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ALAN WATSON

A House of Lords' Judgment, and Other Tales of the Absurd

It is a quirk of many societies that some professions may be found in them whose members cannot possibly, in the state of knowledge of the time, adequately fulfill the tasks entrusted to them, and yet their professional expertise is generally not questioned. For instance, in ancient Rome, there existed professional torturers of slaves about to give evidence in court, whether in civil or criminal cases. There were serious restrictions on slaves giving evidence but whenever they were competent witnesses they always had to be tortured first. There are few suggestions that this was not a satisfactory way to get at the truth, though the jurist Ulpian in the late 2nd or early 3rd century A.D. is recorded in the *Digest of Justinian*, 48.18.1.23, thus:

It is declared in imperial rescripts that not always, but also not never, should trust be given to torture. For it is a delicate and dangerous business and one that may be deceptive. For many people by reason of endurance or toughness are so contemptuous of torture that the truth can in no way be extracted from them: others have so little endurance that they will tell any lies rather than suffer torture; thus it happens that they confess in various ways so that they incriminate not only themselves but also others.

No doubt a torturer whose profession was impugned would retort that he had his Masters' in Torture, had served a long apprenticeship, had great experience, and knew exactly when sufficient torture had been applied in the individual case to elicit the truth.

One profession, though, the profession of judging, is unique in that it is and has been honored in many countries though its practitioners are unable to give the society what it expects from them. The populace expects from judges the correct legal decision as a result of their applying the law to the facts. How do good judges arrive at their decision? It is easier to say what makes a bad judge; his reasoning is lacking in logic, or he fails to know or to understand relevant law. But one cannot say that a good judge, at least in most types of appellate civil cases, is one who arrives at the correct deci-

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sion through the use of logic and the application of the legal rules to established facts.¹ Provided that the attorneys for the parties have done their work adequately and prepared their case there is no answer that is necessarily correct. The case can go either way. The answer that is correct is the one that the judges come to, but it is correct only after, and only because, they come to it. As Justice Jackson put it: "There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."² So, possibly, all judges who are not obviously bad judges ought to be counted good judges? Yet insiders all believe that there are, in addition to bad judges, mediocre and good judges, and that among good judges some are better than others. What are the criteria for insiders? The answer I would suggest is that for insiders a good judge is one who reaches the law to be applied to the facts by a mental process that is thought to be the most appropriate by his brother judges and by well-placed attorneys and legal scholars. What the appropriate mental process is will be determined by the legal culture; and, like other aspects of culture, will scarcely be questioned by those participating in it. The outsider sees things differently. He may be very impressed by the 'foreign' culture but some aspects strike him as incongruous.

In this paper I want to look at four approaches to deciding a case in different societies—contemporary England, uncodified civil or 'mixed' law systems (with an example from 17th century Scotland and another from early 20th century South Africa), 19th century France after codification, 15th century Germany with a glance at 13th and 14th century Spain—where the attempt is made each time to reach the correct decision by applying the mental process thought most appropriate. None of the approaches examined here is result-oriented, and to outsiders, especially to lawyers brought up in a different legal culture, the mental process seems artificial, even absurd, but not to those involved in the game. The approach in each case is not atypical for the particular legal culture, but I have tried to find striking examples.

1. "Most types of appellate civil cases" rather than all because it may be that one party believes so passionately in the morality of his position that, despite the clear meaning of the law, he insists on going to court to make a point or in the faint hope of winning the verdict. Such was the situation on the rendition of fugitive slaves after the U.S. Fugitive Slave Act of 1850: see e.g., Cover, *Justice Accused* 119 ff. (1975). Such cases, where the judge is caught between the demands of his role and the voice of conscience (Cover, *id.* at 6ff.), where he may be asked to go *beyond* the law in the direction of freedom, will not be discussed here, though they raise similar issues.

2. *Brown v. Allen*, 73 S. Ct. 397, 427 (1953).

I

Anyone interested in the vagaries of legal evolution, whether as legal historian or law reformer, must be fascinated by the English doctrine of precedent especially since the Practice Statement of the House of Lords in 1966.³ From 1898 (according to the usual calculation but actually earlier)⁴ the Law Lords regarded themselves as bound by their own previous decisions, but in the just mentioned Practice Statement they announced that, while treating their previous decisions as normally binding, they would depart from a previous decision when it appeared right to do so.⁵

One very recent House of Lords case, *President of India v. La Pintada Compañía Navegación S.A.* [1984] 3 W.L.R. 10, is instructive for its approach. The legal issue involved was whether, when no interest for delay in performance was specified in a contract, and payment was delayed but made before proceedings were begun, the other contracting party could claim interest for non-payment among his damages. This issue is the 'case 1' referred to by the judges.

Lord Fraser of Tullybelton, who delivered his opinion first, was brief:

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brandon of Oakbrook. His reasoning seems to me irresistible and I feel myself driven, though with reluctance, to agree that this appeal must be allowed, with the consequence that the arbitrator's alternative award will be upheld.⁶

Now, as I have said, in most types of civil cases at the appellate level, if counsel on both sides have done their work, it should not be that one decision on the law is forced upon the judges.⁷ Otherwise the case would not have got so far. All the more is this true where, as with the House of Lords, the court is not bound by its own or any other precedent. If the decision is not inevitable then reasoning to it cannot be irresistible. Lord Fraser can only mean that by the type of logic or arguments that judges find persuasive, whatever these may be, Lord Brandon's reasoning to the conclusion is convincing. Nonetheless, Lord Fraser expresses regret at the decision he comes

3. Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234.

4. *London Street Tramways Co. v. London County Council* [1898] A.C. 375; and see e.g. Stevens, *Law and Politics* 88 ff. (1978).

5. For their practice see above all Paterson, *The Law Lords*, especially at 162 ff. (1982).

6. At 13.

7. This, of course, was one of the insights of the American Legal Realists. To say that a well-fought appellate civil case can always be decided either way is not to deny the existence of legal rules. The rules decide many issues before they come to trial, but appellate cases are either about the boundary lines of legal rules or as here about changing the rules when the court has power to do so.

to. He accepts, that is to say, that there are principles which determine what is the law even when injustice is the result. Though he does not say so expressly, he accepts that lawness is to be fixed by these principles even when he is technically free to decide that the law is different. In other words, higher than the notion that judges decide what the law is, when they are free to do so, stands the idea that this decision has to be reached by the application of some conception of lawness—of what constitutes law—even when injustice results. That is, that even those who can make law accept the standards of law as being different from their notions of justice.

