

Triremes and Steamships: Scholars, Judges, and the Use of the Past

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When I was appointed to the Supreme Court, I commented to my colleague Lord Brown that the library seemed to me to be rather weak in some areas.¹ He asked me if I knew what Lord Diplock had said when the newly appointed Lord Brandon made a similar comment:

‘Books? You don’t need books. All you need is the Appeal Cases and your own intelligence.’

Certainly, the set of Appeal Cases with which each of the justices is provided tends to be used much more than any other resource. But the attitude exemplified by Lord Diplock’s remark no longer prevails. It changed particularly during the time of Lord Goff, who was a former teacher of law and an author of academic writings, as many other members of the final court in recent times have also been to a greater or, as in my case, a lesser extent. Lord Goff insisted on being referred by counsel to the relevant academic literature, and that practice is now firmly established.

Judges at the highest level appreciate the help that they can derive from academic scholarship, particularly doctrinal scholarship. I am afraid we do not often acknowledge it in our judgments, essentially because we are trying (or perhaps I should say struggling) to keep our judgments as short as we can – believe it or not – and are more concerned to set out our analysis of the issues than to explain the process of research and thought which led us to it. Nevertheless, we do read academic work, and are influenced by some of it.

¹ A matter which has since been addressed.

Reading a great deal of academic writing during the process of writing judgments has led me to think about the ways in which my approach to the problem in hand may differ from that of the academic writers. It occurred to me, in relation to this lecture, that it might be of some interest if I were to share with you some thoughts about the approach to the law required by the judicial enterprise, as I see it, and about how it differs from the approach adopted in some (but, I should emphasise, by no means all) academic scholarship. This is terrain which has been traversed by a number of academic writers,² but less so by judges.³

I should make it clear at the outset that I am expressing a purely personal view. I should also make it clear that I am concerned only with academic work concerned with legal doctrine. A great deal of the work done in university law departments is of course of a different character. Much of it is of a socio-legal character. Such work can be very useful to judges when considering how the law ought to develop. For example, in the case of *Osborn v Parole Board*,⁴ concerned with the circumstances in which the Parole Board should allow prisoners to have an oral hearing, I cited criminological research carried out at Cambridge which was directly relevant to my thinking. Social or economic research is often drawn to our attention by interest groups, professional bodies and representative organisations which have been allowed to intervene in the proceedings.⁵ Work which makes us aware of sociological or other non-legal aspects of our own activities can also be valuable to us: as a Canadian judge once remarked to me, fish don't know that water is wet.

² See, for example, Duxbury, *Jurists and Judges: An Essay on Influence* (2001); and Stanton, 'Use of Scholarship by the House of Lords in Tort cases', in Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (2010).

³ Two exceptions are Lord Goff and Lord Rodger of Earlsferry: see, for example, the former's Maccabean Lecture, 'In Search of Principle', (1983) 69 Proc Brit Acad 169, 186, and the latter's John Kelly Memorial Lecture, 'Savigny in the Strand', (1993-1995) 28-30 *Irish Jurist* 1. Another is Sir Jack Beatson: see 'Legal Academics: Forgotten Players or Interlopers?', in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist* (2013).

⁴ [2013] UKSC 61; [2014] AC 1115.

⁵ Such interventions are common in the Supreme Court, but much less common in the Court of Session.

Another field of academic work which I find useful, but which I am not going to discuss, is legal philosophy. Obviously some theory underpins any coherent judicial work, whether the judges are conscious of it or not. It is unusual for jurisprudence to be cited to judges, and I am afraid there may be some who take the view that having undergone the ordeal of studying it at university, they are excused from considering it for the remainder of their lives. But there are also some who are sufficiently interested in the intellectual foundations of what they do to read it for themselves. The case of *Osborn* is again an example: when discussing procedural fairness, and rejecting the utilitarian rationale adopted by the Court of Appeal, I cited the work of Jeremy Waldron. In this lecture, however, I will focus on black letter doctrinal scholarship, since it is the type of academic work which in general is most relevant to the work of the courts.

One of the strengths of common law reasoning – an expression I am going to use to describe the methodological approach, and conception of the judicial role in legal development, shared by most English-speaking jurisdictions - is derived from its casuistic nature, and the consequent scope which it allows to appellate courts, especially at the highest level, to develop the law incrementally, so that it adapts to the current needs of society as they see them. This judicial role in the development of the law operates within limits, and is very much secondary to the role of the legislature, assisted by the law commissions, but it is nonetheless important. Judicial decisions developing the law reflect both the influence of an inherited tradition, in which such developments have to find a foundation, and also the judges' conception at a particular point in history of how the law ought to regulate relationships and behaviour here and now.

