



MASTER OF
THE ROLLS

LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS

**THE INCOMING TIDE: THE CIVIL LAW, THE COMMON LAW, REFEREES
AND ADVOCATES**

THE EUROPEAN CIRCUIT OF THE BAR'S FIRST ANNUAL LECTURE

GRAY'S INN

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(1) Introduction

1. When asked about his lineage, Jean-Andoche Junot, 1st Duc d'Abrantès – as you would expect from a self-made son of the French revolutionary wars - replied, “*Ah, ma foi! Je n'en sais rien. Moi je suis mon ancêtre.*” Or as he might have said if he'd been on this side of the Channel, “*Ah, my faith! I know nothing about it; I am my own ancestor.*” Tonight I suppose that I am my own ancestor as, with feelings of both pleasure and honour, I am giving the European Circuit's first annual lecture¹. I am sure that it will be the first of very many. And as they say, from here, the only way is up.

¹ In doing so I should acknowledge the valuable help given by John Sorabji in the preparation of this lecture.

2. It is now 36 years since Lord Denning MR, in a dispute between *H. P. Bulmer Ltd. and Another v J. Bollinger S.A. and Others*² concerning Bulmer's use of the appellation 'champagne' in respect of their perry and cider, famously described the effect of the United Kingdom's accession to the Treaty of Rome and of the European Community Act 1972 in the following terms,

*"The first and fundamental point is that the Treaty concerns only those matters which have a European element, that is to say, matters which affect people or property in the nine countries of the common market besides ourselves. The Treaty does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute."*³

3. Four years later, Lord Denning returned to the theme in *Shields v E Coomes (Holdings) Ltd*⁴, a case concerning equal pay for male and female counterhands in betting shops in south east London. Having noted both the direct effect which the articles of the Rome Treaty had in member state law (as they still have) and the supremacy of European Community law generally, he went on to conclude that, as a result,

*"the flowing tide of Community law is coming in fast. It has not stopped at high-water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water."*⁵

4. Thus, in four short years, Denning perceived that the incoming tide had become transformed into a tidal wave; one which would require English lawyers and judges to grow gills and fins so profound a change did it bring with it. And as Debbie Harry, of Blondie fame, might have

² [1974] Ch. 401

³ [1974] Ch. 401 at 419.

⁴ [1978] 1 WLR 1408.

⁵ [1978] 1 WLR 1408 at 1416.

put it, 36 years after *Bulmer*, and 32 years after *Shields*, the tide is high and it's still rolling on into the common law's estuaries and rivers⁶.

5. It is not the only such tide. Since 2000, when the Human Rights Act 1998 effectively incorporated the European Convention on Human Rights into UK law, a second European tide has been flowing directly, and more immediately obviously, into UK law. To develop Denning's aquatic trope, since 1998 our law has been the product of a confluence of three distinct traditions: the common law, European Union law and Strasbourg jurisprudence. In tonight's lecture I want to focus on four issues that arise from this confluence of traditions: first, I want to look broadly at our historical relationship with the tidal source – Europe; then I want to touch upon our relationship with the European Court of Justice, now renamed the Court of Justice for the European Union; I then turn to our relationship with the European Court of Human Rights; before finally turning to some thoughts about the future.

6. I turn then to my starting point this evening: our historical relationship with European law.

(2) The common law and equity: a European inheritance

7. As John Donne once famously said, '*No man is an island, entire of itself: every man is a piece of the continent, a part of the main.*'⁷ Throughout its history, to varying degrees, this has been true of English law: the common law never was an island, entire of itself. It was always a piece of the continent, even if it was a piece separated by the English Channel. Saying this is not to suggest, which would be as foolish as it would be inaccurate, that it was a homogeneous part of the whole. Being a piece of the continent never meant that England's

⁶ Pace Blondie, '*The tide is high but I'm holding on.*'

⁷ Donne, *Devotions upon Emergent Occasions*, Meditation 17.

laws or legal system was of a piece with the law and legal system as they developed over the water. But, then, it would be just as foolish and inaccurate to suggest that the law and legal systems on the continent were homogenous either.