Lord Scarman's opinion reads:

My Lords, I agree with the speech to be delivered by my noble and learned friend, Lord Brandon of Oakbrook, a draft of which I have had the opportunity of studying. But I wish to associate myself with the comments made by my noble and learned friend, Lord Roskill. I also reach with regret and reluctance the conclusion that the appeal must be allowed. The sooner there is legislation along the lines proposed by the Law Commission (or some other solution achieving the same end) the better.⁸

This takes us further than Lord Fraser. Again Lord Scarman gives the unjust decision though by exercising his judicial right of making law he need not have done so. Yet he expresses the desire that the law be changed, but by legislation. There is a hierarchy of law makers, and the legislature has greater powers of law making than have judges. Where the law ought to be changed, judges may feel that it is appropriate for the legislature to make the change, not for themselves even when they can do so. This remains their position (or at least of Lord Scarman in this case) even when first there is no certainty of legislative intervention, and secondly when legislation, if any, will not rectify the present injustice. In furtherance of some notion of appropriateness in law making, judges are prepared to commit an injustice: not an injustice by some theoretical notion of justice, but by the judges' own personal ideas of justice and injustice.

Lord Roskill also found Lord Brandon's reasoning compelling. Then he went on:

But I freely confess that I have arrived at this conclusion though without doubt nevertheless with both regret and reluctance. It has long been recognised that *London, Chatham and Dover Railway Co. v. The South Eastern Railway Co.* [1893] A.C. 429 left creditors with a legitimate sense of grievance and an obvious injustice without remedy. I think

8. At 13.

the House in 1893 recognised those consequences of the decision, but then felt compelled for historical reasons to leave that injustice uncorrected. Since 1893 Parliament has intervened twice, first to remedy what my noble and learned friend has called case 3 and secondly to remedy case 2. On the latter occasion Parliament, with the Law Commission's report before it, had the opportunity also to remedy the injustice to creditors to which case 1 (a debt paid late but before proceedings for its recovery have been begun) can so often give rise. But Parliament neither accepted the Law Commission's proffered solution to case 1 nor provided any substitute solution of its own. It must, I think, therefore be accepted that this inaction was deliberate. If so it cannot be right for this House in its judicial capacity by departing from the *London, Chatham and Dover Railway* case to proffer a remedy which if applicable at all must apply to all three cases and not only to case 1 with the consequence that as regards cases 2 and 3 there would be concurrent and inconsistent remedies, one statutory and discretionary, the other at common law and as of right since once a breach of contract and damage caused by that breach are proved a court has no discretion but must award the damages claimed in full.⁹

The main authority set out for the decision is the case of 1893, 91 years before, and Lord Roskill felt—rightly as we shall see—that the House of Lords at that time also thought their decision unjust.

Lord Roskill gives more argument for his decision. He accepts Lord Brandon's view that the *London, Chatham and Dover*, decision covered three separate 'cases'. 'Case 3' was remedied first by Parliament. Then, with a Law Commission report in front of them which covered 'cases 1 and 2' they remedied '2' but did nothing about '1'. They neither accepted the Law Commission's recommendations nor proffered their own solution. From this Lord Roskill draws the conclusion that Parliament's inactivity was deliberate (and hence presumably that the House of Lords would be acting against the will of Parliament if they changed the law).¹⁰ This type of reasoning which is akin to an argument from silence is always dangerous. It becomes much more fragile when we take into account that British

9. At 13.

10. See also the note by P.M.N. in *Lloyd's Maritime & Commercial L.Q.* 305 ff. (1984). On discovering the intention of the legislature, see, e.g., Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," now in *Benchmarks* 196 ff., especially at 200, 207, 219 ff. (1967).

parliamentary drafting is notoriously bad,¹¹ that the British House of Commons is famous for its lack of interest in legislating on matters with no party political impact,¹² and that many are the factors extraneous to the deliberate intention of the House of Commons that prevent the passing of legislation or the passing of complete and well-rounded legislation.¹³ Moreover, Lord Roskill's words "Parliament, with the Law Commission's report before it" sound a trifle exaggerated. Rather, the Law Commission had submitted a report to Parliament. But that is not to say that Members of Parliament were conscious of it, had read it and understood it, or had it in contemplation. The reasoning—from a failure to act, mind you—becomes downright absurd when we consider that British courts refuse to consider legislative history. There is arguably a case for seeking for the (fictitious) intention of the legislature only in the wording of a statute,¹⁴ but there can be none for interpreting a statute by seeking the intention of the legislature by the absence of clauses on a rather different issue.

Lord Roskill's argument at the end of that paragraph derives from that of Lord Brandon and is fundamental, and it is appropriate now to quote from Lord Brandon:

There are three cases in which the absence of any common law remedy for damage or loss caused by the late payment of a debt may arise, cases which I shall in what follows describe for convenience as case 1, case 2 and case 3. Case 1 is where a debt is paid late, before any proceedings for its recovery have been begun. Case 2 is where a debt is paid late, after proceedings for its recovery have been begun, but before they have been concluded. Case 3 is where a debt remains unpaid until, as a result of proceedings for its recovery being brought and prosecuted to a conclusion, a money judgment is given in which the original debt becomes merged.¹⁵

Now it does seem to me that Lord Roskill is correct. A remedy given in 'case 1' ought also to be given in 'cases 2 and 3'. It would be wrong for there to be a greater right to interest in 'case 1' where no action was brought before payment than in 'cases 2 and 3' where the

11. See e.g., the materials and discussion in Watson, *Sources of Law, Legal Change, and Ambiguity* 78 ff. (1984).

12. See, e.g., the remarks of various politicians during the passage of the Land Registration (Scotland) Act 1979, that are quoted in 24 *Journal of the Law Society of Scotland* 235 ff. (1979); Lord Hailsham of Marylebone, "Obstacles to Law Reform," 34 *Current Legal Problems* 279 ff., especially at 286 ff. (1981).

13. See e.g. Watson, *supra* n. 11 at 80 ff.; *Society and Legal Change* 61 ff. (1977).

14. That is, in fact, to interpret a statute only in terms of the words used.

15. At 23. On the question of statutory and common law remedies existing together one might refer to *Illinois v. City of Milwaukee*, 599 F.2d 151 (1979).

debtor was being or had been sued. But is there really an argument for saying that the creditor's claim should be greater in 'cases 2 and 3' than in 'case 1'? Is there any justification for holding that a creditor who has started an action is entitled to interest on the debt, but one who has not is not so entitled? Commonsense and justice—which may have little to do with law—would suggest not.

But much may depend on the nature of this legal right in 'cases 2 and 3'. The Law Reform (Miscellaneous Provisions) Act of 1934, section 3(1) covers 'case 3' and provides

In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages

The court may, "if it think fit," give interest on the debt where there is a judgment. Schedule 1 of the Administration of Justice Act 1982 also covers 'case 2':

Subject to rules of court, in proceedings (wherever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given or payment is made before judgment.

The court "may" award interest. Thus, in 'cases 2 and 3' the court has discretion to award interest.

But what is the nature of this discretion? It is surely not to be exercised arbitrarily, but—like the right of the House of Lords not to follow its own decision—to be exercised according to sound standards of judging.¹⁶ What are the appropriate principles to be applied? I think we can state that interest is not to be awarded as a penalty: first because one would expect that if an award could include a penalty that would be expressly stated in the legislation, secondly because an appropriate penalty would not always correspond to an interest sum, and thirdly because the primary purpose of interest is compensation or recompense. Fourthly (and above all) because both statutes expressly declare that their provisions do not

16. I am reminded of Art.1 of the Swiss Civil Code:

The law regulates all matters to which the letter or the spirit of any of its provisions relates.

