

UNIVERSITY OF
BIRMINGHAM

The common law and Europe: differences of style or substance and do they matter?

The Rt Hon Lord Mance
Holdsworth Club Presidential Address
Friday 24 November 2006



The diversity of modern legal
Europe is stimulating, and too
deeply rooted to yield lightly
to wholesale harmonisation.

The Rt Hon Lord Mance

Birmingham Law School



The common law and Europe: differences of style or substance and do they matter?

Being the Presidential Address of

The Rt Hon Lord Mance



President of the Holdsworth Club
of the Birmingham Law School
at the University of Birmingham
2006–07

Published by
The Holdsworth Club of the
University of Birmingham
2007

ISBN10: 0704426226

ISSN 0307 0859

ISBN13: 9780704426221

The common law and Europe: differences of style or substance and do they matter?

Being a common lawyer in Europe is sometimes lonely. Strictly viewed, Europe has few common law jurisdictions – England and Wales, Northern Ireland, Eire, Cyprus and (in some but not all respects) Malta. Having said that, the common law has much in common with some other systems of law (for example the Nordic), not least if one considers their judicial role and style of judgment. Two great forces at work in Europe for some time are now also rapidly bringing important areas of legal thought closer together. They are European Community and Union legislation, backed by the authority of the European Court of Justice, and developments in human rights, centred around the European Convention of Human Rights and backed by the European Court of Justice in Strasbourg. Quite apart from proceedings involving these courts, European judges and lawyers meet more frequently than ever before. The European Commission has recently held ‘stakeholder’ meetings to examine common points of reference between different legal systems in the area of contract. The diversity of views as well as the many common views there expressed have underlined for me the dangers of speaking over-simplistically about any clear division between common law and the rest of the wider Europe. I also represent the United Kingdom on the Council of Europe’s Consultative Council of Judges (CCJE).¹ The CCJE has over the last six years issued a series of opinions subscribed to by representatives of all 46 member states of the Council of Europe,² identifying and examining common principles on such topics as the independence of judges, judicial ethics, discipline and liability, judicial training, appointments to the European Court of Human Rights, fair trial within a reasonable time, justice and society and, this year, the role of judges in the context of terrorism and in applying international and European law. In the year to come, it proposes to examine the role and relevance of Higher Councils of the Judiciary, a topical subject in the United Kingdom with our new judicial appointments board and increasing involvement of judges in the administration of justice; and in 2008 it proposes to look at the roles and inter-action of judges and prosecutors.³ Such interchanges and the many other interchanges which now take place between

¹ <http://www.coe.int/Judges>

² Stretching geographically from Azerbaijan and Armenia in the east and from Norway, Finland and Estonia in the north to Turkey, Greece, The Former Yugoslav Republic of Macedonia or Malta in the south to Eire and Portugal in the west.

³ An area where there are significant differences between the approach taken in common law and some civil law countries, which merit careful scrutiny. In many civil law states prosecutors have judicial status, and sit at a different level and retire through the same door as the judges to an office in the judicial quarters.

national judiciaries are bound to reinforce what we have in common and to lead by osmosis or more radical transplant to greater assimilation.

There are therefore important trends towards convergence of approach. Nonetheless, differences of approach remain, which may be important to recognise and consider as we develop the modern legal Europe. The most obvious differences are between the common law approach and a civil law approach exemplified by the French or Napoleonic and German systems, each with their own set of codes. Further, these broad differences mirror themselves at the level of European courts, with the European Court of Justice modelling itself on a French approach, and the European Court of Human Rights tending towards a common law approach.

For a judge, or I suspect a law student, the clearest difference lies in the way in which judges approach and answer problems. So I want to focus largely on the nature and style of judgments given in common and civil law systems, and particularly on appellate judgments, though this will also lead me to consider some underlying structural differences between common and civil law systems. Common law judgments are notable for their individualistic style. This comes naturally to former advocates, and contrasts with the more uniform and colourless style which we associate with the civil law. One of my predecessors as your president, three times, was Lord Denning whose judgments are, I hope, still read by today's students. You could often tell which way the scales of justice were coming down from the opening lines, whether they were 'Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy was a farmer there. His home was at Yew Tree Farm. It went back for 300 years'⁴ or 'It happened on April 19, 1964. It was bluebell time in Kent. Mr and Mrs Hinz had been some married some ten years, and they had four children, all aged nine and under. Mrs Hine was a remarkable woman.'⁵ My own recollection is of Lord Denning in a case where my clients were claiming what they maintained was a contractually fixed sum under an agreement to take back a vessel early from charterers. Lord Denning was concerned that this had proved to be a considerable over-estimate of the actual loss suffered, and

⁴ *Lloyds Bank Ltd. v. Bundy* [1975] 1 QB 326, 334, a case where Mr Bundy was seeking to be relieved of liability on a guarantee.

⁵ *Hinz v. Berry* [1970] 2 QB 40, 42, a case where Mrs Hinz was seeking damages for herself and her children including for the nervous shock of witnessing her husband's death in a traffic accident.

I recall his emphasis when he said: 'The question now is... Are the owners entitled to their *real* loss? Or to a *notional* loss?'⁶ Happily, his judgment proved to be dissenting, and I want also to devote some time to the benefits of such judgments. Lord Denning, like Lord Mansfield, two hundred years before, was so towering a figure that dissents were comparatively rare in his court. Not of course that he was in any way intolerant of them. The story goes that, earning of likely disagreement by a colleague in one case, he said 'So, you will have to dissent'. When the third member of the court indicated that he shared his colleague's view, Lord Denning is reputed to have said: 'So you will have to dissent also'.

Now you should not suppose that individualism or poetry are wholly unknown on the mainland of Europe. I am not aware of any English judgment written entirely as a poem, like this decision of the Landgericht Frankfurt of 17.2.82.⁷ The question was whether a landlord had given a sufficient notice in writing to pay outstanding rent, to entitle him under the relevant German legislation to interest. Being polite and poetic himself, the landlord had sent a poem, to the effect that giving notice was a difficult and embarrassing art, when one wanted the money but not to upset the tenant. Ungraciously, the tenant argued that this was not a sufficiently serious means. In its 12 verse judgment the Landgericht addressed the legal issue and elegantly demolished the tenant's defence. A true case of *res ipsa loquitur*, to use the Latin which remains part of the *lingua franca* of German, Italian or Spanish lawyers.