8. It is perhaps easy for us to forget that the English common law and equity have, as Professor van Caenegem put it, a '*continental origin*.'⁸ It is easy to forget that, despite many differences between our common law system and civilian systems, such as our view that judges should be umpires, or referees (depending on whether cricket and tennis or football and rugby are your sport of choice). As Pollock and Maitland, obviously cricket fans, put it, Judges here sit in court '*not in order, that they may discover the truth, but in order that they may answer the question "How's that?"*', whereas civilian judges sit in court like scientists actively seeking, inquiring into, the truth and playing a role more commonly played by the parties and their advocates here.⁹ It is easy to forget, but it is however a matter of record. As they go on to say,

*'Nobody will deny that the common law has indeed developed in the course of the centuries into a peculiarly English phenomenon . . . Nevertheless at its very beginning it was the feudal law as administered by the English royal courts under King Henry II. That feudal law had been imported into England by the Norman conquerors and had basically been developed on the Continent from the days of Charlemagne onwards.'*¹⁰

9. The common, feudal, law administered in England by the early Norman kings was the same law as that they administered as Dukes in Normandy, from where it originated. Indeed as Maitland put it, the law which prevailed in England in the 12th Century was

'in a sense very French. It (was) a law evoked by French-speaking men, many of whom (were) of the French race, many of whom (had only just) begun to think of themselves as

⁸ van Caenegem, *European law in the past and the future*, (Cambridge) (2002) at 2.

⁹ Pollock & Maitland, *The History of English Law*, (1898) (2nd edition) (Cambridge University Press) Vol. 2 at 667.

¹⁰ *Ibid.*

*Englishman; in many respects it (the common law) (was) closely similar to that which prevailed in France.*¹¹

English writs, the means to commence common law actions were, for instance, the mirror of their Norman ancestor and equivalent: the Norman ducal brief, which was not a form of ducal underwear, but rather the offspring of the Latin *brevia*. Despite the questionably justifiable passing of the writ under the Woolf reforms, this aspect of our common heritage lives on here today and will continue to do so as long as solicitors send barristers briefs, even if they do now contain the more prosaically named claim forms.

10. The writ was originally merely the procedural means through which proceedings were set on foot: it got the litigation ball rolling and gave the common law courts the necessary authority to determine the claim. The nature, that is to say the form of action, was originally distinct from this Norman innovation. As Bigelow put it,

*“Originally the writ had simplified nothing in respect of the form of action in a particular case . . . The issue of the writ was simply to set on foot a suit under Supreme authority; and this continued to be the case until perhaps the 13th Century . . . The English forms of action are older than the oldest forms of writ.”*¹²

Assuming Bigelow is correct, and for tonight’s purposes I’m not going to doubt his erudition, the forms of action, or at least some of them, predated the Norman Conquest. It was the combination of English forms of action with Norman writs which formed the basis of the developing English common law; a system which lasted procedurally until 1852 and lives on substantively today through the effect it had on the development of our substantive law of contract, tort, and, despite Lord Atkin’s clanking medieval chains¹³, restitution.

¹¹ Maitland cited in van Caenegem, *op. cit.*, at 3.

¹² Bigelow, *History of Procedure in England from the Norman Conquest*, (Macmillan & Co) (1880) at 196 – 197.

¹³ *United Australia Ltd v Barclays Bank* [1941] A.C. 1 at 27.

11. This Anglo-Norman union had another effect on the development of our legal system. The jury trial – central to our criminal justice system and once equally central to our civil justice system is something we think of as bred in the bone of our Island heritage. In the words of Sir Robin Auld,

*“The jury is often described as ‘the jewel in the Crown’ or ‘the corner-stone’ of the British criminal justice system. It is a hallowed institution which, because of its ancient origin and involvement of 12 randomly selected lay people in the criminal process, commands public confidence. In the van of such confidence are the judges and legal practitioners who, when asked, invariably say that, in general, juries ‘get it right’. For most it is also an important incident of citizenship; De Tocqueville memorably described it as ‘a peerless teacher of citizenship’.”*¹⁴

Who can doubt de Tocqueville? But equally who can doubt the fact that the jury is of ancient origin in these Isles? It dates back to before the 11th Century. It has undergone many changes since then.