In the absence of an applicable legal provision, the judge pronounces in accordance with customary law and, in the absence of a custom, according to the rules that he would establish if he had to act as legislator.

He is guided by the solutions consecrated by juristic opinion and case law.

apply if interest had been fixed by agreement between the parties or otherwise, a rule that is inappropriate if the judges were in fact being given power to award a penalty.

Now if interest may be awarded but neither arbitrarily nor as penalty, the award must be to take account of loss suffered by the plaintiff: the interest is to be awarded as damages. It is relevant that under both statutes the discretion of the court, "if it thinks fit", extends not only to the award of interest, but also to the rate of interest and the period of time for which it runs.

Let us now return to the question whether there is an argument for saying that the creditor's claim should be greater in 'cases 2 and 3' than in 'case 1'. If the foregoing analysis is correct, and courts should award interest in 'cases 2 and 3' where part of the plaintiff's loss is precisely loss of interest that he would have obtained if he had received payment of the debt, then they ought also to award interest in 'case 1'. And, on principle, apart even from 'cases 2 and 3' interest ought to be awarded in 'case 1'. As we have seen Lord Roskill arguing, at common law: "Once a breach of contract and damage caused by that breach are proved a court has no discretion but must award the damages claimed in full." On that sound principle, no one would now doubt—whatever may have been the situation in 1893 and earlier—that in the usual situation a creditor on receipt of payment will invest it, at least in a bank. Where he is likely not to have done so, and hence not to have sustained further loss, the court should not grant interest as damages.

Thus, on general principle, in the absence of the 1893 decision—which could have been set aside—and apart from 'cases 2 and 3', the court could and should award interest as damages in 'case 1'. But Lord Roskill sees a problem: all three 'cases' would be covered by the common law and would give a remedy as of right, but 'cases 2 and 3' are also covered by statute that gives only a discretionary remedy. The inconsistency is more technical and aesthetic than substantive. By common law, interest would be given as of right, but only where loss is presumed to have followed from non-payment or late payment of the debt; by statute, the court 'if it thinks fit'—and the discretion must not be taken from the judges—is to include interest in the award, but it must not act arbitrarily or make the award as a penalty, hence only on account of loss, actual or presumed. The remedies have different bases but they ought not to lead to inconsistent results.

Lord Roskill concluded:

My Lords, it would be idle to affect ignorance of the fact that the present state of the law in relation to case 1 places the small creditor at grave disadvantage vis à vis his sub-

stantial and influential debtor. The former may fear to offend the latter by instituting legal proceedings either swiftly or indeed at all and it is notorious that some substantial and influential debtors are not slow to take advantage of this tactical strength, especially in times of financial stringency. It has taken two pieces of legislation, one some 50 years after 1893 and the other almost another half-century later, to remedy the injustice in cases 2 and 3. I venture to hope that whatever solution be ultimately adopted in case 1, whether the Law Commission's somewhat complicated solution or something simpler, that solution will be found promptly and the remaining injustice in this branch of the law finally removed.¹⁷

The first part of that paragraph shows clearly the need to give the creditor in 'case 1' as much protection as creditors in 'cases 2 and 3'. The unlikelihood of legislative activity to remedy 'case 1' is brought out by the length of time it took to remedy 'cases 2 and 3'. Neither Lord Roskill nor any of his brother judges are likely to live to see legislative reform of 'case 1', a reform which they themselves refused to make.

Lord Brandon of Overbrook gave three main reasons for his decision:

My first main reason is that the greater part of the injustice to creditors which resulted from the *London, Chatham and Dover Railway* case has now been removed, to a large extent by legislative intervention, and to a lesser extent by judicial qualification of the scope of the decision itself. My second main reason is that, when Parliament has given effect by legislation to some recommendations of the Law Commission in a particular field, but has taken what appears to be a policy decision not to give effect to a further such recommendation, any decision of your Lordships' House which would have the result of giving effect, by another route, to the very recommendation which Parliament appears to have taken that policy decision to reject, could well be regarded as an unjustifiable usurpation by your Lordships' House of the functions which belong properly to Parliament, rather than as a judicial exercise in departing from an earlier decision on the ground that it has become obsolete and could still, in a limited class of cases, continue to cause some degree of injustice. . . .

My third reason is this. Suppose that your Lordships

17. At 14.

were to depart from the *London, Chatham and Dover Railway* case [1893] A.C. 429 in such a way as to give all creditors, whose debts either remained unpaid or were paid late, whether before or after action brought, a cause of action for interest by way of general damages for breach of contract, what would be the result? The result, as it seems to me, would be that such cause of action would be available to a creditor not only in case 1, in respect of which he still has no remedy except where he can prove special damages, but also in cases 2 and 3, in respect of both of which, since the coming into force of the Act of 1982, he already has a statutory remedy. What is more, the new cause of action so applicable to cases 2 and 3 would constitute a remedy as of right for a creditor, whereas the statutory remedy would remain discretionary only. There would, accordingly exist, in relation to cases 2 and 3, two parallel remedies, one as of right and the other discretionary; and the likelihood would be that creditors would, because of this difference, come to rely mainly on the former, rather than the latter, right. It is, in my view, plainly to be inferred, from the form of the relevant provisions in the Acts of 1934 and 1982, that Parliament has consistently regarded the award of interest on debts as a remedy to which creditors should not be entitled as of right, but only as a matter of discretion. That being the manifest policy of the legislature, I do not consider that your Lordships should create, in relation to cases 2 and 3, a rival system of remedies which, because they would be remedies as of right, would be inconsistent with that manifest policy.¹⁸

The first main reason is quite unconvincing and has no force. If a legal rule works unjustly in three situations and is corrected in two that is scarcely an argument for leaving it uncorrected in the remaining situation. For those who find themselves in that unfortunate situation it is scarcely consolation that in related situations, but not in theirs, injustice will not be done.

The third reason we have already seen, and it also weighed with Lord Bridge of Harwich. Even as set out so expertly by Lord Brandon it seems a trifle forced. The common law rule need not be that in all actions on breach of contract for non-payment of the debt interest on the debt would necessarily be included in the award of damages, but that, where part of the plaintiff's loss was interest on the unpaid debt, the award of damages would include an amount by way of interest.

18. At 30.

To estimate the value of the second main reason we have to consider the 1982 Act. The beginning of the Act sets out its contents.

An Act to make further provision with respect to the administration of justice and matters connected therewith; to amend the law relating to actions for damages for personal injuries, including injuries resulting in death, and to abolish certain actions for loss of services; to amend the law relating to wills; to make further provision with respect to funds in court, statutory deposits and schemes for the common investment of such funds and deposits and certain other funds; to amend the law relating to deductions by employers under attachment of earnings orders; to make further provision with regard to penalties that may be awarded by the Solicitors' Disciplinary Tribunal under section 47 of the Solicitors Act 1974; to make further provision for the appointment of justices of the peace in England and Wales and in relation to temporary vacancies in the membership of the Law Commission; to enable the title register kept by the Chief Land Registrar to be kept otherwise than in documentary form; and to authorise the payment of travelling, subsistence and financial loss allowances for justices of the peace in Northern Ireland. [28th October 1982].

