JUDICIARY OF
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'BLACK HOLES IN THE LEGAL COSMOS - A HITCHHIKER'S GUIDE'

KING'S COLLEGE LONDON LAW ALUMNI AUTUMN LECTURE

15 November 2012

It is a great privilege to be invited to give this lecture, following as I do in the footsteps of some very distinguished speakers. I doubt that the content of this lecture will match the erudition displayed by those speakers, but I hope that it will at least raise some questions of interest. I do not claim to be able to supply the answers to some of the questions raised, but one of the luxuries of being invited to give a lecture of this nature is to be able to raise issues without necessarily having to offer a means of resolving them.

It is also a great pleasure to give this lecture in this venue …. It was in this room that [when] I was President of what was then called the Faculty of Laws Society, the student society, it was my privilege to chair and then give the vote of thanks to Lord Denning, then Master of the Rolls, who was the guest speaker at its annual Celebrity lecture. That would have been in late 1969. He stood almost exactly where I am standing now …. However, the hours I spent in this room shortly after I arrived at Kings are, perhaps, the most relevant to the subject of this lecture.

I hope you will forgive one further autobiographical fact before I move to the substance of my talk. It may help also to explain what might, at first sight, seem an odd title for this lecture.

Apart from an early and continuing devotion to cricket, as a boy and a teenager my passion was astronomy. I can remember being totally hooked on the radio series "Journey into Space", broadcast in the mid- to late 50s followed in 1961 by that fantastic TV series called "A for Andromeda", written by Professor Fred Hoyle and John Elliott. Both captured a youthful and fertile imagination and I was an avid reader of anything I could find on the subject of the moon, the planets, the stars, the galaxies and beyond.

Unfortunately, the career openings for an enthusiastic stargazer were rather limited so I ended up doing Maths, Physics and Chemistry for A-level and in due course a degree in chemistry beckoned. I was, however, much more interested in the structure of the atom than how to develop new polymers to make plastic macs and plastic buckets and a late-teen crisis resulted in a change of path and … to law at Kings.

It was in this room that many of the first-year lectures were held. It was in this room that I first hitched a ride on the English equivalent of a Greyhound bus around the English legal system albeit for rather different reasons from those that launched Arthur Dent, the principal character in Douglas Adams' *The Hitchhiker's Guide to the Galaxy*, on his somewhat bumpy

journey around the far-flung parts of outer space. However, there is at least a loose symmetry about a journey into the broadly unfamiliar, if not the completely unknown.

It was, to within a few weeks of today, 45 years ago that I first heard about the distinction between the common law and equity, how the doctrine of precedent worked and, in the constitutional law lectures, about the separation of powers, particularly the separation between the judiciary and legislature and the executive. And here I am today doing a 'day job' that requires me to try to apply the principles about which I first learned in this room.

The opportunities to get off the Greyhound from time to time to take stock of the surrounding landscape are, I am afraid, few and far between these days. But the invitation to give this lecture has afforded me one such opportunity. Having accepted it in principle, within a week or so Lord Neuberger of Abbotsbury, then Master of the Rolls, now President of the Supreme Court, gave his Presidential address to the Holdsworth Club entitled 'Where angels fear to tread' in which he cautioned judges against speaking too readily when invited to do so. I could hardly renege on my agreement to speak, but I will try to keep within the parameters he set out.

Despite choosing a career in the law, I have retained my interest in matters sub-atomic and matters universal – the little and the large of what we are, where we are and who we are. The title for this lecture permits me to indulge my fantasy that I understand something about the infinitesimally small and the infinitely large. Let me state clearly and unequivocally that I do not - or at least not well enough to justify any part of a lecture that refers to either. But that will not stop someone who was an advocate for over 30 years at least from trying to put the best complexion he can on the position.

Opportunities are limited, but if only to demonstrate that I do try to keep in touch with developments in this area, I wonder how many of you here were aware that the Milky Way, the galaxy of which the Solar System is a part, is due to collide with the erstwhile inspiration for the TV series I have already mentioned, the Andromeda galaxy, at a speed of 250,000 mph. Unless I put that piece of information into perspective, I can foresee a headline, should there ever be any media report of my words tonight, along the lines of "Top Judge predicts the end of the world".

The headline I saw in The Times on 2 June this year[1] was "We're heading for intergalactic crash at 250,000 mph". A really good headline, I thought, and one that immediately captured my attention. Closer reading of the article demonstrated that the collision, if indeed that is the right word, will not start for another 4 billion years and will take a further 2 billion years to complete. Further reading of the article shows that because of the vast distances involved between the 1 trillion stars in the Andromeda Galaxy and the 300 billion or so stars in the Milky Way, the chances of any impact between individual stars is negligible and every reason to think that the Solar System, including, of course, the Earth, will not be affected by what takes place. So if any of you are planning to be around when it happens, don't worry.

As you will by now appreciate, dragging me away from things like this to discuss the current legal system is not an easy task. But there is enough of an analogy between that little anecdote and the first general area that I would like to address, namely, current perceptions of the law, to justify recounting it. I will explain why shortly.

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[1] The Times, Saturday 2 June, 2012, p. 45.

May I begin this part of what I have to say by quoting to you the contents of a report based on a survey carried out in 2007?

