one, would not call in question for any earthly consideration: oh no!) to regulate his own proceedings by his own likings and dislikings, supposing they are not immoral and not irreligious."'

Under the heading 'Pecksniffian advice' the following letter from Linda Hepburn appeared on 24 November:

> 'Charles Dickens's Mr Peckniff has an impressive line in wise words; however he is actually a repellent hypocrite. William Shakespeare's famous "To thine own self be true" speech is spoken by Polonius, a man who spies on his children and hides behind an arras to listen to a private conversation.
>
> The best writers are complex.'[1]

2

Curia novit legem

Professor John Bell tells us of an important difference between the continental and the common law system. In the former, where the maxim *curia novit legem* (the court knows the law) applies, it is the judge, not the parties or their advocates, who will be expected to research the law:

> 'The judge never has to explain which materials he or she has looked at and in what order. The whole heuristic process of how the relevant law is discovered lies completely hidden from view.'

In the common law system, on the other hand, the process of law management is more transparent.

> 'With a traditional emphasis on the parties presenting their legal sources to the judge at a concentrated (and largely oral) hearing, a set of rules grew up about what sources parties could present in support of their claims, and under what circumstances.'[2]

The common law judge is nevertheless entitled to refresh his or her memory of the law by whatever means appear suitable. Furthermore it is accepted that such judges are liable to make mistakes in law.

> 'As is well known, anybody, even a judge, can be capable of misconstruing a statute; and such misconstruction, when it occurs, can be severely criticised without attracting the epithet "negligent".'[3]

If a judge who misconstrues a statute is not necessarily negligent, this applies *a fortiori* to a legal or other adviser. Taking and acting on a wrong view of the law may however amount to maladministration.[4]

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[1] See *www.francisbennion.com/2009/038.htm*.
[2] John Bell, *Law Studies* (September 2002), 473 at 477.
[3] *Rowling v Takaro Properties Ltd* [1988] AC 473 at 502.
[4] See *Westminster City Council v Haywood* [1996] 2 All ER 467, *per* Robert Walker J at 482.

3

A small dose of Thomas Hearne, antiquary

St Edmund Hall, founded in the thirteenth century, is now the sole survivor of the medieval academic halls which preceded the University of Oxford colleges. In 1951 I had the honour to be appointed by the Hall as its first official tutor and lecturer in law. I discovered that in 1699 the antiquary Thomas Hearne (1678-1735) graduated from the Hall as a Bachelor of Arts and remained in residence for many years. Under the title *Hearne's Collections*, his diaries were published in eleven volumes by the Oxford Historical Society between 1885 and 1918. They have some points of interest for present day lawyers and others, but they perhaps need to be taken in small doses. Here is one such dose, which might strike a chord with some hard drinkers of today.

22 August 1705 Yesterday Mr Gilby, Bachelor of Law, Fellow of All Souls College, and one of the Proctors in the vice-chancellor's court , died of a consumption, which he said a little before he died he thought verily to have proceeded from a piece of cherry stone which some time since went down his windpipe & caused a corruption in his lungs. Which though it might be one cause, yet 'tis said the chief was hard drinking. He is reported to have been a person of some parts, and some learning.

4

Judicial bias: Fatima and Lady Cosgrove

What is a judge? A professional with life experiences that qualify the judge to preside over disputes. Judges bring to the bench many existing sympathies, antipathies and attitudes. They are the product of every type of social experience, process of education, human contact with those with whom we share the planet. So say Justices L'Heureux-Dubé and McLachlin.[1] Lord Rodger of Earlsferry adds that judges have the advantage of years of relevant training and experience. They swear an oath to decide impartially and are expected to be able to put aside any prejudices they may have. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge was biased.[2]