No mention of our topic! That is slipped in as Part III of the Act after a Part on 'Damages for Personal Injuries Etc.—Scotland' and before a Part on 'Wills'. Part III reads:

15.—(1) The section set out in Part I of Schedule 1 to this Act shall be inserted after section 35 of the Supreme Court Act 1981.

(2) The section set out in Part II of that Schedule shall be inserted after section 97 of the County Courts Acts 1959.

(3) The Crown Proceedings Act 1947 shall accordingly have effect subject to the amendment in Part III of that Schedule, being an amendment consequential on subsections (1) and (2) above.

(4) The provisions mentioned in subsection (5) below (which this section supersedes so far as they apply to the High Court and county courts) shall cease to have effect in relation to those courts.

(5) The provisions are—

(a) section 3 of the Law Reform (Miscellaneous Provisions) Act 1934; and

(b) in the Administration of Justice Act 1969—

(i) section 22; and

(ii) in section 34(3) the words from "and section 22" onwards.

(6) The section set out in Part IV of Schedule 1 to this Act shall be inserted after section 19 of the Arbitration Act 1950.

16. The following subsection shall be added after section 23(5) of the Matrimonial Causes Act 1973 (financial provision in orders in connection with divorce proceedings etc.)—

(6) Where the court—

(a) makes an order under this section for the payment of a lump sum; and

(b) directs—

(i) that payment of that sum or any part of it shall be deferred; or

(ii) that that sum or any part of it shall be paid by installments.

the court may order that the amount deferred or the installments shall carry interest at such rate as may be specified by the order from such date, not earlier than the date of the order, as may be so specified, until the date when payment of it is due.

The statute has much of the charm hinted at by many observers of United Kingdom legislation: several subjects are dealt with in one statute; the law on one subject is dealt with in several statutes; legislation is by reference to other legislation (thus increasing the obscurity); and there is a flight from the body of the statute to schedules.¹⁹ Above all, the statute does not indicate that Parliament had given full, all-rounded consideration to the issue of when interest should be awarded for the non-payment of a contractual debt. R.H.S. Crossman records that when he was Minister of Housing and Local Government he never bothered to read any of the Bills he got through the House of Commons, that he "never bothered to understand the actual clauses, nor did many Members, not even the spokesman for the Opposition."²⁰ Lord Brandon's argument would have us believe that the Members of Parliament not only bothered to read and understand s.15 of the Administration of Justice Act

19. See, e.g., Dale, *Legislative Drafting: A New Approach* 331 ff. (1977); the publications of the Statute Law Society entitled *Statute Law: The Key to Clarity* (1972) and *Renton and the Need for Reform* (1979); Zander, *The Law-Making Process* 9 ff. (1980).

20. *The Diaries of a Cabinet Minister* 628 (1975).

1982—and understanding of the section involves reading and understanding the schedule and the 6 statutes referred to in the section—but understood what was not covered by the section and had made the deliberate decision not to have the injustice of ‘case 1’ corrected—and this deliberate decision involves them knowing the previous law, including case law. I, for one, remain skeptical, and therefore find unpersuasive the second main reason for Lord Brandon’s decision. Parliament’s treatment of the Law Commission’s 1978 Report on Interest (Cmnd.7229) and s.15 of the 1982 Act do not encourage me to expect speedy reform by legislation. Incidentally, there is something almost inconsistent in Lords Scarman and Roskill accepting Lord Brandon’s reasoning as compelling (that Parliament did not want reform of ‘case 1’) and their expressed hope for legislative reform. It is worth recalling that if the Lords had reformed ‘case 1’ they would not have been flouting the expressed wish of Parliament, but altering the basis of a decision of their own of 1893.

A consideration of *President of India v. La Pintada Compañía Navegación S.A.* as an example of judicial approach to law making would be excessively incomplete without a glance at *London, Chatham and Dover Railway Co. v. The South Eastern Railway*, the case of 1893 from which their Lordships decided not to depart. In that case Lord Herschell, L.C. said:

I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action; . . . But I have come to the conclusion, upon a consideration of the authorities, agreeing with the Court below, that it is not possible to do so.

And Lord Watson:

I regret that I am unable to differ from your Lordships.

And Lord Shand:

I confess that I have looked with very great anxiety to the possibility under the law of England, as I have heard it argued, of giving interest in this case, for I cannot help thinking that a gross injustice is the result of withholding it. It appears to me that it is a defective state of the law.

Thus a judgment of 1893 which was regarded as unjust by the judges who issued it and which was treated as settling the law leads judges who are not bound by it, 91 years later, to issue a judgment which they repeatedly expressly condemn as unjust, when there was no intervening legislation on the point in issue. The 1893 judges, of course, were particularly concerned with ‘cases 2 and 3’.

The main purpose of this part of the paper is to discuss the case as a specimen of the House of Lords' approach to law making. I am, of course, not suggesting that the approach taken in the case is unique or even unusual—far from it. Nor is it relevant to inquire whether *sub specie aeternitatis* the decision ought to be regarded as unjust. Rather the aim is to indicate that law was treated as existing in its own right, that judgment was to be reached by a mental process appropriate to establishing lawness, not by the judges' own feelings of what was just or what the law ought to be. The decision was unjust in the judges' own express opinion. They could have reached what they believed was the just decision by reversing a decision of their own of almost a century earlier, and they had the power to do so. Instead, they felt they were bound to come to the unjust decision because of a particular process of legal reasoning. First, they held that the law was previously settled. Secondly, they accepted that there is a hierarchy of law makers: legislators rank above judges. Then they reasoned from that, that if legislators had not made a change in the law when they had the chance, then the judges ought not to make the change, since that would be to usurp the role of the legislators. And they deduced from the simple failure of the legislators to act a deliberate intention not to act. The argument is a legalistic one, and will be acceptable to many within the tradition on that ground. But the artificiality—and the legalistic nature—of the reasoning is revealed both by the accepted refusal to inquire into the state of intention of the legislators, and by the expressed hope that the legislators would change the law. (One cannot, I believe, escape from this conclusion by postulating that the judges were shedding 'crocodile tears', that in fact they had reached the conclusion most acceptable to them for social, economic or political reasons. First, if they had so thought, they need not have stressed that their judgment was unjust nor have expressed a hope for legislation thus calling attention to the shortcomings of the decision. Secondly, it is difficult, and for me impossible, to understand what political, economic or social bias would have motivated their decision. Thirdly, one of them, Lord Scarman, had been Chairman of the Law Commission, which recommended reform.)

It will usually only be outsiders, and especially outsider lawyers, who see the absurdity of legal reasoning in this fashion, who will ask how people can be paid and highly regarded for reasoning in this fashion. To the insider the form of law making is hallowed by tradition; he cannot explain why it has come to be as it is, and he will be surprised if he is even asked to explain it.