> "Many respondents to the … survey … form their views about the courts … without any direct knowledge or experience of them. Only a small proportion of [the population] have direct experience of courts and the judiciary which might form a basis for their attitudes and perceptions. Experience can derive from being a witness or defendant in a criminal matter, a civil litigant, a participant in family court proceedings, an observer in the public gallery, or a member of the legal profession, or other occupational group that works in and around the court, including court administration. Two-thirds … of [the] … respondents report that they have not been present at a court proceeding in any capacity in the last decade or so. One in five … report being present once and only 13% report being present at a court proceeding more than once over the past decade. A much smaller proportion (6%) report any contact with the criminal courts [at whatever level] in the past year.
>
> Given this lack of direct experience, public views may be based on media reports – news as well as entertainment or "infotainment" – or perhaps on the experiences of friends, family members or acquaintances. Courts and the legal system are often the subject of television and movie drama and hold a prominent place in popular culture. Some court decisions, especially sentencing …, are reported widely in the mass print and electronic media. At other times the courts and judges are topics of media attention, including events such as judicial appointments, reports on judicial pay increases, or judicial deviance, for example individual judges facing criminal charges. Much of this attention is negative and critical. An analysis of newspaper headlines concludes that: "judges are portrayed within the media as … out of touch with the community … and as a consequence that the justice system is in need of review". Other research … also describes a consistent public image of the judiciary as a closed, self-reproducing entity, embedded in archaic traditions, resistant to change and disconnected from ordinary citizens and contemporary values."

I have omitted certain words and added just a few others to conceal initially the source of the report. It was not a report on our domestic legal system, but the Australian Survey of Social Attitudes 2007[2]. Given the passage I have quoted, you may think it surprising that the report also contained this passage:

> "At a general, fairly abstract level, Australians value highly the work of the courts and judicial officers. Nearly all … respondents (95%) agree … that "the work of judges and magistrates is important to the community". This finding signals acknowledgement of the important institutional contribution of the judicial system to the democratic polity. Age, education, social class and political affiliation, but not gender or income, seem to influence the level, but not the existence, of agreement. The higher the age, more education and greater self-identification as not working class all increase the intensity of agreement. For example, older cohorts (55+) are more emphatic: 52% strongly agree and 43% agree compared

[2] 'The work of the Australian judiciary: Public and judicial attitudes', Sharyn Roach Anleu and Kathy Mack, (2010) 20 JJA 3.

> with 37% of 17-34 day olds who strongly agree and 56% who agree with the statement …. Interestingly, larger percentages of respondents with a clear political orientation (whether right or left wing) strongly agree that the work of judges and magistrates is important to the community compared with those respondents who indicate they are politically neutral or who cannot choose their political orientation."

I am not qualified and am in no position to comment on the accuracy or validity of the survey and, of course, would not presume to pass any comment on the Australian legal system. But since the survey emanated from the other side of the world, it encouraged me to question whether similar attitudes had emerged from other similar surveys elsewhere. It seems to be so.

In June 2008 Steven Van de Walle and Professor John Raine of Birmingham University produced a report for the Ministry of Justice entitled 'Explaining attitudes towards the justice system in the UK and Europe'[3]. Its methodology was based principally on secondary analysis of existing social surveys - in other words, a review of the conclusions from other surveys of European jurisdictions, including the UK. The report does, however, refer also to surveys carried out in North America and Canada.

It is, perhaps, important to emphasise, as the authors of the report emphasise, that attitudes to and thus perceptions of a system of justice tend to be conditioned by attitudes and perceptions to the criminal justice system of the country in question.

Since my particular interest in the context of this lecture is the perception of and the development of the civil law, I will return to the potential significance of that shortly, and indeed to what the report concludes about attitudes to the civil law; but let me draw first of all on the summary prepared by the authors of the report to illustrate its conclusions.

Their conclusions were that confidence in the justice system has declined substantially in most Western countries compared with the early 1980s, although that decline was halted in the second half of the 1990s, that the UK was no exception to this trend and that in a wider European perspective, citizens' attitudes towards the justice system in the United Kingdom were close to the average and finally that the justice system is rarely among the most trusted institutions in any country.

Whilst there are echoes there of the conclusions drawn in the Australian survey, as presented, the summary makes rather gloomy reading for a judge. Where is there reference to "the important institutional contribution of the judicial system to the democratic polity", the slightly grand proposition mentioned by the authors of the Australian survey? Was there really no expression of confidence in the judiciary at all?

Perhaps it was just the way the questions in the surveys reviewed were asked. I say that because, as it seems to me, whatever perceptions, valid or invalid, there may be about judges in general, their vital role in maintaining a civilised society is acknowledged widely. If a survey posed the somewhat leading question "Do you think that the work of judges and magistrates is important to the community?" – a question that seems to have been asked in the Australian survey - the overwhelming answer would surely be "yes".

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[3] Ministry of Justice Research Series 9/08.

So what is it that leads the public in general apparently to regard judges as out of touch and remote from the community they serve, but yet be recognised as valued members of that community whose job is important?

You will recall that the Australian survey said that an analysis of newspaper headlines had concluded that "judges are portrayed within the media as … out of touch with the community". That raises the question of whether media portrayal the universal reason for the perception.

It appears that the Australian survey did not ask the specific question of its respondents whether they considered judges out of touch. However, in her seminal survey of the English legal system carried out in 1997 which led to the publication in 1999 of the book 'Paths to justice: What people do and think about going to law?', Professor Dame Hazel Genn, as she has since become, did raise that question directly with the respondents to her survey. About two thirds of her respondents agreed with the proposition that most judges were out of touch with ordinary people's lives. Her findings suggested that this perception was one that held across social boundaries and irrespective of experience of the legal system. When the respondents were questioned about the reasons for their views, it appeared that much was derived from instances of inconsistent or lenient sentencing in criminal cases and insensitive judicial comments reported in the media. As to that latter factor she remarked that it was often some notorious comment made some time ago that prompted the current view of the respondent.