12. Originally, its function was not to receive evidence passively and adjudicate on the basis of that and the law as stated by the judge, but rather to adjudicate on guilt or innocence based on its own knowledge of the matter before the court. The jury as witness or investigator of fact lasted until about the 17th Century, when the modern jury trial began to take shape, as fans of Baron Garrow’s early career will no doubt know. Equally, at one time juries could be indicted if they gave a false judgment. In other words, during the age when the jury was witness or investigator if they knowingly returned a false verdict an appeal, known as an attain, to a jury of 24 new witnesses or investigators could be made. If the appeal succeeded, the first jury would face imprisonment for perjury¹⁵. The attain passed into history as the jury as witness passed into history.

¹⁴ Auld *A Review of the Criminal Courts of England and Wales* (2001) (<http://www.criminal-courts-review.org.uk/auldconts.htm>) at 135.

¹⁵ Zane, *The Attain*, (15) *Michigan Law Review* (1916 – 1917) at 13; Sunderland, *The Scope of Judicial Review*, (27) *Michigan Law Review* (1928 – 1929) 416 at 416.

13. One thing has never changed though, and in that there is perhaps a faint hint of continental influence. I'm sure we're all familiar with the iconic Hollywood film from the 1950s: *Twelve Angry Men*, Sidney Lumet's classic tale from the jury room. But why twelve? Scotland, for instance, has fifteen on its criminal juries. Why did we alight on 12? The *why* is perhaps lost in the mists of time, but the *when* is perhaps capable of answer. And in this we perhaps see a Norman hand, or rather the hand of William the Conqueror's half-brother and sometime Chief Justiciar of England: Odo, Bishop of Bayeux. We do so because it appears that what may well be the first recorded 12 man jury was presided over by Odo in 1087¹⁶.
14. This faint hint of Norman, clerical influence is stronger however where equity, the common law's twin, is concerned. Equity, as we all know, developed out of the canon law¹⁷. My ancient predecessors were appointed in order, for instance, to advise the Lord Chancellor, "*as to the equity of the civil law, and what is conscience*" while he was sitting in the Court of Chancery.¹⁸ Chancery's processes developed out of a particular form of Canon law procedure – the *denunciatio evangelica*¹⁹; one specific and seemingly unique feature of which was something we used to call discovery. Disclosure then, which is now looked on with suspicion at best in many parts of continental Europe was originally an import from there to here.
15. The continental inheritance which enriched the flood plains of English law did not stop with common law and equity. Admiralty law was always predominantly civilian in its make up, following and applying as van Caenegem put it, '*the European ius commune*²⁰.' Bracton's Treatise wears its Justinian influence on its sleeve as does St Germain's Dialogues between

¹⁶ Zane, *ibid* at 127 and 137.

¹⁷ Barbour Some Aspects of Fifteenth-Century Chancery, (31) Harvard Law Review (1917 – 1918) 834 at 835 & 859; Getzler, *Patterns of Fusion*, in Birks (ed), *The Classification of Obligations* (OUP) (1997), (1997) at 162.

¹⁸ Spence, *The Equitable Jurisdiction of the Court of Chancery* Vol. 1 (of 2) (1846) (Stevens & Norton) at 357.

¹⁹ Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, (1955) 71 Law Quarterly Review 223.

²⁰ Van Caenegem, *op. cit.* at 20 – 21.

Doctor and Student on the laws of England²¹. Lord Mansfield, the great creator of much of English commercial, insurance, and mercantile law is well known to have been greatly influenced by Civilian law; as Anderson put it, Lord Mansfield '*during the eighteenth century, did not hesitate to dip into the Pandects.*²²' Those were the days then, when judges panned for gold in Justinian's Digest.