II

But the approach of the English judges should not be singled out. These judges are not alone in seeking a route to an answer that they can justify, not by the quality or suitability of the result, but by a notion of lawness; a route that is artificial and seems bizarre to outsiders, and that the judges need not take.

Elsewhere I have already described one striking case of this kind from 17th century Scotland.²¹ Striking though it is, it represents a common attitude for the times both in Scotland and in Continental Europe. A landowner had caused the pollution of a tributary of the river Tweed, which resulted in the deaths of Tweed salmon, thus causing loss to the Tweed commercial salmon fishers. The fishers brought an action. The main arguments on both sides of the case proceed on the restrictions on the use of rivers in Roman law, and especially on the issue whether a riparian owner had the right to pollute flowing water. The societal economic factor at the heart of the case, where Scottish conditions were different from Italy, namely the existence of a large commercial river fishery, was never discussed in order to determine the relevance of Roman law as a guide. Yet Roman law was not part of Scots law and need not have been resorted to. But it had become common practice to look to Roman law when there was a gap in Scots law. The arguments proceeded on a view of lawness which was established by the legal tradition, an approach that owed much to prevailing fashion and was definitely not mandatory. We do not know the outcome of the case. Nor does it matter. What concerns us is that the attorneys on both sides thought the case ought properly to be adjudged on the basis of Roman rules and that the appropriateness of these rules to Scottish conditions was not brought into issue.

Even today, in countries where the *Corpus Juris Civilis* and subsequent developments from it are still regarded as being in some sense part of the law of the land or at least highly persuasive, the same problem of tradition may arise; judges may be so imbued with their legal culture that they approach their decisionmaking through rules that were made to apply elsewhere and in very different circumstances, without always giving sufficient weight to the particulars of the case before them. The Republic of South Africa, which is now the main civil law country (though with an admixture of common law) where the law is uncodified presents, naturally enough, the most obvious examples. One, from before Independence, will suffice. By way of background it is enough to note that on the orthodox view Roman-Dutch law and in particular the law of the

21. *Haining's Case*, to be found in Sir George Mackenzie, *Works* Vol. 1 at 24 ff. (1716): discussed in Watson, *The Evolution of Law* 87 ff. (1985).

Province of Holland in the 17th century, is authoritative in South Africa even without the impress of South African case law.²² This Roman-Dutch law, includes the *Corpus Juris Civilis* so far as received in the Netherlands (or perhaps as far as not abrogated by subsequent statute or a contrary custom), the writings of the Dutch jurists and the decisions of the Dutch courts.

Mann v. Mann [1918] C.P.D. 89 was a case in which a woman living separated from her husband, but without a judicial separation, and where there was no community of property, brought an action against him for assault both on the grounds of loss and of pain and suffering. As part of his judgment, Searle, J. said:

With regard to the Roman-Dutch Law on the subject, the absence of any known civil action ever having been brought in this Court on such grounds as these by a wife against her husband goes far to show that it has been tacitly recognised as not allowed by our law, but of course this is not conclusive. Under Roman-Dutch Law, marriages ordinarily take place in community of property, all the property of husband and wife is joint, though each may be regarded as entitled to half; the husband has the administration of the whole. Consequently, I do not see how there can be civil actions between them involving the payment of money by the one spouse to the other. If the wife sues the husband, the latter is entitled to have the amount of the judgment paid over to him, as long as the marriage subsists and there is no legal "separation"; it would be of no advantage to the wife to get a judgment against her husband for he still would be entitled to the administration of the proceeds.²³

The statement is very clear and very reasonable, but not too helpful for the present case where, as I have mentioned, the issue was precisely an action for assault where the parties were not married in community. Searle then goes on:

There are not many Roman-Dutch authorities which I have been able to find on this point, other than those quoted by the Magistrate. *Voet* (Bk. 47, tit. 10, para. 2) says, as translated in Mr. Melius De Villiers' Book on *Injuries*: "It is indisputable, moreover, that a husband has marital power over his wife, but if he abuses that power by inflicting upon her any 'real' injury of a more serious kind, there is nothing to prevent her according to a decision reported by *Sande* su-

22. See e.g., Hosten, Edwards & Nathan, *Introduction to South African Law and Theory* 222 (1977); Hahlo & Kahn, *The South African Legal System and its Background* 581 (1968).

23. At 94.

ing him on account of the injury, provided that the action, for the sake of the respect due to the estate of matrimony, be couched in moderate and temperate language." Voet explains in paragraph 7 that by "real injury" he means a serious injury, and undoubtedly the assault here charged, if it be proved to have taken place, would be sufficiently serious to be styled "real." The learned author of this Book on Injuries in commenting on the above passage says at p.42: "It is very questionable, however, whether a wife can sue a husband in a civil action for an injury done to her by him," and he refers to Brouwer *de Jure Connubiorum* (2, 29, 12). This author says: "The Jurisconsults deny the *actio iniuriarum*, which is '*famosa*', to a wife who has been severely and excessively beaten, without reason, but they allow the *actio in factum*, to the effect that the husband pay compensation for the injuries he has brought upon her. The former is correct, but the latter is not, for the law has provided a fixed penalty for this delict, and we ought to be content with the punishments contained in the laws." He then refers to a penalty prescribed in such case by *Justinian*, namely that the husband should give out of his own goods to the wife the third part of the goods settled by antenuptial contract; and points out that nowadays wife-beaters are handed over into custody for correction and emendation by the authorities, and that *Justinian's* penalty has never been adopted in practice, i.e. the practice of the Courts of Holland.

The discussion by the Dutch authorities largely concerns points of Roman pleading affected by substantive Roman law. Under Roman law a spouse could not bring an action against the other which would cause the unsuccessful defendant to be *infamis*, to suffer a kind of technical legal disgrace.²⁴ Such an action was the *actio iniuriarum*, the private action appropriate to assault. To avoid this consequence of *infamia* and to give the injured spouse an action for redress, the Romans granted an action on the facts, an *actio in factum*: an action for damages for assault would be allowed, but the unsuccessful defendant would not become *infamis*. The Dutch had not received the notion of *infamia*, nor the technical aspects of Roman pleading. The Romans, it is worth noting, had no system of matrimonial property regimes. On the face of it, therefore, there should have been no obstacle in Holland to an injured wife, married without community, suing her estranged husband for assault. The

24. On *infamia* in Roman law, see above all Greenidge, *Infamia: Its Place in Roman Public and Private Law* (1894).

opinion of à Sande and Johannes Voet would therefore seem to be vindicated. Hendryk Brouwer, whose opinion is cited without analysis, seems a trifle confused. If Justinian's penalty had not been accepted (in Holland) as he says, then the Roman jurists could not be inaccurate (for Holland) in allowing the *actio in factum* since that action could not have been displaced (in Holland) by the action with penalty. Searle continues with further Roman-Dutch authority:

The decision in *Sande* to which *Voet* refers is to be found in *Dec. Fris.* (Bk. 5, tit. 8, Def. 9). After referring to an action against the wife as to which there was some difference of opinion among legal experts, he says: "And therefore Castellianus Catta lays down that a wife cruelly beaten by her husband ought not to proceed by the *actio injuriarum* but only by the *actio in factum*, in order that the "*fama*" of the husband may still remain." One difference between the *actio injuriarum* in Roman law and the *actio in factum* ("on the case") consisted in the circumstance that the consequence of a defendant being condemned in the former action was that he suffered "*infama*," [sic] involving the loss of certain important civil rights (see *Hunter's Roman Law*, p. 546) whereas the *actio in factum* did not entail these consequences.