Professor Genn remarked that only a very few respondents had ever met or appeared before a judge, but nonetheless they (the respondents) were, she said, "generally opinionated and fluent on this subject." She went on to say that this was because "judges, and caricatures of judges, through media communication, regularly enter the homes of the public …."

So the Australian survey and that survey stand side by side.

The reference to the analysis of headlines in Australia implies that the headlines were phrased in a way that conveyed a not altogether flattering portrait of what judges did or said. I suspect that sentencing in criminal cases figured largely in those headlines.

I have no intention of entering this area further than it is necessary for me to go in order to raise for consideration the issue of where people's perceptions come from, but it is usually, is it not, some apparently lenient sentence that sparks a headline which has a shelf life and then disappears from view? Let me make it plain that there can be absolutely no objection to any debate about sentencing. It is a difficult and sensitive task for those who do it and a perfectly legitimate matter for public debate - and indeed should be a matter for public debate – and if a controversial case raises questions, all well and good. The only unfortunate feature is that the debate can become skewed by reference to one or two at least superficially notorious cases rather than by reference to the hundreds of sentences that are passed by judges and magistrates throughout the country each year about which no public complaint is raised.

When the annual figures were published in July this year to show the numbers of Crown Court sentences referred by the Attorney-General to the Court of Appeal Criminal Division in the previous year as potentially "unduly lenient", a total of 97 sentences were increased by that court because the original sentence was too light. The headline in one national newspaper was "Almost 100 sentences were lenient" - which, of course, was entirely accurate. But, as Sir John Thomas, President of the Queen's Bench Division said at the time, this

represented a "tiny fraction" of the total number of sentences passed, a recurrent annual theme that rarely gets much publicity. The headline was not "Tiny fraction of sentences were too lenient." If it had been, would anyone have read the article underneath?

The other side of that story is that whenever the Court of Appeal Criminal Division reduces a sentence imposed by a Crown Court judge, the headline of the article reporting it frequently says that the sentence has been "slashed". Indeed it is a word used internationally in this context. Recent examples I have found included a reduction of a sentence of 8½ years to 7 years, one of 4 years to 3 years and, though "slashed" was the word used in the article rather than the headline, a sentence of 30 months to 24 months. I must leave you to decide whether that word reflected accurately what occurred, bearing in mind also, as you might, that when a fixed term sentence is reduced by, say, one year, the period in custody spent by the person concerned is generally reduced by 6 months because of the statutory automatic release provisions after half such a sentence has been served. However, leaving that consideration to one side and leaving aside the wording of the headline, in fact a reading of each article in full compared with what was said by the appeal court at the time showed that the basis and the reasoning for the reduction in sentence was accurately and fairly reported.

So that I am not misunderstood, let me say again that personally I have no problem with the use of virtually any eye-catching word or phrase that attracts a reader to an article about what goes on in the legal system. Someone whose attention to an article is attracted by the expression "intergalactic crash" can hardly complain about the word "slash" and, in this busy world, we are all, are we not, heavily reliant on the headlines to decide what else to read in a newspaper?

If headlines attract, that is generally a good thing provided, of course, they are not totally misleading and the substance of what appears below the headline is broadly accurate. In the particular area I have referred to my very limited research suggests that it is. I am not able to say anything more than that and maybe this is a potential subject for a survey or, since I am speaking in an academic institution, for a PhD thesis. However, given the conclusions to be drawn from the surveys I have mentioned, perhaps the more obvious concern is that no-one does go on to read the article itself and an assumption is made from the headline that is not borne out by the contents of the article - or indeed a more general assumption is made about how many appeals against sentence are successful out of the appeals that are launched, an assumption that the publicly available Annual Review of the Court of Appeal Criminal Division[4] would also show to be misplaced.

The serious point, of course, is that the more that is known and understood generally about how the justice system really operates the better, my emphasis being on the word "really".

Let me to move away from perceptions of the criminal justice system to perceptions of the civil system which is my principal area of interest in this lecture. The first question is whether it is possible to make valid judgments about public perceptions of the system of civil justice. The work of Van de Walle and Raine shows that the answer generally seems to be 'no'.

[4] The most recent is the "Review of the Legal Year 2010/2011" to be found at - http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/cop-crim-div-review-legal-year-2011.pdf

In Dame Hazel's book the following is recorded:

> "The evidence of … the present study revealed a depth of ignorance about the legal system and a widespread inability to distinguish between criminal and civil courts. As a result of this confusion … attitudes towards the judicial system are strongly influenced by media stories about criminal cases and televised representations of criminal trials."

However that may be, it does not prevent a great deal of comment, both in the media and through social media, on some civil cases. Not long ago there was a great deal of comment about the law of privacy and its role in relation to the private lives of those in the public eye. Whenever a case is reported that features the rights of those for whom some feel that no recourse to the human rights legislation should be permitted, there will always be significant comment. Where compensation is granted where some feel that it should not be, there will be much talk about "the compensation culture" and the "nanny state". Difficult issues concerning family and gender will occasion comment. Those are just a few examples that come to mind; there are many others.