So what are we to think regarding bias when Lady Cosgrove, a Jewish judge of the court of Session, makes a decision in a case where Miss Fatima Helow, a Palestinian asylum seeker, is a party? In the absence of any indication to the contrary, we are to expect that the above factors will lead Lady Cosgrove to decide impartially. Will it make any difference that she is a member of the International Association of Jewish Lawyers and Jurists ('the Association')? No, said the Appellate Committee.[3] This even applies if the Association's journal *Justice* contains some anti-Palestinian material, because *Justice* specifically says that the views of individuals and organisations published in it are their own and that inclusion in it does not necessarily imply endorsement by the Association.[4] Counsel for Miss Helow suggested that the observer would think that, by reading *Justice*, Lady Cosgrove might by a process of osmosis have absorbed the more extreme views expressed in its pages. No said Lord Rodger, since *Justice* appears quarterly and anyone reading an article would be unlikely to retain any clear recollection of a similar article in an earlier issue. This would greatly reduce the chances of the articles having a cumulative effect on the reader.[5]

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[1] *R v S(RD)* [1997] 3 SCR 484, cited in *Helow v Secretary of State For The Home Department and Another (Scotland)* [2008] UKHL 62 (hereinafter *Helow*) at [57]. This is stated more fully at the end of this note.
[2] *Helow* at [23].
[3] Unanimously held in *Helow*.
[4] See *Helow* at [19].
[5] *Helow* at [22].

Who is this theoretical 'observer' who is to judge the question of judicial bias? The legal test to be applied in cases of apparent judicial bias is to be found in a speech of Lord Hope of Craighead, in an earlier case[1]:

> 'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.

It is equally well established that the fair-minded observer is neither complacent nor unduly sensitive or suspicious.[2]

The theoretical observer is called on in all cases of suspected judicial bias except where the principle of automatic disqualification applies. It applied in the Pinochet case[3] where it was held that a judge was automatically disqualified not merely if they had a pecuniary interest in the outcome of the case, but also if their decision would lead to the promotion of a cause in which they were involved together with one of the parties. It applied in a Jersey case where Lord Brown emphasised that a party to litigation (above all one who had been convicted in it of an offence), must leave court feeling he or she has received a fair trial.[4]

In *Helow* Lord Mance cited the remarks of Justices L'Heureux-Dubé and McLachlin already mentioned.[5] They added that the requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes . . . the duty to be impartial does not mean that a judge does not, or cannot, bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

5

Law-churning, or make do and mend

In a case turning on the complexities of the Transport Act 1981 s. 19, Lord Lane CJ said he sympathised with courts 'which have to grapple with this sort of legislation'. He added that it would be very surprising if judges did not make mistakes in this branch of their work.[6]

Judicial difficulties of this kind grow with the increasing complexity of statute law. A typical complaint by a senior judge was cited by Lord Walker of Gestingthorpe in a 2006 case.[7] He said of a knotty question of construction on sex discrimination that it had become virtually impossible and almost unacceptable to decide points of this kind in short form.

> 'The legal materials on indirect discrimination and equal pay are increasingly voluminous and incredibly intractable. The available arguments have become more convoluted, while continuing to multiply. Separating the wheat from the chaff takes more and more time. The short snappy decisions of the early days of the industrial

[1] *Porter v Magill* [2002] 2 AC 357 at 494.
[2] *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, *per* Kirby J. See *Helow* at [14], [38].
[3] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119.
[4] *Michel v The Queen* (2009), *The Times*, 9 November: see 173 CL&J (21 November 2009), 750. A fair trial is of course required by the European Convention on Human Rights, art. 6
[5] *R v S(RD)* [1997] 3 SCR 484 at [119]. See *Helow* at [57].
[6] *R v Kent* [1983] 1 WLR 794 at 796.
[7] *Secretary of State for Trade and Industry v Rutherford and another* [2006] UKHL 19, [2006] 4 All ER 577, at [37].

> tribunals have long since disappeared. They have been replaced by what truly are "extended reasons" which have to grapple with factual situations of escalating complexity and with thicker seams of domestic and EC law, as interpreted in cascades of case law from the House of Lords and the European Court of Justice.'