Ulrich Huber in *Heedensdaegse Rechts Geleertheyt* in pt. 2, bk. 3, ch. 10, para. 21, says that the *actio injuriarum* does not obtain between spouses, because he who is condemned in such an action loses reputation, or at all events has reputation lessened, and such a result ought not to obtain as between spouses. As is pointed out by Mr. de Villiers the authorities thus do not seem to agree. *Voet* seems to think that the *actio injuriarum* lies, but quotes *Sande*, who says that it does not, but that an *actio in factum* does. *Huber* simply says that the *actio injuriarum* does not lie, and *Brouwer* says that neither action lies, because a specific punishment has been provided. *Sande* and *Huber* are Frisian authorities, and the Frisian law seems to have followed the Roman law more closely than the law of Holland, of which *Voet* and *Brouwer* are exponents.

Grotius in his *Introduction* (bk. 1, ch. 5, para. 20) says: "A husband may not beat his wife or otherwise illtreat her; and whichever of the spouses forgets himself or herself as against the other, is liable to such fine as is prescribed at each place for such offence, and is occasionally even more severely punished. In case of protracted quarrels, a separation from cohabitation may be granted by the Court.

Perezius on the *Code* (bk. 9, tit. 15, para. 4), after laying

down that it is conceded according to prevailing custom that a husband may give moderate correction to his wife, says that if the husband vents his rage against his wife he may be restrained according to the discretion of the Judge; and that it is always open to the wife on account of the intolerable cruelty of her husband to leave him and to live apart; and that in like manner a son who is badly treated by his father, may compel the father to grant him emancipation. *Groenewegen, De Leg. Abrog.* commenting upon *Novel 117*, para. 14, says that if any one vents his rage against his wife without cause, by our customs he does not fall into this legal penalty (referring to divorce, and Justinian's rule as to the third part of the property, above cited) but he is wont to be fined according to the Judge's discretion; and that the husband may be made liable to pay alimony to a wife suing for it, away from her home; but he adds that it is lawful for a husband to chastise an erring or delinquent wife, and quotes a considerable number of authorities to that effect.

The argument of Ulrich Huber would seem to have little relevance since *infamia* did not exist in Holland. That the possibility or otherwise of a private action between spouses for damages for assault is not mentioned by some Roman-Dutch authorities is not surprising, no more than is the absence in South Africa in 1918 of a precedent, because in 17th century Holland too, marriage usually entailed full community of property. Thus, Hugo Grotius, *Inleiding tot de Hollandsche Rechts-geleertheyd*, 2.11:

8. Marriage contracted in Holland or West Friesland produces community of goods between the spouses at common law, except in so far as community is found to be excluded or restricted by ante-nuptial contract; except when a young man beneath the age of five and twenty, or a girl beneath the age of twenty, marries without consent of parents, friends, or of the magistrate, as has been said above in treating of marriage; since in the case of such marriages, though the marriage proceed, there is no community of goods.

13. Upon dissolution of the marriage the joint estate is divided equally between the spouses or their heirs: and if there are children who during the marriage have received anything from their parents to advance their marriage or trade and commerce, they must bring this advance into the common estate before any division: and this bringing-in (*collatio bonorum*) enures for the benefit not only of the other children (we shall speak of this below) but of the sur-

viving spouse as well.²⁵

Searle himself immediately continues:

It certainly would seem to be an intolerable state of things that if a husband grievously assaulted his wife who was earning her own living apart from him in such manner that she was no longer able to earn it—as for instance if he broke her arm—she should only be able to prosecute him or bind him over to keep the peace, but should have no remedy of compensation for the loss she had sustained. For it would surely not be sufficient answer that the husband was bound to maintain his wife; he might be in a very poor position whilst she might be able to earn a large income. But probably the most reasonable view to arrive at is that suggested by Mr. Melius De Villiers in his work quoted above. He says (p. 42) “Where husband and wife have been divorced or judicially separated there can be no reason why an action should not lie on account of injuries committed subsequent to the claim for divorce or separation being granted.” It is true that the text writers do not appear to lay down this rule. Of course it goes without saying that when the parties are divorced and the marriage dissolved a civil action of damages for assault would lie; and although after a judicial separation the parties are still husband and wife, and the order is granted in hope of reconciliation I can see no reason why, as long as the order is in force, the relations between them should not be treated as so distinct that an action of compensation for an assault committed after the date of the order should lie.

It is precisely here that Searle shows himself to be unnecessarily in-

25. 8. By huwelick aengegaen in Holland ofte West-Vriesland geschied boedelmenging onder de echt-ghenoten, door het landrecht, uitghenomen voor zoo veel de zelve by huwelicksche voorwaerden bevonden werd uitgesloten ofte gemindert te zijn, uitgenomen als een jongman beneden de vijf en twintig ofte een dochter beneden de twintig jaren met iemand trout, zonder bewilliging van de ouders, vrunden ofte overheid, zulcks als hier vooren in de verhandeling van 't huwelick is ghezeyt, alzoo tusschen zodanighe (schoon 't huwelick voortgang hebbende) de ghemeenschap gheen plaets en heeft.

13. Den echt-band zijnde gescheiden werd den ghemeenen boedel ghejckelick gedeelt tusschen de echt-ghenoten ofte hare erven: ende soo daer kinderen zijn die staende huwelick van haer ouders tot vordering van haer huwelick ofte van hare neering ende koopmanschap iet hebben genooten, die moeten 't zelve wederom brengen in de ghemeen boedel voor alle deelings: welcke inbrenging niet alleen en komt tot voordeel van de andere kinderen (waer van haer nae zal werden ghehandelt) maer oock tot voordeel van de langst-levende der echt-genoten.

The translations by Lee, *Hugo Grotius: The Jurisprudence of Holland* 121, 123 (1953).

fluenced, over-influenced in fact, by the cultural tradition of referring to Roman-Dutch law which in this case was primarily concerned with a different factual situation. Certainly, as he says "the law cannot provide for every individual case". But it can provide for marked categories such as where the couple were married without community. The opening sentences of the paragraph just quoted, where Searle voices his opinion on a husband assaulting a wife living apart, apply equally well where the spouses are married with community or without, and in the latter case where the separation is judicial or not. Searle expressly adopts the opinion of Melius De Villiers, with its restrictions:

Where husband and wife have been divorced or judicially separated there can be no reason why an action should not lie on account of injuries committed subsequent to the claim for divorce or separation.

But he need not have done so as he immediately goes on to show:

It is true that the text writers do not appear to lay down this rule.