Yet again, let me be absolutely clear: all debate on issues of this nature is to be welcomed. The issues are usually very difficult and reflecting on a range of opinions about those issues is always healthy: there is rarely a monopoly of wisdom in any one view. It is, of course, more reassuring when the debate is well-informed and expressed in moderate language, but even the dogmatic, self-opinionated view must be accorded respect and subjected to proper analysis.

Sometimes the views expressed are directly critical of the individual judge or judges responsible for the decision that excites interest. Is this a good or a bad thing.

Let me try to put that question, and what I perceive ought to be the answer, into perspective by reference to what others have said on the topic recently.

In his illuminating contribution to the workshop organised by The Foundation for Law, Justice and Society in Oxford in July 2011, which examined the influence of the media on the judiciary and on politics, Sir Mark Potter, who was appointed a High Court judge in 1988 and completed his judicial career in 2010 following five years as President of the Family Division and Head of Family Justice, posed the question 'Do the media influence judges?' His answer was this:

> "As a general proposition, I do not believe that they are. Judges, who are creatures of flesh and blood, are no doubt delighted if their decisions *are* the subject of approval, publicly expressed. Equally they may feel frustrated, even wounded, if their decisions are criticized (particularly when criticism is based on incomplete knowledge, or a misunderstanding, of the facts and issues in the case). But, historically, judges' backs have been broad and they remain so."

I suspect that every judge dealing with civil work, particularly those tasked with hearing difficult and sensitive cases, whether in the family jurisdiction or, perhaps more especially, in the administrative law and human rights fields, knew at the time of appointment that a broad back was a necessary part of the judicial torso. The experience in practice at the Bar or as a member of the solicitors' profession of representing unpopular clients or an unpopular cause,

or of advancing propositions that to some sections of society would seem beyond the pale, is a useful back-strengthening exercise.

Despite that, voices have been raised about the consequences of the kind of criticism sometimes meted out. In her lecture to the Bentham Association at University College London in March this year, Lady Justice Hallett, whilst affirming unequivocally her belief that the current generation of judges has the necessary fortitude to withstand the pressures to which they are sometimes exposed, in effect cautioned that the impact of what she described as "the drip drip drip of public criticism" should not be under-estimated and the ability to withstand it not to be taken for granted.

Picking up Sir Mark Potter's theme more recently, my colleague, Mr Justice Tugendhat, a judge particularly experienced in the privacy, defamation, freedom of expression and media fields, reminded his audience at a lecture he gave in September this year, as did Sir Mark in his contribution, of the judicial oath that requires each judge to "do right by all manner of people, after the law and usages of this realm, without fear or favour, affection or ill will." As Mr Justice Tugendhat said, it is not to do right according to the judge's personal principles or preferences and, as he put it pithily but nonetheless absolutely correctly, "[t]here is no conscience clause in the judicial oath." He went on to make this observation:

> "Those who criticise the decisions of judges may not always have in mind what the judicial oath requires. This applies both to the media and to politicians. If judges are publicly criticised for making unpopular decisions which the judicial oath requires them to make, no good can come of that."

I agree, but I would also add that if judges are praised publicly for making <u>popular</u> decisions, not much good can come of that either. I have myself recently had occasion to remind a courtroom filled with the best part of 150 supporters of a particular local cause that judicial decisions are not made by the counting of heads[5].

In his speech entitled 'Judicial Independence and Responsibilities' at the 16th Commonwealth Law Conference in 2009, the Lord Chief Justice, Lord Judge, who, since the conferment of an Honorary Degree upon him on Tuesday, we can now count as an alumnus, said this:

> "The judge therefore cannot be out for popularity. He – or she – cannot please everyone. He should never try to please anyone."

All this is well understood by the professional judge and is confirmed by the oath to which I have referred - an oath that I believe all who take it regard as a privilege to take and one by which each strives to abide each moment of his or her working day. It is rarely possible to duck a difficult issue however tempting it may be. As Lord Walker of Gestingthorpe said in a lecture in Australia in September, to which I will return a little later, **"…** it is not open to judges, faced with a difficult question, to say "pass"."

The fact that the general message has to be emphasised so often by judges of the highest distinction suggests that it is not one as well understood as it might be by those who comment on judges' decisions, whether in the media, the social media or elsewhere. If everyone "out there" in the cosmos of society understood fully the parameters that govern the daily tasks of a

[5] South Manchester Law Centre v Manchester City Council [2012] EWHC 1398 (Admin).

first instance judge, it would make even raising the question of the presence or absence of praise or criticism of a judge entirely irrelevant. Those parameters include being bound by the authority of decisions of the higher courts, by the terms of Acts of Parliament passed by the (entirely separate) legislature, by the evidence placed before the individual judge in the individual case and by the way in which the respective cases of the parties in the individual case have been argued. Whilst evaluating evidence is what a judge has to do in a civil case - and that does call for the exercise of judgment on the individual judge's part - much of the rest of what the judge at first instance is presented with is material from which it is impossible to escape, even if he or she wished to do so.

Is a society in which those tightly-demarcated parameters are fully understood a Utopian dream? Is the development of such an understanding ever going to be possible or is it a scenario the potential for which has long since disappeared into a black hole never to emerge again?

Reverting, for a moment, to my imagined role as someone who understands these things, let me remind you that a "black hole" is a place out there in the cosmos where so intense is the gravitational pull in the region that even light cannot escape from it. However, it is, perhaps, worth noting that despite that short - and doubtless wholly inadequate - description of a black hole and despite how the expression is used in everyday parlance, it does appear that things can escape from them. A few weeks ago I came across another very recent headline which read as follows: "Black hole spews out 2-million-light-year-long stream of WTF." This certainly captured my attention. I am, however, about to reveal that I am, in true judicial fashion, completely out of touch. I had assumed that WTF was an acronym for some combination of sub-atomic material that had hitherto escaped my occasional reading in this area. Further research revealed that it is an acronym for an expression connoting a state of ignorance. I will leave the uninitiated present to spend the rest of the lecture endeavouring to work out what it stands for!