Lord Scott of Foscote joined in:

> 'This short point produced a judgment of some 14 pages by the Employment Tribunal (which held that the appellants' contention was right), a judgment of over 100 pages by the Employment Appeal Tribunal (which held it was not) and a judgment by Mummery LJ in the Court of Appeal . . . that, in a mere 14 pages, upheld the EAT. Mummery LJ commented on the lamentable state of complexity and obfuscation which appeared to attend this area of employment law.'[1]

The situation is exacerbated when coupled with the sort of constant legislative changes that I have christened law-churning, which grows worse by the day. There is an increasing tendency on the part of politicians to think that it will benefit them electorally if they promote frequent legislation. By this law-churning the Government of the day may do serious damage. A nation's legal system cannot perform its social function properly if it is constantly uprooted in this way. Lawyers cannot know the law. Law students cannot be taught the law. More unproductive lawyers are needed to work the system. Judges are thrown into confusion. Lord Radcliffe said:

> 'The respect for the law, without which it will certainly never be readily obeyed, cannot survive the spectacle of its continual making and remaking before our eyes. Human nature is not so constituted.'[2]

Law-churning has been particularly apparent in relation to criminal law. In 2005 Rose LJ, Vice-President of the Criminal Division of the Court of Appeal, said of the Criminal Justice Act 2003 that it was more than a decade since the late Lord Taylor of Gosforth CJ called for a reduction in the torrent of legislation affecting criminal justice. He added:

> 'Regrettably, that call has gone unheeded by successive governments. Indeed, the quantity of such legislation has increased and its quality has, if anything, diminished. The 2003 Act has 339 sections and 38 schedules and runs to 453 pages. It is, in pre-metric terms, an inch thick. The provisions which we have considered have been brought into force prematurely, before appropriate training could be given by the Judicial Studies Board or otherwise to approximately 2,000 Crown Court and Supreme Court judges and 30,000 magistrates. In the meantime, the judiciary and, no doubt, the many criminal justice agencies for which this court cannot speak, must, in the phrase familiar during the Second World War "make do and mend".'[3]

I have written more on this vexed topic elsewhere, but that will do for the moment.[4]

6

His Lordship, now that I have written to him about his title and emerged alive, has decided to become a regular correspondent. He sends me copies of some of his searing epistles. Here is one.

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[1] Ibid. at [7].
[2] Lord Radcliffe, 'Some reflections on law and lawyers' 10 CLJ 361 at 366.
[3] *R v Bradley* [2005] EWCA Crim 20 at [39], (2005) Times, 17 January.
[4] See the topic 'Law-Churning' on FB's website for his articles on this subject, www.francisbennion.com/topic/lawchurning.htm.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

Rutland

4 July 2009

Philip Hensher Esq.,
c/o *The Daily Telegraph*,
111 Buckingham Palace Road,
London SW1W 0DT.

Sir,

On being insulted

You had a great spread in the *Telegraph* on 3 July 2009, holding forth about literary punch-ups. Drolly you said that one of the things that had been drummed into you as a baby novelist (a what?) was Never Respond. When people are rude about you in print, Never Respond. If you meet them at a party, smile graciously, shake their hand if necessary (never employ kissing), and move on. Not a principle I've ever subscribed to myself, but then I'm not a handshaker anyway. (They say I'm more likely to shake people by the neck, that's by the way.)

In your piece you wrote about how Alain de Botton failed to keep up to your principle. He was stung by a review in the *New York Times*. So he wrote on the chap's blog (so you say):

> 'It's a review driven by an almost manic desire to bad-mouth and perversely depreciate anything of value. You have now killed my book in the United States . . . I will hate you till the day I die.'

Here you thought you saw your chance to plunge the knife into Mr de Botton yourself. So in your piece you wrote:

> 'It was unfortunate that De Botton, seeking to demonstrate his own value as a writer, wrote "depreciate" when he meant "deprecate", but still we get the point.'

Condescending or what? We graciously get your point even though you are such a thundering buffoon as to muddle up common words like deprecate and depreciate. And you call yourself a writer, sniff, sniff . . . Hardly the gracious smile, handshake and move on.

Unfortunately it was you who came unstuck. I felt suspicious and sent for little Miss Mousie who works as fourth stenographer in Dungeon 5b at the castle. She confirmed my suspicion by looking up our monster copy of the full OED. I had suspected that in fact De Botton wrote "depreciate" when he meant "depreciate", and I proved right. The OED says a meaning of this transitive verb is "To lower in estimation; to represent as of less value; to underrate, undervalue, belittle".

Spot on, I would say. Retire hurt, wretched Hensher. (I nearly wrote Hamster.)

Forsooth

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INDEX

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W