However, the individually shaped and full – you may well think too full – style of common law judgments contrasts with the style of judgment found in civil law countries. The Cour de Cassation presents the most extreme example. Modelled on the principle of the Aristotelian syllogism,⁸ the major premise is a statement of law, the minor premise is a statement of fact, and the conclusion follows. The brevity is barely relieved by the modern practice of publishing the report of the juge rapporteur, and the occasional commentary on a past case in the Court's own annual report. The result is a field day for speculation and academic interpretation. In a famous article in the early 1970s *Pour une*

⁶ *Sterling Coal & Navigation Corp. v. Halfdan Grieg & Co. (The Lysland)* [1976] 1 L.R. 427, 436,

⁷ LG Frankfurt, Urt. v. 17.2.1982 – 2/22 O 495/81.

⁸ E.g. All men are mortal. Socrates is man. Therefore Socrates is mortal.

motivation plus explicite des décisions de justice by Procureur Général Adolphe Touffait of the Cour de Cassation⁹ and Professeur André Tunc,¹⁰ the authors urged a change of practice. This call has not borne fruit to this day, but was recently echoed in an intervention by M. Lacabarats, a member of the Cour de Cassation, at a celebration at the court of the 30th anniversary of the new French code of civil procedure. One unfortunate consequence of the present position is that decisions of the highest French court are less usable and useful for comparative law purposes than for example decisions of German or Dutch courts.¹¹

The European Court of Justice presents a half-way picture. Modelling its practice on the French Conseil d'État rather than the Cour de Cassation, it gives fuller judgments, setting out first the facts and then the law but usually adding only terse reasoning to explain its conclusion. The brevity is probably a function of the rule of unanimity and of the committee-style approach which govern the formulation of such judgments. This is not prescribed in any European Treaty, but Article 27 of the Court's Rules of Procedure postulates a unanimous decision.¹² The Court's approach has this in common with the Cour de Cassation, that it often resolves cases by repeating, without elaboration or

⁹ Later from 1976 to 1982 a judge of the European Court of Justice. Sadly, for the thesis of this paper, he did not there make any similar call for more transparent decisions.

¹⁰ Interestingly, the article was written with some input from Professor Hamson of Cambridge University. In recent years the Cour de Cassation has shown itself equally open to fruitful interchanges with common law academics and practitioners, but the style of its judgments remains unchanged. The Cour de Cassation suffers a huge workload of some 20,000 cases a year.

¹¹ See for example the use made of such decisions in *Raffaelsen Zentralbank Österreich AB v. Five Star General Trading LLC (The Mount Star)* [2001] 1 L.R. 597 and *Quantum Corp. v. Plane Trucking Ltd.* [2002] 1 WLR 2678.

¹² Article 27 reads: '1. The Court shall deliberate in closed session.

2. Only those Judges who were present at the oral proceedings and the Assistant Rapporteur, if any, entrusted with the consideration of the case may take part in the deliberations.
3. Every Judge taking part in the deliberations shall state his opinion and the reasons for it.
4. Any Judge may require that any questions be formulated in the language of his choice and communicated in writing to the Court before being put to the vote.
5. The conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court. Votes shall be cast in reverse order to the order of precedence laid down in Article 6 of these Rules.
6. Differences of view on the substance, wording or order of questions or on the interpretation of the voting shall be settled by decision of the Court...

examination, some general phrase or principle from its past jurisprudence, which it then asserts governs the particular facts. The Advocate General's common law style opinion may assist to explain or amplify the reasoning, but this cannot be relied on. The Court does not always agree with the Advocate General, and, where it does not reproduce the Advocate General's full reasons, this may well be because it proved impossible during the deliberations to achieve agreement on them. An example of the difficulty that can result is the recent House of Lords case, where, after a reference to Luxembourg, both parties came before the House, each to submit, over the course of a day, that it had won and the House advanced three different views as the legal position.¹³

There are of course many courts, particularly higher or constitutional courts, in Europe where dissent is permitted: the German Constitutional Court (though only since the 1970s), Scandinavian courts, the European Court of Human Rights all provide examples. Indeed, the only jurisdictions where no dissent at all is permitted appear to be France, Italy, The Netherlands, Belgium, Luxembourg and Austria. The five countries' status as founders (with Germany) of the original European Coal and Steel Community and the Economic Community goes far to explain the present mode of operation of the European Court of Justice. The great majority of recent East European countries joining the Community recognise dissenting judgments, at least in their constitutional or supreme courts.

Perhaps less well known, there are common law courts where dissent is not permitted. There has, I believe, been only one dissent ever in the Court of Appeal Criminal Division or its predecessor, although if a matter goes to the House of Lords you can have as many judgments as judges. The Privy Council always gave a unanimous advice or decision until dissent was (following, it is said, pressure from Australia) allowed in 1966, and recently even the convention that there should be no judgments giving different or additional reasons for concurring has loosened.¹⁴ On the question of the constitutionality of a law the Irish Constitution requires the decision of the Supreme Court to 'be pronounced by such one of the judges of that Court as that Court shall direct and no other opinion on such question, whether assenting or dissenting, shall

¹³ CELTEC Ltd. v. Astley [2006] UKHL 29; [2006] 1 WLR 2420.

¹⁴ See e.g. *The State of Mauritius v. Abdul Khoyratty* [2006] UKPC 12; [2006] 2 WLR 1330.

be pronounced nor shall the existence of any such other opinion be disclosed'.¹⁵ We have there, in the final phrase, a statutory enactment in a common law context of the *secret des délibérés* which applies in civil law countries. A similar provision applies when the Irish Supreme Court sits in judgment on a bill, but states that 'The decision of the majority of the judges of the Supreme Court shall... be the decision of the Court.'¹⁶ Interestingly, when in 1940 the High Court struck down the validity of the Offences of the State Act 1939 allowing for internment without trial on the certificate of a minister and the President referred the validity of an amending bill to the Irish Supreme Court under the latter article, and the Supreme Court then gave a judgment expressly stated to be the judgment of 'the majority of the judges', there was a storm of speculation about possible dissent and dissentients among the Court's members.¹⁷

Even within the English and Welsh legal systems, there have been some moves towards greater uniformity. In the era when Lord Diplock presided in the House of Lords, the single judgment became common. In the Court of Appeal it has become common to see a single detailed judgment, followed by simple statements of assent. In a footnote to a characteristically robust article in 1985 by the late Dr F.A. Mann on awards of interest in English law,¹⁸ he wrote of the Court of Appeal decision in *Wallersteiner v. Moir* [1975] QB 373: 'The numerous old cases on the equitable rule are referred to and discussed in the three judgments which in those days the Court of Appeal used to deliver to the great benefit of the law and of lawyers'. More recently, Lord Phillips of Worth Matravers wrote as Master of the Rolls in the Court of Appeal's annual review for 2001–2, that 'It is now more convenient for a constitution of the Court of Appeal to deliver a single judgment to which all members have contributed. This is a trend which has my support. Profusion of precedent is the bane [sic] of judges and practitioners. A single judgment reduces the material that has to be read, avoids the opportunity for differences of interpretation and provides greater clarity. Providing certainty, and giving clear guidance, are among the Court's most important functions.' However, any such trend has not been particularly marked.