But perhaps that headline offers a glimmer of hope that that which was once trapped in a real black hole can escape. Let me suggest that there is also a glimmer of hope that the scenario I have identified, which arguably is at the moment confined to a societal black hole, may also wrestle free.

We all recognise the advantages and disadvantages of the more or less universal access there is to the information, comment and other material available on the Internet. On the negative side, misconceptions, misinformation and worse can spread like wildfire. But the countervailing advantage is that positive and accurate information can also be made available widely. For nearly 4 years now judges at all levels have had the opportunity, when identifying a case with a potentially wide public interest, to arrange for the judgment or decision to be placed on the Judiciary website[6] to which all members of the public have access. The judgment or decision is usually placed on the website very shortly after it has been delivered in open court. In cases where the judgment is long and complex, a summary will be prepared by the judge to assist the media and any members of the public in the direction of the main areas of interest. There is no doubt that the media welcome summaries of this nature.

[6] www.judiciary.gov.uk.

I express, of course, merely a personal opinion, but, to my mind, this practice is to be welcomed and encouraged. It is not a medium for self-publicity for the judge; neither should it to be seen as a judicial self-defence mechanism against possible criticism. It should, in my view, simply be seen as a means by which every member of the public with access to the Internet can, if he or she wishes, read in full, very soon after it has been delivered publicly, the reasoning which has led to a decision in which that person finds interest. Furthermore, as I shall emphasise in a moment, it enables the judge to try to express him or herself in a way that conveys to a non-specialist reader the essential reasoning that led to the decision and to spell out the parameters within which the decision fell to be made. For the reader it will mean, of course, reading more than the newspaper article or the contents of the other media report or reports seen on the television or through other channels, but if that media contribution, or even just the headline in a newspaper, has excited that interest, the opportunity to read the full story exists. I wonder how many people realise that the opportunity does exist to read online the reasoning of the judge or judges in high profile cases.

People may respond to this by saying that the language the judge uses will be difficult to understand and that it would be pointless to read what is said. I recognise that in some, heavily law-laden cases, no matter how hard the judge tries, the judgment will be impenetrable to many people. However, many judges nowadays recognise those cases where the judgment will have a wider readership than the parties and their lawyers and, accordingly, will attempt to write it in a more readily accessible style than the style that might be familiar to the lawyers. I cannot help but think that that would be a useful discipline for all who hold judicial office in any event. Whether the judge who attempts this succeeds or not is, of course, for others to assess, but the opportunity for members of the public to analyse the reasoning is available by the process to which I have referred and its existence should be more widely acknowledged.

Even in cases that do not justify placing them on the judiciary website, many reserved judgments are available free on the Internet through the British and Irish Legal Information Institute ('BAILII' for short) website and these are usually made available within 48 hours of the judgment being handed down. Even in those cases in which the judgment has not being reserved after the hearing of the case and where the preparation of a transcript of the oral judgment given by the judge by the court shorthand writers must be awaited, the judgments usually end up on this website in due course. I should, perhaps, say, in case it is thought that I am a shareholder in BAILII, that it is funded by charitable donations and, in addition to cases in the UK, carries reports of cases well beyond these shores.

All this means that any member of the public with access to the Internet has the opportunity to read precisely what the judge has, or judges have, said rather than relying wholly on either the headline to or the text of the article concerning the case that has engaged their interest. This is an important contribution to an open society. My personal experience is that the substance of most articles on civil cases is accurately and fairly represented. Inevitably and understandably, however, the journalistic focus is on the most newsworthy aspects of the case rather than necessarily upon those aspects that are decisive of the result. Again, there is nothing wrong with that, but the existence of the facility for the interested reader to see the fuller picture is one that, in my view, needs greater prominence.

I have referred elsewhere in this lecture to various surveys of public attitudes to the judiciary. I am not qualified to say whether such a survey would be feasible, but a survey of people's attitudes to a judge's decision before and after reading the full judgment would be interesting.

I am not, of course, suggesting that people need to agree with the result or the reasoning, but at least the opportunity for dispelling misconceptions about it will have been taken.

But I must move on to the final strand of what I want to say. It relates to the reform of the civil law, but what I have said already has a bearing on it. My enforced starting point is that if most people's perceptions of a judge are derived from their perceptions of what judges do in criminal cases, and the perception is that judges are either too soft or are out of touch, their perception of what judges do when handling civil cases will be similar. It is a perception perhaps also fed by the odd headline where the Human Rights Act appears to give to someone a right that the vast majority of people feel should be denied or is granted compensation where many feel it should be denied. That modern-day perception was summed up with his characteristic sense of humour when Sir Mark Potter said this in the contribution to which I have already referred:

> "Any judge who started life in the law … in the early 1960s … will have seen the stereotype of the High Court judge transformed in certain organs of the press from that of a port-soaked reactionary, still secretly resentful of the abolition of the birch and hostile to liberal influences of any kind, to that of an unashamedly progressive member of the chattering classes, spiritually if not actually resident in Islington or Hampstead, out of touch with 'ordinary people', and diligently engaged in frustrating the intentions of Parliament with politically correct notions of Human Rights."