16. What does all this point to though? Lord Denning may well have been concerned about the latest infusion of European learning on the common law; but the simple fact is that the incoming tide is no more than the latest inflowing of waters that have long left rich deposits on the flood plains of English law. We have long drawn from continental waters and it seems to me that the great success that is the English common law and equity, like the English language, stems from its ability to absorb those influences for its own purposes enriching itself as it does so. Our legal story is not one of '*splendid isolation*²³' but rather of splendid synthesis.

17. To see how this synthesis might be developing and might develop in the future, I turn first to European Union law and then to European Human Rights law.

(3) English law and the European Union law

18. Lord Denning's two judgments came from an era where the European Union was still the European Economic Community of ten member states. Things are markedly different now.

The EU now has 27 members, with a total population of some 501 million. 16 of those

²¹ St Germain, *The Doctor and Student or Dialogues between a Doctor of Divinity and a Student in the Laws of England containing the Grounds of Those Laws together with Questions and Cases concerning the Equity thereof*, (Mulchall rev) (Clarke & Co, Cincinnati) (1874)

²² Anderson, cited in Oldham, *English Common Law in the Age of Mansfield*, (University of North Carolina Press) (2004) at 99.

²³ Van Caenegam *op cit.*, at 21.

members now have a single currency. The Lisbon Treaty has brought with it a Charter of Fundamental Rights, which at one stage it seems was to be popularised through turning it into an epic poem. An instance perhaps of Shelley's view that poets were the unacknowledged legislators of the world²⁴. Unfortunately for latter-day writers of epic poetry it seems that their talents are not to be called upon. Commissioner Reding took the view that such a project would not provide any 'added value' and would run the 'counterproductive risk' of undermining the 'dignity of the charter'²⁵. Indeed. And there the project ended leaving the law's prose free of any Homeric, let alone Shelleyan, touches.

19. Poetry and the Charter of Fundamental Rights aside, the Lisbon Treaty has also seen the reorganisation of the European Union courts – the European Court of Justice, the Court of First Instance, which is now the General Court, and the Civil Service Tribunal – into a Court of Justice for the European Union. The three courts are each part of the whole. The ECJ and the General Court are as we all know responsible for ensuring that European Union law is correctly interpreted. They ensure that divergence in application, in meaning, does not arise throughout the 27 members states. They are not however the only European Union courts, as Advocate-General Maduro highlighted in the case of *Cartesio Oktató és Szolgáltató bt (a limited partnership)* [2009] Ch 354. In his opinion in that case, he had this to say,

*'The possibility for a lower court in any member state to interact directly with the Court of Justice is vital to the uniform interpretation and the effective application of Community law. It is also the instrument that makes of all national courts Community law courts. Through the request for a preliminary ruling, the national court becomes part of a Community law discourse without depending on other national powers or judicial instances: Sarmiento, Poder Judicial e Integración Europea (2004), p 58. The Treaty did not intend that such a dialogue should be filtered by any other national courts, no matter what the judicial hierarchy in a state may be.'*²⁶

²⁴ Shelley, A defence of poetry.

²⁵ See <http://euobserver.com/9/29972>.

²⁶ [2009] Ch 354 at [19].

As Article 267 of the Treaty on European Union (as amended post-Lisbon) makes clear lower court means ‘*any court or tribunal of a Member State.*’

20. All member state courts, if seized of an issue arising from European Union law, can then be seen as courts within a singular, European judicial hierarchy. When a District Judge sits in, for instance, Central London County Court or Carlisle County Court and an issue of European Union law arises, he or she is as much a judge of the European Union judicial hierarchy as is a Giudice de Pace hearing a low value civil claim in Milan or Palermo or a judge of the *Amtsgerichte* hearing a similar claim in Frankfurt. The same point can be made for any of the 27 Member States.

21. This has important consequences. First, it widens out Lord Denning’s metaphor. European Union law is not simply a law which is flowing here. It is a form of law, which is flowing throughout Europe. It is flowing not just into common law rivers and streams, but into European rivers and streams across the length and breadth of the continent. Its effects are shaping us all; and its effects will be as marked in Italy, in Germany, in Romania, in Poland as they are here. Its influence is shaping a European juristic culture and tradition. This raises a second consequence: possible future reform. It poses a question for the future development of our European judicial structures.