Judges' conceptions of how relationships and behaviour should be regulated can of course vary from one area of life to another, and to some extent from one judge to another.⁶ They are constantly evolving. The way judges approach issues can depend on the specific context, and the potential consequences of their decisions. As it seems to me, the living connection between the common law and life

⁶ Hence the importance of having final appeals decided by a relatively large panel.

as it is lived here and now therefore depends on the willingness of judges to particularise, and to accept the contingency of their and their predecessors' convictions. It has to be acknowledged that there are consequent uncertainties and tensions, which it may be impossible to resolve.

Some academic work brings out these aspects of the common law. When I was at Oxford, I was greatly impressed by the lectures on 'Recent Cases in Contract and Tort' given each year by John Davies. He might devote a lecture to a single recent decision of the House of Lords. He explained the legal background to the case, and how the authorities were marshalled by each side in support of their competing analyses of the law. He made clear a fact which is all too often overlooked when cases are read with the benefit of hindsight: that the losing side had at least a reasonable argument, which might have been accepted – and often had been accepted - by other judges, in lower courts or at another time. He then examined the judges' speeches, and brought out the differences between them, explaining the implications which the adoption of the approach of one judge, or that of another, might have for the future development of the law.

This is a model which I have sometimes adopted when speaking to students. I particularly like to discuss with them cases in which judgment has not yet been given. A discussion of that kind should make clear to them that legal thinking in a common law system builds on a tradition, but is nevertheless dynamic; that the derivation of answers to difficult legal problems from the existing law is often not a matter of logical deduction from legal premises but can call for imagination and creativity as well as strong analytical skills; and that it requires judgment as to the approach which is likely to work best. The law is therefore not to be understood as being fixed, or even as a set of clearly defined rules which undergo revision from time to time, like the successive editions of a textbook, but is in some ways better understood, at least from the perspective of a lawyer or a judge engaged in litigation, as a range of possibilities, constantly rolling forward. That sort of lecture may lead the best students to question whether the conceptual structures and principles taught to them by their teachers are as definitive as they might have appeared. They may begin to understand that some problems are incapable of definitive solution, that there are no demonstrably right

answers to the most difficult questions, and that in an important way the answers to legal questions are often time-bound and contextual.

Although John Davies's lectures taught his students how to deconstruct appellate decision-making and analyse it critically, it is relatively unusual in my experience for doctrinal scholarship to focus so explicitly on the dynamic and creative aspects of the common law, or on what I have described as the contingent nature of judicial decision-making. And I would certainly not underestimate the importance of academic work which simply tries to explain what the law seems to be at a given moment. Legal textbooks which order and analyse a mass of case law so as to identify the principles which the cases are thought to establish, the points of divergence between them, and perhaps their strengths and weaknesses, are vital to any understanding of the law in a casuistic system. At the same time, there is a tension between a focus on taxonomy and a recognition of the dynamic and contingent nature of judicial decision-making. A static analysis will struggle to capture the characteristics of the law which I have described. It is easier to dissect a corpse than a living body.

For the reasons I have explained, I do not believe that a descriptive account of the common law, or indeed of the interpretation of legislation, can be definitive. The less interesting reason for this is that the law is constantly being developed by the courts, so that textbooks require to be updated from time to time as superseded decisions are weeded out and new decisions take their place. But courts operating within a common law system apply a doctrine of precedent, and are respectful of the tradition handed down to them. That is true even of the Supreme Court, although it treats precedent differently from lower courts. So the development of the law by the courts is incremental, even if some increments may be larger than others; and the current edition of a standard textbook will normally be recognisably the same vessel as the previous edition, even if some of the old timbers have been replaced. Nevertheless, one can be reasonably certain that some of the current timbers will themselves have been replaced by the time of the next edition, and an

account of the law which identifies the most likely candidates for replacement, and explains why, provides a more realistic and useful description of the law than one which does not.