Whilst human rights issues will arise usually in administrative law cases – in other words, cases involving a challenge to the legitimacy of the decisions of public bodies – they can arise in other situations too. But my purpose is not to examine that. It is to renew a focus on what I perceive to be a beckoning black hole in the civil law that needs to be avoided.

Let me introduce the topic, not with a headline, but a quotation:

> "Each generation has its duty to keep the law in conformity with the needs of the time."

The words were spoken by none other than Lord Denning about four years before he gave his lecture in this room. He was speaking in the House of Lords in 1965 in support of the Law Commissions Bill on its second reading. I acknowledge my indebtedness to Sir James Munby, until a few months ago Chairman of the Law Commission, as the source of that quotation. He reminded his audience of those words at the annual Denning lecture of the Bar Association for Commerce Finance and Industry in November last year[7]. I will return to that lecture shortly, but back to Lord Denning for a moment.

It was as a courageous and innovative judge that I would wish to remember him for my present purposes; not as in those days towards the end of his judicial career and afterwards when he did say a few things that, regrettably, left him exposed to the application of the label "out of touch". He was, as those of us who were students at the time will remember, the foremost exponent of moulding the law to achieve justice as he saw it. There are, of course, well-recognised constitutional problems to such an approach by an individual judge, although it is equally well-recognised that the common law at any rate can develop on a case-by-case

[7] http://www.bacfi.org/files/Denning%20Lecture%202011.pdf.

basis of incremental development. His attentions focused on the law of equity too. From time to time he took gigantic leaps that defied the description "incremental development" and in doing so found himself at odds with his brethren, particularly those in the House of Lords.

The essential point is that he was impatient with law that he saw as out of date and which did not meet modern needs.

This attitude continued after the Law Commission was founded following the passing of the Law Commissions Act in 1965. Let me cite to you what he said in a judgment in the Court of Appeal in *Liverpool City Council v Irwin*[8]. The issue was whether a local authority owed a duty to the tenants of a council-owned block of flats to keep the common parts (including lifts, staircases, rubbish chutes and passages) in good repair pursuant to an implied term in the tenancy agreement, there being no express term to that effect. Lord Denning (in a minority in the Court of Appeal) said 'yes'. He said this:

> "I am confirmed in this view by the fact that the Law Commission … recommends that some such term should be implied by statute …. But I do not think we need wait for a statute. We are well able to imply it now in the same way as judges have implied terms for centuries. Some people seem to think that now that there is a Law Commission the judges should leave it to them to put right any defect and to make any new development. The judges must no longer play a constructive role. They must be automatons applying the existing rules. Just think what this means. The law must stand still until the Law Commission have reported and Parliament passed a statute on it: and, meanwhile, every litigant must have his case decided by the dead hand of the past. I decline to reduce the judges to such a sterile role. They should develop the law, case by case, as they have done in the past: so that the litigants before them can have their differences decided by the law as it should be and is, and not by the law of the past. So I hold here that there is clearly to be implied for the common parts some such term as the Law Commission recommend. The landlord must take reasonable care to keep the lifts, staircase, etc. safe and fit for use by the tenants and their families and visitors."

Wonderful stuff, is it not? But not quite the traditional approach to law reform. In fact the House of Lords agreed with the result, but not the route by which Lord Denning got there. In the decorous and deferential language of the time, Lord Wilberforce, another great judge of his era, said this in the House of Lords[9]:

> "My Lords, it will be seen that I have reached exactly the same conclusion as that of Lord Denning M.R., with most of whose thinking I respectfully agree. I must only differ from the passage in which, more adventurously, he suggests that the courts have power to introduce into contracts any terms they think reasonable or to anticipate legislative recommendations of the Law Commission. A just result can be reached, if I am right, by a less dangerous route."

Lord Denning's judgment was given in July 1975 some 37 years ago – in the midst, incidentally, of an Ashes series between England and Australia when Dennis Lillee and Jeff Thompson, their fearsome opening bowlers, were at their most deadly. The Internet was

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8 [1976] QB 319.

9 [1977] AC 239, 257.

unknown. It was 13 years before the first fax machine was acquired by my former Chambers. For the students listening to this lecture, these were prehistoric times. But I am about to suggest that pre-history in my area of interest this evening has an unfortunate knack of repeating itself.

Another Denning lecture given in March 1993, when some of the students present tonight were either not born or were at least very young, was delivered by another very great judge, Lord Bingham, at that stage of his illustrious career the Master of the Rolls. The theme of his lecture was that it was time to incorporate the European Convention on Human Rights into English law, but let me quote one passage in part of his argument in support of this proposition which reflected the then state of the progress of law reform:

> "… I would refer to the thirty eight reports of the Law Commission which currently await implementation. These reports, produced at quite considerable public expense, represent clear, well-argued and compelling proposals for improving the law; only two of the thirty eight have been specifically rejected by the government of the day; they gather dust not because their value is doubted but because there is inadequate parliamentary time to enact them."

I do not know precisely which reports of the Law Commission were awaiting implementation at that time, but I am prepared to suggest that by far the largest proportion impacted on aspects of the civil law.

The theme that Law Commission reports once prepared have simply gathered dust on a shelf has been one to which successive Chairs of the Law Commission have referred repeatedly over the years, both before and after Lord Bingham's observations.