¹⁵ Article 34.4.5 of the Irish Constitution.

¹⁶ Article 26.2.2.

¹⁷ The story is entertainingly told by a subsequent Chief Justice of Ireland, Ronan Keane, in *The 'one judgment' rule in the supreme court* published in *Reflections on Law and History* (Four Courts Press), where he advocates abolition of the rule.

¹⁸ *On Interest, Compound Interest and Damages* (1985) 101 LQR 30, 36.

Especially in larger courts, like the US Supreme Court with nine members always sitting in banc and the European Court of Human Rights, the practice may develop of composite judgments of groups of judges. There has been an occasional example of a joint judgment in the House of Lords. If you go back to a famous private international law case in the 1860s, *Imrie v. Castrique* 8 CB (NS) 405, 415-6, you will see that Cockburn CJ gave a judgment in which he said that Justices Wightman, Blackburn and Hill and Baron Channell concurred, but he made clear that there was a difference of opinion between them on one point which it did not prove necessary to resolve (cf p.415).

The general position at common law is however one of individual freedom of expression, contrasting with a civil law practice of unanimity in most German and French courts and in the European Court of Justice in Luxembourg. What are the advantages and disadvantages? Some of them have been touched on. In favour of unanimity, can be put

- (i) greater brevity and simplicity, avoiding difficulties of analysis that may result from different judges expressing themselves differently on the same point;
- (ii) greater certainty: in the European Court of Justice in particular, this may well be seen as an important consideration, and it avoids any risk of individual opinions overly shaped by the perspectives of the national law of the particular judge;
- (iii) a greater incentive for judges to discuss differences and to focus on and, where necessary, resolve those that really matter; the discussions within chambers of the European Court of Justice are said to be particularly fruitful in this respect;
- (iv) practicality: again perhaps a particularly relevant consideration in the case of a court such as the European Court of Justice where it is not to be expected that every judge will be able to express himself absolutely fluently in French (the language in practice of most internal discussion and of communications and drafts presented within the Court) or in whatever is the language of the case, into which the final internal draft will eventually be translated;
- (v) anonymity: an unsatisfactory, but nonetheless real consideration in a court such the European Court of Justice, where particular decisions may be seen as sensitive in the country which has appointed a particular participating judge, who may hope to be reappointed; the present term

of office for which European Court of Justice judges are appointed is six years, renewable; in the case of the European Court of Human Rights, Protocol No. 14 dated 13 May 2004 has amended the European Convention on Human Rights to provide that judges are appointed for one single non-renewable term of 9 years;¹⁹ an associated but even more sensitive topic is the desirability in all international courts of dispassionate and objective selection processes, guaranteeing not just the best national candidate, but an appropriate cross-section of talent on such courts, bearing in mind their expanding importance.²⁰ The United Kingdom has developed the practice, in relation to international judicial appointments, of establishing an ad hoc advisory committee including representatives of the domestic judiciary and of the Department of Constitutional Affairs and Foreign Office and a lay member. No other country, so far as I am aware, does this. There are internal processes in both Strasbourg and Luxembourg which on a nominal basis vet candidates proposed by individual countries, but they are at present no substitute for the proper appointment processes, the importance of which has been stressed by for example recent constitutional reforms in the United Kingdom. A sign of hope is the objective appointments system set up by the Council of Ministers for appointments made to the new first instance Civil Service Tribunal, dealing with internal staff matters.²¹ This tribunal has only seven judges, and there could be no question of each European Community state appointing a national judge. Hopefully, this is a marker for similar future developments at higher levels of the Luxembourg Court, although a cynical view might be that member states agreed this to the new system for staff matters, because it did not affect their interests.

¹⁹ The European Parliament proposed a single, non-renewable 12 year term for European Court of Justice judges in 1990: *Resolution on the Intergovernmental Conferences* – OJ No. C324, 1990 219, 231.

Advocate General Jacobs urged a similar reform in *Liver Honorum in honour of Gordon Slynn* (Kluwer Int. 2000) 24–25.

²⁰ Under the draft European Constitution (or 'Convention'), this might have changed, since article III-263 provided: 'A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the European Court of Justice and the High Court before the governments of the Member States take the decisions referred to in Articles III-260 and III-261. The panel shall comprise seven persons chosen from among former members of the European Court of Justice and the High Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council of Ministers shall adopt a European decision establishing the panel's operating rules and a European decision appointing its members. It shall act on the initiative of the President of the European Court of Justice.'

²¹ Council Decision on European Union Civil Service Tribunal O.J. (2004/752/EC).

The CCJE commended independent appointment systems in its fifth Opinion in 2003, saying that 'the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention on Human Rights and also the European Union treaties makes it vital that the appointment and re-appointment of judges to the courts interpreting such treaties should command the same confidence and respect the same principles as national legal systems.' This is vital unfinished, and almost unstarted, business.

Against compulsory unanimity, must however be put some other factors:

- (i) obscurity, rather than certainty, can result from the need to compromise; differences of opinion on a point may only be capable of being met by some all-embracing phrase so bland that no-one knows which view has prevailed, or by deletion of underlying reasoning on a point, or by confining it to its particular subject matter, without considering analogous situations;
- (ii) a committee-style approach may mean a lack of any incentive to engage – after all if one knows that one is in a minority and can do nothing about it, one reaction may be simply to detach oneself;
- (iii) the lack of nuance and contrast may be prejudicial to future legal development and in future cases; it may make it much more difficult to know how far a particular decision goes, and where to draw the line to its application; concurring and dissenting opinions offer shade and contrast, for keen observers like Dr Mann and for future courts; once the European Court has reached a decision, it tends to redeploy its core phrases verbatim in later cases; and the reconsideration, reformulation or development of past jurisprudence might be more easily achievable, where necessary, if the Court's judgments gave greater insight into the considerations taken into account and allowed greater opportunity for exploring alternative formulations.
- (iv) lack of transparency: in modern democratic Europe, should not litigants and the general public know how decisions are made and what factors influence them?