22. The ECJ presently deals with preliminary references and substantive matters. In the coming years, as European Union law becomes ever more clarified, would this be the most effective way to carry on? Might we not see the development of intermediate courts at Member State level, which are capable of deciding preliminary references for instance, or even substantive claims? Might for instance the Supreme Court in each Member State become capable of sitting as part of the Court of Justice of the European Union: a European Union District

23. Such a development would perhaps be viewed by some people as a stark departure from the present way of doing things. But would it really be such a stark departure? Would it not simply build on an established concept – that we are all European Union courts now in matters of European Union law? And would it not also simply build on the commitment to mutual trust between Member States and judiciaries, which has underpinned the European Union since its earliest days? Of course, as Advocate-General Maduro pointed out in the extract from the *Cartesio* opinion I set out earlier, this is something the Treaty does not intend. But in years to come might the Treaty, or those who look to redraft it, look at this aspect of it and the EU's judicial organs and decide that the time might have come for change. It seems to me to be at least an interesting question to ask, and one which members of this Circuit will no doubt be able to provide interesting answers.

24. So much for that aspect of the European tide, what of the other: the European Convention?

(4) English law and its relationship with the European Convention on Human Rights

25. The European Convention on Human Rights and our relationship with it is obviously a hot topic at the present time; although it is perhaps more accurate to say that it has been a hot topic since 1998 when our treaty obligations as signatories to it were incorporated into UK law by the Human Rights Act. Lord Hoffmann examined our relationship with it last year in

²⁷. Lady Justice Arden presented a robust reply shortly after in her *Hailsham* lecture²⁸. The government may well be looking at the Convention in the context of possible reform and a possible UK Bill of Rights. I will have something to say in relation to this debate a little later, but first I shall turn the clock back a little and examine some aspects of the past.

26. My starting point then is 5 May 1949. On that date, the United Kingdom, along with nine other European countries signed the statute which created the Council of Europe. The statute came into force less than three months later, on 3 August 1949. Chapter II of the statute prescribes the conditions of membership. Of the articles in chapter II, article 3 is the singularly most important. It provides that,

'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.'

The aim specified in Article 1(a), was *'to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.'*

27. The United Kingdom over the course of centuries had, of course, developed prior to 1949 a commitment to the principles of the rule of law; commitments which, notwithstanding *Liversidge v Anderson* [1942] A.C. 206, had served it well throughout the immediately preceding War years. The UK had also, as we all know, equally developed a commitment to respect for human rights and responsibilities – as what is a right without a concomitant

²⁷ Hoffmann, *The Universality of Human Rights* (2009 JSB Lecture) (http://www.jsboard.co.uk/downloads/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.doc).

²⁸ Arden, *Human Rights and Civil Wrongs: Tort law under the Spotlight*, (2009 Hailsham Lecture) (<http://www.judiciary.gov.uk/docs/speeches/arden-speech-hailsham-lecture.pdf>).

responsibility – over the course of centuries leading up to 1949. It was, of course, not the only European country to do so; a point emphasised during the discussions which led to the creation of the European Convention on Human Rights – the first significant product of Article 1(a) and 3, as the Convention’s travaux préparatoires make clear: the commentary noting how,

‘the countries in question [i.e., the 10 initial signatories] are among the most progressive and democratic nations in the world, the liberties which their citizens already enjoy under their existing constitutions are very comprehensive.’²⁹

28. Our unwritten constitution was no exception. *Entick v Carrington* (1765) 19 Howell's State Trials 1030, for instance, provides the basis for the right to liberty, security and property. *Phillips v Eyre* (1870) 6 QB 1 provides the basis for the principle that laws should not have retrospective effect. And the common law has long set its face against torture. It has done so to such a degree that, as Lord Bingham put it in *A & Others v Secretary of State for the Home Department* [2006] 2 AC 221 at [12], the common law’s condemnation of torture is a ‘*constitutional principle*.’ Most famously of all though, we have long guaranteed the right to fair trial, or as chapter 29 of the 1354 version of Magna Carta puts it, ‘*due process of the law*.’ The version which remains on the statute book to this day though is the 1297 version (not the original 1215 version), and it reads as follows,

“NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor [condemn him,] but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.”³⁰

The reference to ‘the law of the land’ is a reference to due process of the law. (And it might be said that when consideration is given by Parliament, as has been suggested recently, to

²⁹ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART1-COUR\(77\)9-EN1290551.PDF](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART1-COUR(77)9-EN1290551.PDF) at 2.