The lack of Parliamentary time has been a continuing problem which has indeed been recognised by the legislature and the executive. During their periods as Chair of the Law Commission Sir Roger Toulson and Sir Terence Etherton paved the way for a number of changes designed to lead to a greater strike-rate in the implementation of Law Commission proposals. One new feature of the law reform landscape is a new House of Lords procedure for scrutinising Law Commission Bills, adopted by the House of Lords as a permanent feature in October 2010, which permits the Second Reading of technical and non-controversial Law Commission Bills to be taken off the floor of the House. In his lecture last year Sir James said, I am sure correctly, that this was an "important step forward in ensuring the implementation of Law Commission recommendations." It does, of course, have to be observed that not all sensible and much-needed proposals for law reform can be described as "technical and non-controversial" so they cannot benefit from this mechanism.

Whilst Sir James expressed the view that the implementation rate had been good, he said that it could become better and uttered words that resonate with other words I have quoted;

> "Too many pieces of the Commission's work that would, if implemented, clarify and simplify many areas of law and make justice more accessible and more fair, lie waiting for attention across Whitehall."

Although the focus of what I have just been saying has been upon the non-implementation of Law Commission reports, I think I should say clearly that I am not attempting to take up cudgels on the Commission's behalf. My colleague, Sir David Lloyd Jones, has recently

taken over the reins from Sir James and I have no doubt that all who support the cause of principled and coherent law reform will wish him well in his tenure as Chair.

The Law Department at Kings has the good fortune of having on its current academic staff a former Law Commissioner in the guise of Professor Jeremy Horder, the Edmund-Davies Professor of criminal law. (In parenthesis I should say that I am sure Lord Edmund-Davies, an alumnus of this college and its only alumnus to be appointed to sit as a judge in the House of Lords, would be delighted to know that someone deeply-rooted in the cause of law reform holds a chair in his name. Lord Edmund-Davies, when he was a High Court Judge, chaired the Law Reform Committee, an *ad hoc* predecessor of the Law Commission, and with his colleagues was responsible for the preparation of an important report in 1962 into one aspect of the law of limitation that, in due course, led to reforms in that area.) [Professor Horder] will be able to tell you far more about the relationship between the Law Commission and governmental and Parliamentary processes than I could. He, I think, can claim some successes along the way, but history suggests that that is not the norm. His successes have inevitably been in the field of criminal law. I think it would be fair to say that current successes in civil law have been rather few and far between.

My purpose in highlighting the frustration felt by successive Chairs of the Commission, and doubtless by the Commissioners themselves, is simply to draw attention to the fact that this highly respected institution, set up to further the important task of keeping the law up-to-date, has had limited success in doing so over the whole of its distinguished history. What is the conclusion to be drawn from this lack of success?

It seems fairly clear, does it not, that however important and widely-acknowledged is the need for keeping the law up-to-date, there is no sufficient or sustained momentum at legislative level to achieve it despite some of the initiatives of the last few years? I do not think it is for me to proffer any suggestions as to why this might be so, but simply to note the position as it seems to be.

A Law Commission report represents one mechanism whereby the need for reform in the law, whether in the civil or the criminal law, is highlighted. Inevitably, there is, in effect, a competition process in order for an area of the law to be considered by the Commission: resources do not permit every proposal for law reform to be considered. Sir James Munby touched on this in the lecture to which I have referred. This means that there may be, and certainly are, areas that are worthy of consideration that do not even get as far as review by the Commission.

We have moved away from the days of the reforming zeal of Lord Denning. There is, however, as I have already said, a well-recognised path whereby the common law gradually moves forward by incremental steps and this is something our judicial system and every system like it recognises as legitimate. That development is essentially judge-led and proceeds on a case-by-case basis. It was the subject of the lecture given by Lord Walker in Australia in September entitled "Developing the common law: how far is too far?"[10] and as recently as Tuesday of last week by the present Master of the Rolls, Lord Dyson, in the Annual Lecture of the Administrative Law Bar Association entitled "Where the common law

[10] http://www.victorialawfoundation.org.au/component/content/article/14-about-us/foundation-events-and-programs/136-law-oration-2012.

fears to tread"[11]. As Lord Dyson said, "… over the centuries, the law has developed incrementally in response to changing social and economic conditions and changing moral values". Lord Walker articulated the rationale for the impermissibility of major leaps forward in this way:

> "Judges are not legislators, and even the highest appeal court must hesitate before laying down the law in a way that goes far beyond the facts of the particular case before it. Second, there is the Court's lack of access to, and lack of capacity to process the complex economic, social and scientific data by which much modern legislation is influenced. Third, there is the declaratory (or to be realistic, retrospective) character of judge-made changes in the law. A retrospective change in the law may cause hardship, possibly amounting to injustice, to large numbers of people who are not concerned in the litigation…. The fourth objection is the most important of all, and to some extent it underpins all the others. In a representative democracy changes in the law are in general a matter for Parliament, often acting on the advice of an expert law reform commission, and not for unelected judges."

This particular feature of the legal system, which can contribute modestly to the evolution of the law, can itself operate effectively only if cases raising the issues that need contemporary review come before the courts - and, I would add, in sufficient numbers for the courts to sense the need for a review in the particular area in question.

The civil justice reforms of the late 1990s, led by Lord Woolf, had as one of their objectives keeping out of the courts cases that did not need to be there. 'Litigation should be seen as a last resort' was the message conveyed by the reforms. A great deal of emphasis was placed on the need for settlement of litigation and, where appropriate, for the intervention of Alternative Dispute Resolution, particularly in the form of mediation. I do not think that anyone would quarrel with the good sense and wisdom of those objectives.