The more interesting reason why a descriptive account cannot be definitive is more fundamental. It is, as I have explained, because uncertainty is an inherent consequence of the methodology of the common law: the obverse of its flexibility and adaptability. Tensions and conflicts between the ideas it espouses are an unavoidable aspect of its nature as an evolving response by particular judges to particular problems thrown up by life at particular times and places. This aspect of the law may not be considered in a descriptive and high-level account, but it often emerges from academic work which undertakes a more detailed analysis of specific legal problems or a historical analysis of a particular area of the law. Some of the most useful discussions of this kind, for the purposes of courts considering the development of the law, are to be found in the reports and consultation papers published by the law commissions, which are mostly written by academic lawyers.

Generally, for the reasons I have explained, academic scholarship which adopts an abstract and universalising approach to legal problems, without much evident sense of social or historical context, seems to me to be less realistic than scholarship which demonstrates an awareness that difficult legal problems, as encountered in practice, are situated at a particular time and place, and require an approach to their resolution which is concrete and particular, and often innovative to some degree. Some scholars write as if legal questions have – indeed, have always had - a correct solution, which can be reached by applying principles that are open to inspection by anyone with a clear mind, even if they remain obscure to everyone else. The implicit message of writing of that kind appears to be that legal truths are not discovered without mental effort, but that once the necessary thinking has been done, the legal principles emerge from their hiding places and hand themselves in. My own view is that one needs to look out of the study window and think about how life is actually lived, and the implications of that for the law. I will give some examples later.

Equally, it seems to me that scholarship which expects the law to be characterised by lucid rationality and consistency is liable to be less realistic than scholarship which accepts that life sometimes requires the adoption of conflicting ideas, held simultaneously in tension with each other. Courts of course consider the likely implications of their decisions for the coherence and clarity of the law, as well as considering their other implications. The judges attempt to write lucid judgments, and to state legal principles as clearly as they feel they can. Their function, however, is primarily to decide particular disputes, rather than to formulate general principles of the kind one might find in the American Restatement or in a civilian code. Other things being equal, clarity and coherence are of course preferable to obscurity and inconsistency. But a degree of vagueness, and occasionally even inconsistency, may be unavoidable in practice.

A legal proposition formulated by a court is often best expressed with a degree of indeterminacy so as to be sufficiently flexible to be workable in practice or over the longer term, given the wide and unpredictable range of circumstances in which it may have to be applied. In much the same way, the provisions of civilian codes of law are often expressed in relatively broad and general language, which the judge then has to apply creatively to the facts of the particular case before him. In addition, we all as individuals simultaneously hold conflicting ideas and values, and can reach different views as to how they should be balanced or compromised in different situations. Judges are no different. For example, they attach great importance to the rule of law, and to human rights; but they also attach great importance to public safety, to national security, and to respect for democracy. The ways in which they deal with a range of problems concerning such matters as surveillance, or the disclosure of evidence, or the use of police powers of questioning and search, may not reflect a clearly articulated or entirely consistent balancing of those values even on the part of a single judge, let alone different panels of judges. If it is left to lower courts to find an acceptable way of resolving the indeterminacies and inconsistencies in later cases, in reaction to the problems thrown up by their particular circumstances, that is not always or necessarily a bad thing.

The law is not always, or even generally, a logical body of rules deducible from general principles, but an untidy and historically situated body of judicial decisions, statutes and other materials, which were often designed to resolve particular problems at a particular time and place, and whose interpretation is often difficult and uncertain. As Oliver Wendell Holmes remarked, the law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.⁷ The scholar who devises a logical analysis of the law may respond that he is not attempting to reflect the thinking of the judges who decided the cases, but to show the way to a clearer and more coherent future. That is of course a valuable aspect of the work done by legal academics. Valuable as it is, however, there are limits to the extent to which the courts may be able to follow the scholar down that path. As Lord Walker observed in the case of *Deutsche Morgan Grenfell*, concerned with unjust enrichment: “It is of the nature of the common law to develop slowly, and attempts at dramatic simplification may turn out to have been premature and indeed mistaken”.⁸

On a related point, elegance – by which I mean a structure which is simple, logical and economical – is another quality which has been viewed since William of Ockham as generally desirable in an explanatory theory, but I am inclined to doubt whether it is universally possible, or even desirable, in explanations of the law. Other things being equal, a simple explanatory account of the law, rather than a more complex one, is of course preferable. But the most adequate explanation of the law is not always the simplest; and a legal system whose structure is more complex is not necessarily worse in its practical operation than one whose structure is simpler, or whose leading principles can be formulated at a higher level of generality. The law exists to meet the needs of society; and the standards by which its performance of that function should be assessed are not aesthetic. Unless society's needs are simple, logical and economical, it is unlikely that a legal system which meets its needs satisfactorily will exhibit those characteristics.