³⁰ <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1517519>

providing statutory protection to the right to trial by jury, reference might be had to the fact that it is something which statute already guarantees and has done from 1297 to this very day.)

29. With our history, and our longstanding and continuing commitment to the rule of law and human rights as article 3 of the Council of Europe statute puts it, it is unsurprising that the United Kingdom played such a key role in drafting the European Convention; the Council of Europe's first substantive contribution to post-War redevelopment. It played a key role, although as Brian Simpson's study of its genesis, *Human Rights and the End of Empire*³¹, makes clear it was not always a straightforward or entirely consistent role; although it was a role which saw Sir David Maxwell-Fyfe QC – later Lord Kilmuir LC – declare on the UK's behalf, that '*From the world point of view we cannot let the matter rest at a declaration of moral principles and pious aspirations, excellent though the latter may be. There must be a binding convention . . .*'³². There were many twists in the tale before the manner in which the Convention was to become binding was settled upon; but therein hangs another tale³³.

30. The interesting point from Magna Carta's perspective is the role the UK played in drafting Article 6(1) of the Convention. It was based on what would in turn become Article 14 of the International Covenant on Civil and Political Rights; it was draft Article 13 at the time it was considered by Article 6's drafters³⁴. After some degree of discussion a draft text for Article 6(1) was produced. It read as follows,

'In the determination of any criminal charge against him or of his rights and obligation in a suit at law, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced

³¹ (OUP) (2001).

³² Preparatory work on Article 1 of the European Convention on Human Rights at 11 ([http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART1-COUR\(77\)9-EN1290551.PDF](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART1-COUR(77)9-EN1290551.PDF)).

³³ See Simpson, *op cit*.

³⁴ Dijk et al, *Theory and Practice of the European Convention on Human Rights*, (Kluwer, 1998) at 393.

*publicly but the press or public may be excluded from all or part of the trial to the extent strictly necessary in the opinion of the court in the interests of morals, public order or national security in a democratic society, or where, in the special circumstances of the case, publicity would prejudice the interests of justice.*³⁵

All in all not too dissimilar to what it would become. A number of national delegates had concerns about the drafting. The UK delegation was among that number. Its concerns were that, as it put it,

'The present text of this Article leaves to the discretion of the court the exclusion of the press or public in a number of cases where, under English law, exclusion is enjoined by statute. Nor does it make provision for the cases in which the public may, under English law, be excluded from the hearing and determination by a court of summary jurisdiction of domestic proceedings, as well as cases concerning juveniles.

H.M. Government (it went on) therefore proposes that the second sentence of this paragraph be amended to read:

*'The press and public may be excluded from all or part of a trial in the interests of morals, public order or national security in a democratic society, or where the interests of juveniles or the parties to proceedings concerning their domestic relationships, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but the judgment shall be pronounced publicly except where the interests of juveniles or of the parties to proceedings concerning their domestic relationships otherwise require.'*³⁶

31. As a consequence of this proposal, the draft Article was amended. That amendment, apart from having an extra 'or' which was removed before it was finalised, became the final draft; the draft with which we are all familiar today. The rationale behind the drafting of the substantive limitations that can be placed on the right to fair trial provided for by the Article were then, to a large degree, a product of our law. The UK government secured the incorporation of a number of limits into the right, which reflected the nature of, as well as the limits placed on, the common law right to fair trial, primarily to the principle of open justice as it had been articulated by the law lords in *Scott v Scott* [1913] A.C. 417.

³⁵ Preparatory work on Article 6 of the European Convention on Human Rights at 20 ([http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART6-DH\(56\)11-EN1338886.PDF](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART6-DH(56)11-EN1338886.PDF)).