In the absence of a rule established by precedent or jurists he could have stated that an action for damages also lies against a spouse where the couple have separated and were not married in community of property. Further along in his opinion Searle says:

Upon the whole, therefore, and not without some hesitation and some regret I come to the conclusion that there is no sufficient authority to show that this action is allowed by Roman-Dutch Law or that in the Courts of Holland it has been recognised; that it does not appear to have been recognised by our practice in the Supreme Court; that the bringing of such an action is hedged about with such great difficulties that we must hold that the remedy by way of civil compensation for assault should only be allowed to a wife living apart from her husband under an order of Court for judicial separation.²⁶

He is not entirely happy with the outcome of his judgment. But his decision is primarily culture-determined, and not result-oriented. His decision, which was not forced on him by the state of the law, is geared to show that he is a good judge concerned to come to the result by the mental process appropriate to establishing "lawness". But the approach is artificial in the extreme and takes little account of changed conditions in the law or social behavior. The starting point is the refusal of the Romans to grant an *actio iniuriarum* between spouses. But the reason for this refusal—that the action was

26. At 99.

infaming—was long gone before 17th century Holland, and even longer before early 20th century South Africa. With the reason for the restriction gone, the restriction should also have gone. More could also have been made of the Roman *ad hoc* remedy on the facts. The absence—by no means total—of evidence for the action in Roman-Dutch law, in the courts of Holland and in South Africa is explicable on the basis that the standard marriage was with communion of property, whereas the Manns' marriage was without community. The changed factual situation makes the absence of authority of little relevance. The difficulties that hedge about an action between husband and wife in South African law are largely, as the first quotation from Searle shows, the result of community of property: any award to one against the other involves a withdrawal from joint property coupled with the addition of the same sum to the joint property, with no alteration in the allocation of resources.

Before we leave the case we must backtrack a little, and return to a paragraph of Searle's slightly before that last quoted:

Voet, in his book on the *Lex Aquilia*, the action allowed under the Roman-Dutch Law to recover compensation in damages for wrongs done (9, 2, 12), says: "These direct and equitable actions lie against those who have occasioned the damage, even against a wife or husband if the action does not bring about *infamia*." This, as has been stated, would be the consequence if the *actio injuriarum* succeeds. He quotes in support of this the *Digest* (9, 2, 56) which lays down that a wife may be sued if she damages her husband's property. But *Voet* points out (in 47, 10, 13) that cases of assault to the person all fall under the class of *injuriae* proper; so that the fact that an action under *Lex Aquilia* can be brought between husband and wife does not take this matter much farther.²⁷

Mrs. Mann's case, though based on assault, was actually for doctors' and chemists' expenses and for pain and suffering. Grotius in the *Inleiding*, 3.34.1,2 says:

Wrongs against the body are acts whereby someone loses a limb, is maimed, wounded or otherwise hurt. From this arises obligations to compensate for the surgeon's fee, for damage sustained and profit lost during the recovery, and also afterwards if the injury is lasting. Pain and disfigurement of the body, though properly incapable of compensa-

27. At 98.

tion, are assessed in money, if such is demanded.²⁸

And the appropriate action for pain and suffering as well as for medical expenses was accepted by the Roman-Dutch authorities as being provided by the *lex Aquilia* though the remedy is a post-Roman development.²⁹ And the *actio legis Aquiliae* did lie between husband and wife because it was not infaming. Mrs. Mann should have succeeded. *Mann v. Mann* was effectively overruled by *Rohloff v. Ocean Accident & Guarantee Corp. Ltd.* 1960 (2) S.A. 291 (A.D.) and it seems now to be accepted that an action based on the *Lex Aquilia* will lie.³⁰

To the outsider from another legal tradition, it is bizarre to see judges struggling to interpret law to be found in authorities hundreds of years old; even more when the appropriate action is hard to discover; still more when the old law, when discovered, is not binding. But when judges in such a position fail to take much account of changes in the reason for the law or in societal conditions then their approach is incomprehensible except in terms of the enormous impact of legal culture.

III

A third type of approach is occasioned by one effect of the dominating event in most civil law countries, the promulgation of a civil code. In almost all cases, the promulgation of a code involves a break with the past. The civil code is now the law, and gaps ought not to be filled with reference to the preceding law.³¹ The reason is clear: what is wanted is a new beginning, and one of the main reasons for codification has often been a desire for simplicity in the law, and especially in the sources of the law.³² Reference to the old law

28. I. Misdaed jegens't lichaem is waer door iemand eenig lid werd afgeslagen, verminckt, gebloedrist, ofte andersins gekrenckt.

2. Hier uit ontstaet verbintnisse tot vergoeding van't meesterloon, schade ende winst-verzuim, 't zy gedurende de genezing, 't zy oock daer nae, soo wanneer het gebreck is gheduirig. De smert ende ontciering van't lichaem, howel eighentlick niet en zijn vergoedelick, werden op geld geschat, so wanneer sulcks versocht werd.

29. See e.g., Grotius, *Inleiding*, 3.34.2; Voet, *Commentarius ad Pandectas*, 9.2.11, Matthaëus, *De Criminibus*, 47.3.3.4; Groenewegen, *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia Vicinisque Regionibus*, D. 9.3.7.

30. See e.g., Macintosh & Scoble, *Negligence in Delict* 41 (5th ed., 1970). Van der Merwe & Olivier, *Die Onvregmatige Daad in die Suid-Afrikaanse Reg* (4th ed., 1980) accept *Rohloff* for the proposition that a delictal action lies between husband and wife not married in community but retain *Mann* for the proposition that an action does not lie when the marriage is in communion; at 302,355.

31. There are, of course, exceptions including the earliest of the modern civil codes, that of Bavaria, the *Codex Maximilianeus Bavaricus Civilis* (1756), which had only subsidiary force.

32. See e.g., Watson, *The Making of the Civil Law* 101 (1981); "Legal Change:

obstructs the fulfillment of this desire.³³ Thus, sooner or later, even for the interpretation of the code, judges and jurists will put a distance between the code and the older rules even when the latter formed the basis of the code provisions.

Yet sometimes there ought to be reference to the old law, for instance when a contract was made before the codification. Then there might be an obvious conflict, to be resolved only in terms of legal culture, between the need to recognize that the old law is deeply relevant and the overwhelming desire to restrict its impact. The issue arises in a particularly striking form when, for example, at the heart of a dispute is a continuing contract, such as a lease, made many years before the code, but entailing obligations even into the future.

Such a case is that of the French *Cour de Cassation, Chambre Civil*, 6 March 1876,³⁴ *De Galliffet v. Commune de Pélissane*. In so far as concerns us here, the Civil Court of Aix found on 18 March 1841, that by a contract of 22 June 1567 Adam de Craponne agreed to construct and maintain an irrigation canal and to irrigate the lands of the commune of Pélissane. In addition it was agreed that for the irrigation of each carteirade, 3 sols would be paid to Adam de Craponne or his heirs, and the commune was not to levy taxes on the revenues from the canal. Adam de Craponne agreed to maintain the canal and bridges over it in perpetuity. The court further found, in addition to the terms of the contract, that the cost of irrigation and of maintenance of the canal had risen to such an extent that the cost of irrigation was out of all proportion to the payment and that the enterprise would have to be given up unless the payment for irrigation of each carteirade was raised. The court ordered the cost to be raised to 60 centimes (i.e. about four-fold); and justified this on the ground that when a contract involves successive performances over a long period the court may on equitable principles revise the contract in the light of changed circumstances which make the contract unjust.