A common lawyer like Chief Justice Ronan Keane or myself is likely to see the disadvantages of uniformity. But we do not stand alone. Speaking of the Cour de Cassation, in paragraph 21 of their article Procureur Général Adolphe Touffait and Professeur André Tunc raised a question which they acknowledged 'will astonish, or even appear insensitive, so far does it stray from [French] tradition.' That is whether concurring and dissenting judgments would not assist to revivify French law, to adapt it to contemporary society and to reveal the true authority of a decision. They acknowledged that there might then prove to be individual judges too weak to write credible individual judges – citing the United States Supreme Court judge supposedly nick-named 'Love' because 'Love knows no law.' Dismissing that fear they said that nothing would be undermined save the particular judge. And, one might add, perhaps a good thing too.

As to the European Court of Justice, for Advocate General Jacobs²² the first two factors favouring the present unanimity rule, combined with the significant mitigation he saw in an advocate general's opinion, outweighed all the others.²³ Of course, he was writing as an insider and producer, while I am speaking as outsider and user. Both perspectives have relevance. But for my part I think that his analysis gives too little weight to the value for the smooth development of Europe of more open dialogue, of clearer explanation of what the Court is doing and of occasional recognition that there are two sides to a coin. Recently, M. Julia Laffranque, Justice of the Supreme Court of Estonia has written powerfully, advocating a change of practice in the European Court of Justice under the title: *Dissenting Opinion in the European Court of Justice – Estonia's Possible Contribution to the Democratisation of the European Judicial System*.²⁴ She outlines some of the advantages of current Estonian practice in a way which transposes to the European Court:

'Here the dissenting opinions of the judges of the Supreme Court concerning the nature and functions of the court and the methods of interpretation of constitutional and procedural law, which have facilitated the dynamic interpretation of the Constitution, among other things, serve as an invaluable asset. Dissenting opinions of Supreme Court judges have promoted the internationalisation of justice, relying on the law of

²² The UK's Advocate General until the end of 2006. He has been succeeded by Eleanor Sharpston QC.

²³ See the chapter written in *Liber Amicorum in honour of Gordon Slynn*, referred to in footnote 19 above.

²⁴ *Juridica International*, IX/2004, 14. I am indebted to this stimulating article, with its wealth of information.

other countries as well as on international and European law... When some opinions have been too progressive for their day... and considerably more liberal and far-reaching than the majority opinion, the dissenting opinions have also served not just to aid development of the law but also to provide limits to the role of the court and warn the majority against indirect, publicly undeclared alteration of earlier practice. In this respect, dissenting opinions can be compared with litmus paper and serve as the internal control of the Supreme Court itself in delimiting its competencies.'

Certainly, any common lawyer can point to dissenting judgments which have over time proved far more influential than the majority: Lord Atkin's great dissent in *Liversidge v. Anderson* [1942] AC 2062²⁵ or Lord Denning's great dissent in *Candler v. Crane v. Crane, Christmas & Co.* [1951] 2 KB 164, which became the law in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 on 28th May 1963, just in time severely to disrupt the digestion of those preparing for final examinations in the year ahead of me at Oxford. Of course, as any student of precedent will know, there are cases where it takes much study to discern what has been decided, and even lamentable examples where it is not clear that anything has been decided at all, save hopefully the result. Their fate is to join the ranks of the 'very distinguished' authority. But such cases are not unknown in Europe.

It is worth asking why different legal systems place such different emphasis on the virtues of self-expression, on the one hand, and disciplined certainty, on the other? The explanation probably lies deep-rooted in different conceptions of the nature of law and of judging: more particularly as to (a) the role of judges: are they seen as independent arbiters serving the parties or more as state functionaries charged with administering state-imposed law? (b) the approach to decision-making: do judges, as in the common law, start from the bottom up, with the facts, or, as in civil law countries, tend to start from the top down, with the particular rule seen as applicable in the context? (c) the place where

²⁵ R.V. Heuston's article *Liversidge v. Anderson in Retrospect* (1970) 86 LQR 33 gives a vivid account of the history. This includes correspondence in which the then Lord Chancellor, who had not sat on the case but (unusually) obtained from the judicial office copies of the draft speeches in advance, politely sought to dissuade Lord Atkin from use of the famous references to Charles I and to Humpty-Dumpty and a remarkable letter afterwards to *The Times* by Lord Maugham, who did preside over the appeal, averring that he had not heard anything which could justify Lord Atkin's comment about Charles I.

the law if found: is it found in case-law or in a code? (d) the most important influences on the law: are they practitioners or academics? and (e) the value of pragmatism and flexibility as opposed to fixed and easily applied rules. The factors on each side of the divide are of course related.

A historical perspective is interesting. In a valuable publication *Common Law et tradition civiliste* by Duncan Fairgrieve of the British Institute of International and Comparative Law and Horatia Muir-Watt, Professor at the University Paris-I, the authors take the role of the English judge back to Henry II and then to the Civil Revolutions of the 18th century. Henry II established the common law judge as a figure with royal authority independent of any other force in the land. The 18th century, during which the judiciary allied itself with the winning Parliament, established the judge as a figure independent of the monarch. The unity of common law jurisdiction, covering civil, criminal and administrative law, and the development of a case-law system added to judicial authority, but the very breadth of their power meant that the judiciary had to take care to ensure that the results met public and social needs. The concern was met in criminal cases by the jury system and the use of lay magistrates and in civil cases both by the doctrine of precedent (which operated as a safeguard against excessive individualism) and, perhaps paradoxically, from at least the time of Lord Mansfield by a flexible, pragmatic, utilitarian or (as Napoleon with his gibe about shopkeepers would perhaps have put it) 'mercantilist' approach which kept the law in touch with popular sentiment and needs. The fact that judges came from independent practice gave them a habit of independence of mind and the respect and cooperation of the bar. As a result, the common law has been prepared to trust its judges to exercise broad discretionary powers, which in civil law countries are still anathema. The law operated pragmatically, through an open-textured case-law system. Only a common lawyer could say, with Diplock LJ (as he then was), that the 'beauty of the common law [is] that it is a maze and not a motorway.'²⁶ Having cut itself free from civil and Romanist influence by the end of 16th century, the common law was largely free of academic or outside influence, although notable exceptions began to re-emerge