³⁶ Preparatory work on Article 6 of the European Convention on Human Rights at 22 – 23.

32. It is interesting to reflect that apart from these amendments, which the UK Government ensured were incorporated into Article 6's text, they took the view then that the remainder of the right was consistent with our common law, Magna Carta-based, right to fair trial as it operated in our civil and criminal courts, that our civil and criminal practices and procedures were both consistent with the right as it had guaranteed here since 1297, and that they were consistent with Article 6 as it had been drafted. If it did not we can properly surmise that the UK delegation would have called for more wide-ranging amendments to the drafting than those they proposed and which were accepted.

33. More could perhaps be made of the rationale lying behind the words of the Convention. I certainly do not wish to sound a call for originalism, but I do note that Pieter Dijk and the other co-authors have already raised the question why there is not as much reference to the Convention's travaux préparatoires when the Strasbourg court is divining the meaning and scope of Convention rights as there might properly be³⁷. The Convention may be a living document, but it is as much a product of its history as everything else; we might do better perhaps to remember that history, a history as much reflective of the common law tradition as it is the civil law tradition, and learn from it.

(5) Conclusion – where to next?

34. Before I finish I thought I might briefly, very briefly, say something about the future. Have we grown gills and fins since Lord Denning's tidal observations? Or is it a case that après le deluge, we are, as Stevie Smith, might have said, not waving but drowning?

³⁷ Dijk et al (1998) at 393 – 394.

35. I think we can say that we remain, as continental Europe does too, in an evolutionary phase. We haven't reached a point yet where, as van Caenegem suggests, we have a *ius commune*; a common European jurisprudence³⁸. Whether we reach such a point is very much a matter for the future. It will depend on many things; not least a more robust approach by the common law in promoting its traditions, insights and jurisprudence and a more open consideration by both common law and civilian traditions of each other.
36. I did however promise earlier to say something about the debate between Lord Hoffmann and Lady Justice Arden about the Strasbourg court. In his lecture Lord Hoffmann drew attention to what he described as a '*basic flaw in the concept of having an international court of human rights to deal with the concrete application of those rights in different countries*'.³⁹ Different countries with different jurisprudential, social and political traditions, give proper effect to the various high level principles set out in the Convention in different ways. The point is, of course, one which can be developed by reference to the United States of America.
37. The US Constitution guarantees the right to fair trial⁴⁰. It guarantees the right to jury trial in criminal cases, and in federal civil cases⁴¹. These guarantees, we can proudly say, are derived from Magna Carta, from the very part of it I referred to earlier. Equally, it guarantees the right to freedom of speech⁴². The right to privacy is not explicitly guaranteed however, falling under the 9th Amendment saving provision. The European Convention also guarantees the right to fair trial, the right to freedom of speech and, explicitly, it guarantees the right to respect for privacy. It is an obvious point to make, and one Lord Hoffmann

³⁸ Van Caenegem *op. cit.*, at 137.

³⁹ Hoffmann, *op. cit.* at [25].

⁴⁰ US Constitution, 5th & 14th Amendments; *Solesbee v Balkcom* 339 US 9 (1950) at 16; cf *Snyder v Massachusetts* 291 US 97 (1934) at 105; *Scott v Sandford* 60 US (19 How.) 393 (1857) at 450.

⁴¹ US Constitution, 6th & 7th Amendments.

⁴² US Constitution, 1st Amendment.

makes, that different approaches can be taken to the concrete implementation of high-level rights⁴³. The balance between freedom of speech and privacy, for instance, is struck differently in the United States and in Strasbourg: in the US the balance is one which comes down firmly in favour of freedom of speech, in Strasbourg the balance is just that – a balance. That a different approach is taken does not imply one is wrong and the other is right. It does not show that one approach does not give properly accept the '*principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms*', as the Council of Europe statute puts it.