⁷ *The Common Law* (1881), p 1.

⁸ *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49; [2007] 1 AC 558, para 156.

By way of illustration, the practical problems which resulted from the adoption of Lord Wilberforce's abstract formulation of the duty of care, in *Anns v Merton LBC*,⁹ led to its abandonment only 13 years later,¹⁰ and to the adoption in *Caparo*¹¹ of an approach which is less abstract, less clear and less elegant: an approach which is dependent on pragmatic judgments of what is 'fair, just and reasonable' in particular factual situations, but which has nevertheless been found to work better in practice, and is better adapted to the needs of employers, insurers and others who need to know where they stand.

The point is also illustrated, in a different way, by Scottish private law. In some areas, at least, it might reasonably be said to be relatively clear and less complex than English or American law. As I have explained, however, it would be a mistake to assume that that is necessarily an advantage. For example, one of its clearer principles is that a security over moveable property cannot be created without a transfer of possession. It follows that the creation of a floating charge is impossible. Parliament eventually intervened, in order to enable businesses in Scotland to borrow as easily as those elsewhere in the United Kingdom. That intervention continues to be lamented by some academic lawyers, as disrupting the elegance and logic of the legal system, and introducing an element which is alien to its tradition; but it was a boon for the section of society whose needs had been ill-served by that system.

Analogous problems continue to arise today, as English and American lawyers devise new forms of security or trust which Scots law lacks the flexibility to accommodate. This was discovered for example by persons who had paid Rangers Football Club £25 million for a beneficial interest in the proceeds of future season ticket sales, under an agreement governed by English law, when the agreement was held to be ineffective under Scots law.¹² Some Scots lawyers found it difficult to sympathise with a business which had seemingly failed to consider the possibility that Scots law might be different. Another reaction, however,

⁹ [1978] AC 728.

¹⁰ *Murphy v Brentwood London Borough Council* [1991] 1 AC 398.

¹¹ *Caparo Industries plc v Dickman* [1990] 2 AC 605.

¹² *Joint Administrators of Rangers Football Club plc, Noters*, 2012 SLT 599.

might be to consider whether Scottish football and rugby clubs endeavouring to compete with clubs outside Scotland are well served by legal rules which make it more difficult for them to raise finance. The same kind of point could also be made about other types of business of even greater importance to the Scottish economy, such as the financial institutions and the oil industry, which unsurprisingly tend to prefer to use a system which can accommodate modern types of security, and may offer other advantages, such as clearer rules in relation to third party rights under contract.

I mentioned earlier the importance of bearing in mind the historical context of sources of law and being prepared to innovate in order to establish appropriate legal solutions for society in the present day. This is something which needs to be borne in mind in Scots law, as in other systems. When writers such as Stair set out their analyses of private law in the seventeenth and eighteenth centuries, they adopted an approach, modelled on classical precedents, which reflected the intellectual climate of the period – the period of Descartes and Locke. So it was an approach rooted in theory and logic rather than in a sense of historical development. That is not a criticism: Stair's *Institutions* is an impressive product of the intellectual culture of that time. But to treat an analysis of that kind not merely as an authoritative account of the law of that period, but as the definitive source of ideas about how Scots law should respond to the problems of modern life, would restrict the flexibility necessary for the law to respond to changes in society.

Some scholars continue to go back to sources from the distant past to find solutions to contemporary problems. I sometimes go back to them myself. But one has to bear in mind that there are inherent limitations to the amount of help that may be obtained. They are illustrated by a remark made by the philosopher and ancient historian R G Collingwood, when he described reading some modern philosophers, who argued that the ancient Greeks had an inadequate understanding of moral obligations, as being like a nightmare in which a man insists on translating the Greek word for a trireme as 'steamship', and

then complains that Greek theories about steamships were all wrong.¹³ To look for solutions to today's problems about the design of steamships in Greek writings about triremes would be equally misguided. Of course, Collingwood understood perfectly well that modern philosophers are working in a tradition which originated with the ancient Greeks. His point was that today's society and culture are so different from those of ancient Greece that the views of the Greek philosophers about the issues which confronted them in their own time are unlikely to assist contemporary philosophers in addressing the issues which confront us in ours.