²⁶ *Morris v. Martin* [1966] 1 QB 716, 730. Lord Goff has referred to the 'mosaic' of the common law: *Kleinwort Benson Ltd. v. Lincoln C.C.* [1999] 2 AC 349, citing his Maccabean lecture *The Search for Principle* (Proc. Brit. Acad. Vol. LXIX (1982) 170, 186) where he made clear that, despite his enthusiastic support for academic and comparative legal interchange, he was sceptical about any attempts at European codification

from the Age of Enlightenment onwards.²⁷ In the last decades, the relationship with academics and with outside legal influences has become a far healthier and fruitful two-way dialogue.²⁸

Civil legal systems represent a contrast, historically and in their view of the role of judges, the place where the law is found, the influences on the law and the value attached to certainty of principle. For centuries after the dark ages, civilian academics could fall back on familiar Roman law texts as the basis upon which to elaborate new models. With the Enlightenment, individual nations began to codify, an exercise which academics dominated. Two great camps emerged, the Napoleonic and the Germanic. Both cemented traditions in which the judge was seen as a functionary whose role was simply to apply the law. Under the *ancient regime*, French judges had acquired a reputation for arbitrary complicity in the abuses of the privileged classes. To counter this Napoleon's civil code included at its outset the famous article 5, whereby: 'Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises' – judges are forbidden to decide cases submitted to them by way of general and regulatory provisions. Judges were to be functionaries. They were to apply the law and not to develop or express their own general or dispositive views about its meaning. They were to have authority, but not power. Hence, the syllogism beloved of the Cour de Cassation, suggesting that the law is a closed logical system with little scope for innovation or judgment.²⁹ The same thought was behind the recent attempt in Italy by S. Berlusconi when Prime Minister to make it a disciplinary offence for judges to engage in 'creative interpretation of the law.'³⁰ The German code was intended to be exhaustive, and German judicial style traditionally involves a chain of paragraph references

²⁷ The first Vinerian Professor of English Law was William Blackstone, appointed in 1758, and later as Sir William Blackstone a judge of the Common Pleas from 1770–80. Regius Professorships of Civil Law were created at the universities of Oxford and Cambridge by Henry VIII. In developing English commercial law, in the second half of the 18th century, Lord Mansfield drew heavily on his extensive knowledge of continental writings, and a number of his 19th century successors were similarly open.

²⁸ Witness e.g. *White v. Jones* [1995] 2 AC 207; *Woolwich B.S. v. I.R.C.* [1993] AC 70; and cf *Judge, Jurist and the Study and Use of Foreign Law* by Professor Markesinis in (1993) 109 LQR 622.

²⁹ Of course, even common law judges used to feel obliged to subscribe to the declaratory theory according to which judges did no more than declare what had always been the common law, a theory described by Lord Reid extra-judicially some decades ago as a fairy-tale, and robustly disclaimed by Lord Goff in *Kleinwort Benson Ltd. v. Lincoln C.C.* [1999] 2 AC 349, 377–8.

³⁰ The attempt only failed because S. Berlusconi lost power to a new Socialist government before the new law was due to come into force on 28th October 2006.

(Paragraphenketten), although I have been glad to listen to modern German judges receiving warnings at the German Judges' Institute in Trier against 'bombardment' of this kind.³¹

Common and civil law judges have quite different career paths. Common law judges were usually advocates and know and trust the lawyers appearing before them. The career judiciaries of civil law countries are traditionally remote from the ordinary advocates appearing before them, and are expected to know and apply the relevant code without much assistance from them. Where career interchange is possible in civil law countries, it tends, as in France, to be with the *parquet*, the public prosecutor's office or the Ministry of Justice, again reinforcing the lien between judge and state. Many of the judges appointed to the European courts worked previously in ministries of justice, or as professors. Advocacy in Germany and France is quite often little more than a formality, or an occasion used to enable the client to feel his case has been ventilated, but often without any real dialogue or influence on the judge. Judgments in the German Supreme Court are I understand commonly written by the time of the hearing. Unfortunately, to my mind, oral advocacy still plays a very limited role before both the European Court of Justice and the European Court of Human Rights. Language difficulties, the pressure of work, the difficulty in the former court of getting up the case long before the Advocate General has written any opinion all reduce many appearances there to a virtual formality. That does not mean that one has to approve the length of argument which English courts sometimes accept.³²

The vastly greater numbers of judges in civil law countries would anyway make it difficult to expect or operate a case-law system or an individualistic system giving judges wide powers of expression and of discretion on the common law model. Above the level of tribunals and magistrates, common law judges generally cover all areas, whereas the authority of judges in civil law countries (Germany, France, Austria, Italy and others) is generally confined to specific

³¹ '[Vor allen], die Beteiligten nicht mit Paragraphensätzen bombardieren!'

³² Despite some recent well-publicised cases submissions today are far far shorter than only two decades ago. But they could sometimes be even shorter. While I would not adopt a traffic light system as in the United States Supreme Court to tell lawyers their time is up, I was impressed by the ground covered and the number of questions asked and answered in a one-hour hearing in that court.

areas: civil, administrative and constitutional; and there is sometimes the most intense specialisation even at the highest level with German Supreme Court judges spending years for example writing judgments on construction industry or professional indemnity disputes.

Two great procedural differences between civil and common law courts lie in disclosure of documents and cross-examination. A wit is reported to have said that 'in England a lawyer is disbarred from practising for not giving discovery; in France he is disbarred for giving discovery.' The common law's exhaustive approach can make a difference. I well remember cases, which were won and lost on discovery dragged out of the other party. But in many cases it may be of marginal if any utility and it is difficult to say how often it affects the result. But it certainly affects the cost. The position with cross-examination is probably the same. In the Hamburg Court, I was once told by a lawyer that the longest cross-examination he had heard of in his entire career lasted no more a court day. In the first instance, questions are there normally put by the judge, and questioning by lawyers is regarded as a limited supplementary tool. Of course, there are risks in a judge's questioning, particularly when the judge also records the answers. Again, I do not want to exaggerate the impact of these differences. Case-management and summary procedures are now strongly encouraged in common law systems, and there are areas where civil lawyers are drawing on common law experience.³³

The differences which I have mentioned continue. Some are responsible for the large divergences in numbers of cases handled in different European countries.³⁴ Speaking very generally, and leaving aside some important developments in for example the area of small claims, the United Kingdom continues to offer an expensive Rolls-Royce system, compared with the higher turnover and cheaper systems of adjudication offered in say Germany. Delay is quite another matter, with the United Kingdom generally faring well and some civil law countries presenting a sad picture. The Italian backlog at the end of 2004 was over 4 million cases.³⁵

³³ See Council of Europe Recommendation No. R (84) 5 and the CCJE's Opinion No. 6 of 2004.