38. The same point can be made, perhaps with more force, in respect of the right to trial by jury. The US Constitution, as an expression of the common law, provides that guarantee as does Magna Carta; a fact not lost on the First Congress of the American Colonies, who in October 1765 passed a resolution declaring that 'trial by jury is the inherent and invaluable right of every British subject in these colonies.'⁴⁴ It was because it was a common law right. The European Convention does not explicitly guarantee that right. It could not do so though. It was drafted as a statement of high principles applicable to both common law and civilian law systems. To guarantee it explicitly would have required significant changes to have been made to the legal systems of the eight original, and civilian, Council of Europe member states' to reflect an aspect, fundamental as it is, of the legal systems of two members: the UK and Ireland.

39. Equally, to suggest that it was inconsistent with the right to fair trial, as explicitly guaranteed, would be equally wide of the mark. Its absence from the Convention reflects, what might be said to be, a concrete instance, at the drafting level, of the margin of

⁴³ Hoffmann, *op. cit.* [15ff].

⁴⁴ As cited in *Duncan v. Louisiana*, 391 U.S. 145, (1968) at 152.

appreciation; the concept that, as Lord Hoffmann put it, '*a certain latitude to differ in [the] application of the same abstract right*⁴⁵' is an essential part of the Convention's superstructure. As with differential approaches taken to free speech and privacy between the US and Strasbourg, differential approaches to the means of ensuring a fair criminal trial are entirely consistent with the high level principle that is Article 6.

40. Not only are they consistent but they reflect our different traditions and approaches to securing the rule of law and fundamental freedoms. Jury trials reflect the common law belief that the best means to secure the rule of law, by providing an effective check on Executive power, was as the US Supreme Court put it, '*the insistence upon community participation in the determination of guilt or innocence*.⁴⁶' Civilian systems developed different means to provide a check on Executive power in respect of criminal prosecutions. The fundamental point though is that there are different means to secure the same end, each equally valid and consistent with that end. We would all do well to keep that in mind.

41. This leads me to a final thought for the future. The Strasbourg court's use of the margin of appreciation is something which could well develop in the future, and develop in a way which takes much greater account of differences in the respective legal, social and political traditions of the Convention states. Equally, it could do well, as we do here, to take account of the approach taken by other courts outside the Convention, which apply rights guaranteed by the Convention. Lady Justice Arden, in her lecture, described how there had to be '*a lively dialogue, in and out of court, between our courts and the Strasbourg court*.⁴⁷' I agree with that. There does.

⁴⁵ Hoffmann, *op.cit.* at [27].

⁴⁶ *Duncan v. Louisiana*, U.S. 145, 391 (1968) at 156.

⁴⁷ Arden, *op. cit* at 16.

42. That dialogue will, as I mentioned earlier, require a more robust approach by our courts through their judgments – *R v Horncastle* [2010] 2 W.L.R. 47 being an example of this – and through informal dialogue with Strasbourg, to explaining the common law position and exactly how and why it sets out a perfectly consistent means of facilitating the rule of law and protecting fundamental rights. Equally, it will require from Strasbourg a more acute appreciation of the validity of the differential approaches taken by Convention states to the implementation of rights. This is not to suggest a weakening of standards or that Strasbourg should adopt an inconsistent approach to determining minimum standards. It is to suggest that Strasbourg might well benefit from developing the margin of appreciation to take greater account of practical differences which arise between Convention states and their implementation of high level principles. Just as there are many streams which flow from a well-spring, there are many ways to protect the rule of law of fundamental rights. A court which looks at the concrete application of high principle in different states, with different traditions should hold that firmly in mind when it approaches the width of the margin of appreciation to be applied in each case that comes before it.

43. One thing we can be sure of is that organisations such as the European Circuit, through bridging the gap between the common law and its continental cousin, will help develop this necessarily more robust process of communication both between European Union member states, Convention states, Luxembourg and Strasbourg. Our courts can do much to foster a more active dialogue; but the European legal professions can do much too. If the courts and practitioners – members of this Circuit – conduct that dialogue as well as I am sure we can, we can be sure that it will help the common law lay its own alluvial deposits on civilian fields, just as throughout history our common law fields have been enriched by alluvial deposits left by continental waters.

44. With that in mind I hope that the circuit goes from strength to strength.

45. Thank you.

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