Those reforms contributed to the downturn in the amount of contested litigation over the last 10-12 years, although the gradual reduction in the availability of Legal Aid has itself made a significant impact. That reduced availability will take another step in April next year and, in consequence of the reforms to the way in which litigation may be funded henceforth, the market-place will play an even greater role in determining which civil cases are fought and which are not.

I say nothing about the policy that lies behind this: that is a 'no-go' area for a judge. But it does not require much imagination to appreciate that civil cases that might be described as on the borderline of arguability will struggle to qualify for funding under the new arrangements. It is, of course, entirely right that the courts should not be overwhelmed with cases of doubtful merit. However, there are cases, which are easier to identify than to define, where success could depend on a subtle change in well-established case law. Cases of this kind could foster the incremental development of the civil law. But what prospects of funding do such cases have in the litigation market-place? It would be idle to pretend, would it not, that the prospects would ordinarily be good? Lawyers are unlikely to take on too many cases the outcome of which is speculative.

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[11] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-where-common-law-fears-to-tread-06112012.pdf.

If that is right, the opportunity for the courts to move well established law forward a step or two to meet modern conditions, having had the benefit of sustained argument on both sides from good advocates, is rendered less possible.

There is another dimension to this scenario that needs to be mentioned. I can introduce this by reference to yet another headline. Whilst scanning The Times on Saturday for a headline leading me to another fascinating insight into some far-flung part of the universe, I stumbled across something a little closer to home. "Rise in DIY lawyers clogs up the system." That was the headline to Frances Gibb's article reflecting on the other effect of the reductions in legal aid, namely, the predicted increase in the number of self represented litigants in the civil courts in a period not far ahead[12].

Her article refers to pressures on the court system and the belief that judges will have to do the work of the lawyers in order to help self represented litigants manage their cases. That topic is another large one and not for me today. However, the dimension I invite you to consider is this: the law, and the need for it to move forward, is unaffected by whether the person arguing for it or against it is a self represented litigant. However, the issue of a potential move forward in the common law or equity is going to arise at times in the future and it may arise in a case where one or other of the parties is or, possibly, both the parties are unrepresented. The judges, of course, have no control over that.

I simply pose this question: "how easy it is going to be for the judiciary to consider a potential move forward in the law if the argument in support or against is advanced by a self represented litigant?" I do not, of course, suggest it would be impossible for a court to do so and it may be necessary to take a bold step, but the cautious manner in which such a task is ordinarily undertaken now, usually only after the court has had the benefit of good and informed argument on both sides, suggests, does it not, that even greater caution may be exercised in that situation?

If that analysis is correct (and, of course, I may be proved wrong) and there is a parallel inertia in moving forward legislative reform of the civil law, where does that leave the law?

I do not think I could say, as Lord Denning would have said, that litigants will have their cases decided "by the dead hand of the past"; but there will surely come a time when in a particular area of the civil law everyone recognises that the law is out of date, but no one, least of all the judges, can do anything about it. They must abide by the judicial oath and administer the law of the land as it is even if it is, dare I use the expression, out of touch with the needs of society, whether for individuals or groups of individuals within that society or the commercial and industrial fabric upon which much of everyday life is based. If that situation should arise, Lord Denning, were he still here, would be able to say with justification that this generation has failed in its duty to keep the law in conformity with the needs of the time.

I tried to choose a title for this lecture that captured the imagination – it was, I suppose, my amateurish attempt at headline writing. To suggest that the reform of the civil law is already confined to a black hole is plainly a step too far. However, unless one confronts the question of how the civil law can develop in a coherent and principled way to meet modern conditions in society, complacency can take over and, before we know it, the proverbial black hole has

[12] The Times, 10 November 2012, page 22.

been created and there is no escape from it - or too rapid an escape is fashioned for an individual area of the law and the legislation enacted is less well-considered than it should be.

As I said when I began, I do not pretend to have a solution to the problem that I have highlighted. It is not a new problem and I am not alone in having highlighted it, but that does not make it any less of an issue that needs to be addressed. Is it important? Yes, it is. Merely because an eye-catching headline foreshadowing the problem cannot be formulated does not mean that this problem does not exist. General respect for the law binds society into a civilised unit. Judges may for ever have to accept the criticisms that others make of their decisions, but they cannot be criticised for applying laws that are out of touch with modern needs if those laws have not been permitted to catch up.

I have spoken of my interest, very ill-informed as I am sure it is, in matters universal and matters sub-atomic. Since this is an alumni event it would, I think, be wrong to conclude without mentioning an alumnus of Kings whose name is associated with both ends of that spectrum of interest, Professor Peter Higgs. It was he who, at about the same time as a few others, predicted the existence of a sub-atomic particle, generally known as the Higgs Boson or, as some would have it, the "God particle". His prediction in its final form, contained in a paper sent in August 1964 to the physics journal that published it in October of that year, was 14 years after his first in physics from King's and 10 years after his PhD, also from this college. He must have been working on this issue during the 1964 visit of the Australian cricket team for another Ashes series and was obviously not distracted by it.

I cannot pretend to understand the process that led to his prediction, a prediction long questioned by some, but the correctness of which was confirmed to the extent of 99.999% in July this year. All I know, relying upon press reports, is that it explains why all the sub-atomic particles with which we are more familiar (electrons, protons, neutrons and others) acquire mass, bind together and form all features of the universe. Without it nothing would exist other than individual sub-atomic particles. So it's pretty important.

So too is keeping the law up-to-date.