³⁴ See e.g. Table 37 in the European Commission for the Efficiency of Justice ('CEPEJ') Report on European Judicial Systems (Ed. 2006) on the Council of Europe's website for CEPEJ.

³⁵ See Table 37 mentioned in footnote 34.

But I repeat that there are strong tendencies conducing to convergence. In Germany for example, in the aftermath of the Nazi era there has been a determination on the part of judges to disclaim the symbols and habits of authoritarian behaviour, and to understand and reflect the aims and aspirations of modern democratic Germany. More recently, all over Europe the Convention and jurisprudence on Human Rights have led to re-examination of old habits, to the partial constitutionalisation of some civil law areas, to the establishment of Higher Councils of the Judiciary (though these are far from always successfully depoliticised) and the promotion of greater judicial control over judicial training and resources. Common law judges have found themselves increasingly engaged in statutory construction. Civil law judges have increasingly operated a case-law system within the textual framework or interstices of their codes, sometimes even looking to the common law approach.³⁶

But I want to focus on the way in which the common law and civil law and their judges approach and answer problems. Here, it is relevant to ask for what purpose and for whom judges answer problems in their judgments. The most obvious purpose is to resolve the case before them.³⁷ Ancillary to that purpose is a requirement to give reasons, now enshrined in the jurisprudence of the European Court of Human Rights under article 6(1) of the Convention. So any judgment must be addressing the parties – above all, the late Sir Robert Megarry suggested, the losing party.³⁸ But in appellate jurisdictions, the immediate result is not the only thing that matters. This is reflected in the test which the House of Lords applies when deciding whether to grant leave to appeal (usually whether the point is, besides being properly arguable, one of

³⁶ In a speech at the Royal Courts of Justice on 22 June 2004, M. Canivet, Premier Président of the Cour de Cassation, noted that the Cour de Cassation had recently stated 'rules that can be linked to the English estoppel doctrine', and in *SA Banque Worms c/Epoux Brachot et al.* [arret No. 1630 P+R] [Juris Data No. 2002-016420] the court granted an anti-suit injunction in respect of proceedings in Spain after the advocate general had referred to academic writing drawing on common law authority. This undermines, at least retrospectively, the Advocate General's confidence in the European Court case of *Turner v. Grovit* (Case C-159/02), para. 33, that 'A comparative review shows that only legal systems within the common-law tradition allow such orders.'

³⁷ In the case of the Cour de Cassation, with its 20,000 customers per annum, only a third or so of whom can be dealt with in a summary way by declaration that their case is inadmissible, that may currently be a pre-dominant consideration.

³⁸ See *The Temptations of the Bench* (1980) 134 Austr. L.J. 61, 64, where he observed that in one bilingual jurisdiction it had as a result been held that judgment should be in the language of the loser.

general importance) or the test which the US Supreme Court applies (usually whether there is a conflict in the jurisprudence of the courts below, a test which arises from the federal diversity of US legal systems). The House of Lords and in many cases the Court of Appeal are there to settle difficult points of law, for future guidance. But for whose future guidance? There are various candidates. As Professor Markesinis has observed,³⁹ French Cour de Cassation judges appear to keep their thoughts to themselves, so that any judgment might be regarded as being for their own future benefit. Procureur Général Touffait and Professeur Tunc castigate the Cour de Cassation for its failure to give any real public guidance as to the legal and, no doubt in some cases, social factors distinguishing and motivating various decisions. German judges refer heavily to academic writing, so their dialogue may be seen as being with those they regard as their intellectual equals or even superiors.

The diversity of English style and approach makes it difficult to say that an English judge is addressing any particular audience, or whether he or she is speaking to anyone who will listen. The intensity of the analysis in many modern English appellate judgments indicates that they are intended to be digested by the legally qualified, whether the parties' lawyers, lower courts, colleagues, judges in any superior appellate court or academics. But in some cases it is clear that the likely audience will be far wider: English appellate authority has for over two hundred years set the framework within which commercial and financial transactions can take place with security. Increasingly today, the press, politicians, the public at large are all concerned with the outcome and reasoning in many cases coming before modern courts, whether they concern for example social or family issues or issues of terrorism or state immunity.

Are the differences between civil and common law jurisdictions simple differences of style or are there differences of substance? To that, I would answer that they derive from and still, in an appreciable measure, reflect differences of substance. They are differences about the role which the judge is seen as occupying and about the values which are put on certainty and academic principle as opposed to pragmatism and in some contexts party freedom.

³⁹ *A Matter of Style* (1994) 110 LQR 607, 608-9.

Do these differences matter? I think that they do. I am no advocate of uniformity. The diversity of modern legal Europe is stimulating, and too deeply rooted to yield lightly to wholesale harmonisation. But, we do all have an interest in a common understanding about the basic notion and aims of law and of judicial activity. First, in the modern world, many citizens or businesses will as a result of business or leisure activity find themselves involved with the domestic legal system of another European country. Second, the European Court of Justice has made clear in a series of recent and somewhat controversial decisions that national legal systems within the Community must all treat each other as equally efficient and trust-worthy. Third, we are all concerned with the European Court of Justice which itself adopts a very particular, civil law based approach.

To illustrate the last two points, I can, as it happens, use some recent decisions in which the European Court has considered the inter-relationship of civil and common law systems. In them it has emphasised the importance of trust between legal systems. Indeed, it has elevated this from aspiration to duty. A duty of mutual trust⁴⁰ exists despite the day to day experience of the European Court of Human Rights in Strasbourg in relation to the delays and inefficiencies of some of such systems. Take one of its effects, according to the Court. It relates to the Brussels regime which governs jurisdiction between member states of the Community⁴¹ and to exclusive jurisdiction clauses under what is now article 23. A contracting party (it may well not be an English business) deliberately ensures that its contracts contain an exclusive London jurisdiction clause so as to have the benefit of English commercial law and judicial procedures. The other party starts proceedings in another European state in flagrant breach of the clause. The usual tactic is to claim a declaration of non-liability. According to the European Court of Justice's decision in *Erich Gasser v. Misat*,⁴² the first party must desist from English litigation unless and until it has gone to that foreign state, and managed to obtain an order from the courts of that foreign state disclaiming jurisdiction. In some states, before any such order can even be sought, it is necessary to address the whole merits of the dispute. The Italian torpedo as this tactic was named as long ago as 1977 has received the Court's imprimatur.⁴³

⁴⁰ See the commentary on *Erich Gasser v. Misat* (Case C-116/02) in *Receuil Dalloz* 2004, no. 27.