Part of the reason why Scots lawyers look to the past is the limited amount of significant modern case law on the civil side, whether in the field of private or public law. In the absence of modern case law, both academic authors and practitioners often rely on such Scottish authorities as exist, even if they may be somewhat antiquated. There is a risk that this can lead to ossification if the old authorities are not understood in their context, and if there is not an awareness of the need to consider whether the present context is materially different.

I could give many illustrations of this point. An example in the field of private law that I came across recently concerned the circumstances in which there may be a presumption of gift when a payment is made by a parent to a child. The only authorities which are referred to in a modern Scottish textbook, and were cited by counsel and the judge in the case concerned, are Scottish cases of the period between 1804 and 1889. The facts of those cases, and the attitudes and assumptions underlying the decisions, belong, as one might expect, to the society depicted by Jane Austen, in the earlier part of the period, and Anthony Trollope, in the later part: a society in which young women of good family can expect to receive dowries so that they can make a suitable marriage, while their brothers can expect their father to purchase for them a commission in the army or a partnership in business. The judgments have to be understood in that context.

¹³ *An Autobiography* (Oxford, 1978), p 64.

Relying on them now, without taking account of their historical context and the ways in which society has changed, would be another example of equating triremes and steamships.

Another example I have recently encountered is the citation in Scottish textbooks and judgments alike of a dictum of Lord Dunedin in 1909 that an employer is liable to an employee for an omission to take a precaution to protect his safety only where the precaution was so obviously necessary that it would be folly in anyone to fail to provide it.¹⁴ Lord Dunedin was a very good judge, but one has to bear in mind that employers today are not living in the world of 1909. They live in a world in which employers have to exercise reasonable care, not merely to refrain from obvious folly, and in which they have to carry out risk assessments, the purpose of which is to reveal risks which may not be obvious. The common law duty of employers has not been transmitted to us in a time capsule from 1909.

In short, a legal system is not like the ship of Theseus, in which every part was replaced with an identical timber, so that it was both new and the same. Developments in society give rise to new problems which have to be considered, and require old problems to be thought through in a new context. Addressing these issues is the function primarily of the legislatures, assisted by the law commissions, but what they can achieve is naturally limited in practice by their resources and by governmental priorities. So they understandably focus on projects which can be accommodated within the available resources and which are likely to lead to proposals which will be implemented. Where modernising legislation is absent, the development of the law becomes an important responsibility of the courts, within the limits of their constitutional and institutional competence.¹⁵

¹⁴ *Morton v William Dixon Ltd* 1909 SC 807.

¹⁵ The point is illustrated by the recent judgment in the case of *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; 2015 SC (UKSC) 63; [2015] AC 1430, concerned with informed consent to medical treatment.

That brings me to my final general point. While both academics and the courts risk temporal parochialism if they fail to grasp that a current or past account of the law may be more ephemeral than its methodology might suggest, they risk a different sort of parochialism if they fail to consider the approaches currently adopted in other comparable jurisdictions. Especially where modern authority is lacking, we should be prepared to consider the case law of other jurisdictions more comparable with our society. For example, the question of presumptions of gift between parents and children has recently been considered by the Supreme Court of Canada, and the English courts have considered the employer's duty to take reasonable precautions in the context of modern employment practices. I do not mean that we should reach for off-the-shelf solutions from elsewhere without considering whether they actually provide the best way forward. But we should be willing to consider the possibility that we might learn from the experience of other jurisdictions.

Of course, the value of comparative law has its limits. Depending on the subject, other courts' thinking may have a different conceptual framework from ours, and each judiciary also has to operate within a specific constitutional framework. There are also, of course, some differences between society here and, for example, in Canada. There is however also a good deal that is shared, in terms of the problems that judges face, and often in terms of the legal culture and values which frame their consideration of those problems. And the nature of some of the most important legal problems in the modern world compels us to take account of the judgments of foreign courts in those areas: we cannot, for example, successfully address the legal issues arising in relation to the internet, or the gathering and sharing of intelligence across the world, or military operations undertaken with our allies, without taking account of the approaches followed in other jurisdictions.

Drawing these remarks to a close, I will finish with an observation made by Benjamin Kaplan, an American judge and professor at Harvard, which encapsulates much of what I have been saying, and also provides a partial explanation of why the work of judges and legal scholars alike is so difficult and so

compelling. A legal rule, he said, cannot be expected “to solve its problems fully and forever. Indeed, if the problems are real ones, they can never be solved. We are merely under the duty of trying continually to solve them.”¹⁶

¹⁶ “A Prefatory Note”, (1969) 10 *Boston College Law Review* 497, 500.