⁴¹ EC Regulation 44/2001.

⁴² Case C-116/02; [2005] 1 AC 1.

⁴³ By an Italian advocate, S. Franzosi, in his article *Worldwide Patent Litigation and the Italian Torpedo* (1977) 7 EIPRev. 382.

In its very brief reasoning, the Court fixed itself firmly on the principle of 'legal certainty' which meant that it must be 'determined clearly and precisely' by simple chronology which of two national courts was to establish which of them had jurisdiction (paragraph 51). But the effect is to encourage a tactical rush to court; while the suggested legal certainty is bought at the price of allowing a party who deliberately seeks to subvert an exclusive jurisdiction clause to do so by the simple device of ensuring that he gets to court first in a state other than that chosen. The European Court dismissed the practical considerations which had led the (French) Advocate General Philippe Léger to advocate a solution whereby in a clear case at least English proceedings could continue. The Court said simply that 'These are no such as to call into question the interpretation of the Brussels Convention, as deduced from its wording and its purpose' (paragraph 53).

A second feature of the decision is that the Court avoided an important issue. The Brussels regime recognises in article 22 another type of exclusive jurisdiction, that of any state over immovable property within its territory or the validity of a company, its constitution or dissolution with its seat within its territory. What happens now if someone begins litigation about English real estate in Italy? Must the English courts defer to the Italian court and its ruling or delay in ruling? Common law courts address cases on a case by case basis, but they are acutely interested in reasoning by analogy and in the relationship of the case before them to or its differentiation from other like situations which can be envisaged, in order to achieve coherence.

There are other observations that can be made on *Gasser*.⁴⁴ Whether the brevity of the reasoning was attributable to the clarity with which the whole Court saw the matter, or whether it conceals some nuances of opinion or even disagreement within the Court will never be known. The Court's rules of secrecy and unanimity precludes our knowing. The suggestion is often made that the latter flows from the former, that it is implicit in the *secret des délibérés* that

⁴⁴ See my own in *Exclusive Jurisdiction Agreements and European Ideals* (2004) 120 LQR 357, and Prof. Trevor Hartley's in *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws* (2005) 54 ICLQ 813.

there should be no concurring or dissenting voice. I suggest that must be a fallacy. The common law recognises that judges must not discuss their thoughts about cases in which they were involved outside court, still less details of discussions they may have had with their colleagues on the court. In Alan Paterson's book *The Law Lords*⁴⁵ K.W. (now Lord) Wedderburn is quoted as saying that how Lord Atkin talked the majority round in *Donoghue v. Stevenson* or how Lord Devlin did the same in *Rookes v. Barnard* should be 'part of our material,' not 'shrouded in secrecy.' That cannot be right. But the principle of secrecy does not preclude the expression of one's own opinion at the end of the day. If it did, one might say that the majority opinion should not be disclosed, and there would be no decision at all.

Take one other case: *Owusu v. Jackson*.⁴⁶ The European Court there held that the common law doctrine of *forum non conveniens* (whereby a common law court will allocate jurisdiction to another available court if that is clearly more appropriate) no longer applies even as against a state not a member of the Community, once a ground of jurisdiction such as habitual residence exists within the Community state where proceedings are begun. So, if A can find one English resident defendant, A can sue him or it here as of right, even though the matter concerns a factory or car accident or an insurance policy in Texas, Australia or Korea, and thereby impose considerable pressure on the English court to accept jurisdiction over all other defendants, even those with no English connection at all. The reasoning is again expressly based on 'respect for legal certainty' (paragraph 38), which it is said a doctrine of *forum non conveniens* would infringe because a defendant domiciled here 'would not be able... reasonably to foresee before which other court he might be sued' (paragraph 42). This is strange: it is up to a defendant sued in his domicile to rely on the doctrine, and he will only ever do so if he prefers to be sued in an overseas jurisdiction which he asserts and shows is more appropriate. A second observation relates to the Court's observation that the doctrine is 'recognised only in a limited number of Contracting States.' A head count in Europe will

⁴⁵ Macmillan Press (1982).

⁴⁶ Case C-281/02; [2005] QB 801. This was decided by a chamber on which no common lawyer sat, and very few if any of the members of which had any discernible experience in the field of private international law.

always come down unfavourably to the common law; one may ask what interest it is of the Community to insist on cases being tried within Europe as opposed to elsewhere if that is more appropriate.

Thirdly, the decision leaves open important questions: What happens if an English resident defendant is sued in respect of immovable property or the constitutional affairs of a company seated in say New York or Hong Kong? Or what happens in the case of an exclusive jurisdiction clause in favour of say New York or Hong Kong? In a later Opinion dated 7 February 2006, the Court took *Owusu* to justify the Community's exclusive competence over the negotiation of a new external Lugano treaty paralleling the Brussels regime but with non-Community states (e.g Switzerland and Iceland). It said that this must be so *because* the draft Lugano Convention contained exclusive jurisdiction provisions which would remit such disputes to Zurich or Geneva, whereas under *Owusu* a defendant's Community residence would make a Community State the appropriate jurisdiction (paragraph 153). Europe's internal jurisdictional arrangements on this basis trump the rest of the world's legitimate expectations. It is interesting to speculate whether, if individual judgments had been permitted, these might have introduced a qualifying or even dissenting note, at least for the future.

The present situation is I believe unsatisfactory and, in the long term, unsustainable. I appreciate the practical difficulties about changing existing practice. But I believe that readers and users of the European Court's jurisprudence would benefit by a change which would allow individual freedom of expression to its judges and make the Court's decision-making and reasoning more transparent, flexible and, perhaps paradoxically, coherent. The operation and reputation of our European courts are after all of fundamental importance for the future of Europe.

The Holdsworth Club

PATRONS

1928–44	PROFESSOR SIR WILLIAM HOLDSWORTH, QM, KC,LLD, DCI, FBA
1949–72	DEAN EMERITUS CE SMALLEY-BAKER, QC, MA, DCI
1974–86	PROFESSOR O HOOD-PHILLIPS QC, MA, DCI, JP

PRESIDENTS

1928–29	LADY BARBER, LLM
1929–30	RT HON LORD ATKIN, LLD, FBA
1930–31	RT HON LORD MACMILLAN, GC VO LLD
1931–32	RT HON SIR FREDERICK POLLOCK, Bt, KC, DCL, FBA
1932–33	RT HON LORD HANWORTH, KBE, LLD, Master of the Rolls
1933–34	RT HON LORD MERRIVALE
1934–35	RT HON LORD WRIGHT, GCMG, LLD, FBA
1935–36	RT HON VISCOUNT HAILSHAM, LLD, Lord Chancellor
1936–37	DEAN ROSCOE POUND, LLD
1937–38	RT HON LORD GREENE, DCL, Master of the Rolls
1938–39	RT HON VISCOUNT MAUGHAN, LLD, Lord Chancellor
1939–40	RT HON LORD PORTER, LLD
1940–41	RT HON LORD NORMAND, LLD, Lord President of the Court of Session
1941–42	RT HON LORD JUSTICE MACKINNON
1942–43	RT HON VISCOUNT SIMON, GCSI, GCVO, DCL, LLD, Lord Chancellor
1943–44	MOST HON THE MARQUESS OF LINLITHGOW, KG, KT, GSCSI, GCIE, DCL, LLD
1944–45	RT HON VISCOUNT BENNETT, KC, LLD
1945–46	RT HON LORD JUSTICE SOMERVELL, OBE
1946–47	RT HON LORD OAKSEY, DSO, DCL
1947–48	RT HON LORD DU PARCQ, LLD
1948–49	SIR ARNOLD McNAIR, CBE, KC, LLD, DCL, FBA, Judge of the International Court of Justice
1949–50	RT HON LORD JUSTICE DENNING
1950–51	RT HON EARL JOWITT, DCI, LLD, Lord Chancellor
1951–52	PROFESSOR A L GOODHART, KBE, QC, DCL, LLD, FBA, Master of University College, Oxford
1952–53	RT HON SIR RAYMOND EVERSHERD, LLD, Master of the Rolls
1953–54	RT HON LORD JUSTICE BIRKETT, LLD
1954–55	RT HON LORD RADCLIFFE, GBE
1955–56	RT HON VISCOUNT KILMUIR, GCVO, DCL, LLD, Lord Chancellor
1956–57	RT HON LORD KEITH OF AVONHOLM, LLD
1957–58	RT HON LORD JUSTICE MORRIS, CBE, MC, LLD, DL
1958–59	SIR CARLETON KEMP-ALLEN, MC, QC, DCL, FBA, JP
1959–60	RT HON LORD COHEN
1960–61	RT HON LORD JUSTICE DEVLIN
1961–62	RT HON LORD HODSON, MC
1962–63	RT HON LORD MACDERMOTT, MC LLD, Lord Chief Justice of Northern Ireland
1963–64	RT HON SIR JOCELYN SIMON, D-en-Dr, President of the Probate, Divorce and Admiralty Division
1964–65	RT HON LORD JUSTICE DIPLOCK
1965–66	RT HON LORD WILBERFORCE, CMG, OBE
1966–67	RT HON LORD DENNING, DCL, LLD, Master of the Rolls
1967–68	RT HON LORD GARDINER, Lord Chancellor
1968–69	RT HON LORD JUSTICE RUSSELL
1969–70	HON MR JUSTICE MEGARRY, LLD, FBA

1970–71	HON LORD CAMERON, DSC, LLD, Senator of the Court of Justice in Scotland, Lord of Session
1971–72	RT HON LORD HAILSHAM OF ST MARY MARYLEBONE, Lord Chancellor
1972–73	RT HON LORD CROSS OF CHELSEA
1973–74	RT HON LORD SALMON
1974–75	RT HON LORD KILBRANDON, LLD, DSC (SOC SCI)
1975–76	RT HON LORD JUSTICE JAMES
1976–77	RT HON LORD EDMUND-DAVIES, LLD
1977–78	RT HON LORD DENNING, DCL, LLD, Master of the Rolls
1978–79	RT HON LORD SCARMAN
1979–80	RT HON LORD JUSTICE ORMROD
1980–81	RT HON LORD ROSKILL
1981–82	RT HON LORD BRIDGE OF HARWICH
1982–83	PROFESSOR JC SMITH, CBE, QC, LLD, FBA
1983–84	RT HON LORD TEMPLEMAN
1984–85	RT HON SIR JOHN DONALDSON, Master of the Rolls
1985–86	THE HON LORD MACKENZIE STUART, President of the Court of Justice of the European Communities
1986–97	RT HON LORD GRIFFITHS
1987–88	RT HON LORD GOFF OF CHIEVELEY
1988–89	RT HON LORD OLIVER OF AYLMEYTON
1989–90	RT HON SIR STEPHEN BROWN
1990–91	RT HON SIR NICOLAS BROWNE-WILKINSON
1991–92	RT HON LORD ACKNER
1992–93	RT HON LORD SLYNN OF HADLEY
1993–94	RT HON SIR THOMAS BINGHAM, Master of the Rolls
1994–95	RT HON SIR RICHARD SCOTT, Vice Chancellor
1995–96	RT HON LORD MUSTILL
1996–97	RT HON LORD WOOLF OF BARNES, Master of the Rolls
1997–98	RT HON LORD RODGER OF EARLSFERRY, Lord President
1998–99	HER EXCELLENCY JUDGE ROSALYN HIGGINS, Judge of the International Court of Justice
1999–2000	RT HON LADY JUSTICE ARDEN
2000–2001	RT HON LORD JUSTICE OTTON
2001–2002	RT HON LORD STEYN
2002–2003	RT HON LORD PHILLIPS OF WORTH MATRAVERS, Master of the Rolls
2003–2004	THE HON SIR MICHAEL DAVIES
2004–2005	RT HON LORD JUSTICE CARNWATH
2005–2006	RT HON LORD JUSTICE SEDLEY

VICE-PRESIDENTS

PROFESSOR C E SMALLEY-BAKER, QC
 BARON PROFUMO, KC
 PROFESSOR O HOOD-PHILIPS, QC (Chairman of Committee, 1949–68)
 SELWYN BATE (Chairman of Committee, 1968–70)
 PROFESSOR R R PENNINGTON (Chairman of Committee, 1970–79)
 PROFESSOR L NEVILLE BROWN (Chairman of Committee, 1980–88)
 RAY HODGIN (Chairman of Committee 1988–94)
 GEORGE APPLEBEY (Chairman of Committee 1994–)

SECRETARY TO THE HOLDSWORTH CLUB

Helen Lewis, Birmingham Law School, University of Birmingham, B15 2TT. h.c.Lewis@bham.ac.uk



Birmingham Law School
University of Birmingham
Edgbaston
Birmingham
B15 2TT

www.law.bham.ac.uk

UNIVERSITY OF
BIRMINGHAM

Edgbaston, Birmingham,
B15 2TT, United Kingdom

www.bham.ac.uk