After some related actions, the Court of Appeal of Aix in 31 December 1873, affirmed the decision of the Civil Court, declaring:

It is recognised in law that contracts resting on periodic performances may be modified by the court when a balance no longer exists between the performance of the one party and the obligation of the other.

Sources of Law and Legal Culture," 131 *U. Pa. L. Rev.* 1121 ff. at 1132 (1983); Dawson, "Book Review," 49 *U. Chicago L. Rev.* 595 ff. at 602 (1982).

33. But an early group of interpreters of the French *Code Civil*, the *école de l'exegese* did look at legislative history; and in the early days of the *Code* old authorities were frequently cited in court.

34. *Dalloz* 1876.1.193.

The commune of Pélissane then raised a *pourvoi* before the *Cour de Cassation*. The ground that concerns us is based on art. 1134 of the *code civil* which runs:

Legally formed agreements take the place of law for those who made them.

They can be revoked only by their mutual agreement or for reasons that the law authorises.

They must be executed in good faith.³⁵

The relevant part of the opinion of the *Cour de Cassation* reads:

But, on the first ground of the *pourvoi*:—art. 1134 of the *code civil* duly considered. Whereas the provision of that article is only the reproduction of ancient principles followed in the matter of obligations by agreement, the fact that the contracts giving rise to the law suit are anterior to the promulgation of the civil code cannot be, in the instant case an obstacle to the application of the said article;—Whereas the rule that it promulgates is general, absolute, and governs the contracts whose performance extends to successive ages just as it does those of a quite different nature; that in no case is it the function of tribunals, no matter how equitable their decisions may appear to them, to take into account time and circumstances to modify the agreements of the parties and substitute new clauses for those freely accepted by the contracting parties; that in deciding to the contrary and in raising the irrigation charge to 30 centimes from 1834 to 1874, then to 60 centimes from 1874, fixed at 3 sols by the agreements of 1560 and 1567 under the pretext that the sum payable was no longer in relationship with the costs of maintenance of the canal by Craponne, the judgment under attack formally violated art. 1134 above considered.³⁶

35. Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.

Elles ne peuvent être revoquées que de leur consentement mutuel, ou pour les causes que la loi autorise.

Elles doivent être exécutées de bonne foi.

36. Mais, sur le premier moyen du *pourvoi*:—Vu l'art. 1134 c. civ.;—Attendu que la disposition de cet article n'étant que la reproduction des anciens principes constamment suivis en matière d'obligations conventionnelles, la circonstance, que les contrats dont l'exécution donne lieu au litige sont antérieurs à la promulgation du code civil ne saurait être, dans l'espèce, un obstacle à l'application dudit article;—Attendu que la règle qu'il consacre est générale, absolue, et régit les contrats dont l'exécution s'étend à des époques successives de même qu'à ceux de toute autre nature;—Que, dans aucun cas, il n'appartient aux tribunaux, quelque équitable que puisse leur paraître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles qui ont été librement acceptées par les contractants;—Qu'en décidant le con-

And the court went on to quash the decision of the Court of Appeal. The court's response should perhaps be amplified for a non-French audience. Inherent in the argumentation, though not made express as self-explanatory, is a principle of French interpretation that "One must not draw a distinction where the law draws none."³⁷ Hence, since art. 1134 draws no distinction between contracts executed by one single performance and continuing contracts, the court must draw none.

The *Cour de Cassation* seemed to agree that the decision of the lower court could appear equitable, but quashed it nonetheless on the ground that it is not for the court to set aside the agreement of the parties. But the decision was not forced on the court which might have fixed its gaze on the good faith of the parties under art. 1134 rather than on the equitable approach of the courts. It could possibly have held that when changed circumstances rendered the balance between one party's performance and the other's obligation to pay so disproportionate that performance would be impossible for any standard commercial enterprise then it was contrary to good faith for the second party to insist on the continued performance of the contract; or that changed circumstances external to the parties rendered its performance impossible by a *force majeure* that could not be imputed to the successors of Adam de Craponne.

But the interest for us lies in a different matter. Obviously for the decision the law as it was in Pélissane in 1567 when the last contract was made cannot be irrelevant; and the court says of art. 1134: "Whereas the provision of this article only reproduces ancient principles continually followed in the law of obligations, . . ." It evinces no desire to show any authority for these ancient principles, how widely held they were, what exceptions there were to them, and above all whether they applied to contracts made in Pélissane in 1567. All the judges want to do is to make art. 1134 the main governing law for the contract. They have to make a bow in the direction of the older law, but in reality they are, again for cultural reasons, taking the *code civil* as the starting point of the law. They might get an apparently fairer answer by looking at the older law but, though they need not do so, they adopt an approach to discovering the law which excludes the possibility.

In fact there were no ancient principles in Pélissane in 1567 corresponding to art. 1134. Pélissane lies in the '*pays de droit écrit*' and

traire et en élevant à 30 centimes de 1834 à 1874, puis à 60 centimes à partir de 1874 la redevance d'arrosage, fixée à 3 sols par les conventions de 1560 et 1567, sous prétexte que cette redevance n'était plus en rapport avec les frais d'entretien du canal de Craponne, l'arrêt attaqué a formellement violé l'art. 1134 ci-dessus visé.

37. See e.g., Weill & Terré, *Droit Civil: Introduction Générale* 184 (4th ed., 1979).

in the absence of a local rule of customary law (which probably could not have been discovered by the court in 1876) recourse would be had to the *Corpus Juris Civilis* and its common interpretation. Roman law knows no such ancient principle as indicated by the court. On the contrary, although there is no text exactly on the point of a contract extending over centuries, there is ample evidence for the contract of hire (*locatio conductio*), admittedly texts relating to hire of a thing, to show that changed circumstances could change the contractual obligations. Thus, if in the lease of land, exceptional climatic conditions, such as drought, or a force external to the land which could not be avoided, such as a plague of starlings, ruined the crop then the tenant was excused from paying the rent for that year.³⁸ Again if the windows of a leased building were subsequently obscured by a neighbor, the tenant could avoid the lease.³⁹ Subsequently instances such as these came to be categorised; for instance, for Robert Pothier (1699-1772) the lessor implicitly guarantees that windows will not be obstructed by a neighbor, if the light is needed by the tenant.⁴⁰

What Roman law did have, however, which is the historical ultimate source of art. 1134 is the rule that parties to a contract might by agreement impose standards different from those settled in law. Thus:

Digest of Justinian, 16.3.1.6. If it is agreed in a deposit that there will be liability even for negligence the agreement is ratified: for the contract becomes law by the agreement.⁴¹

Normally there was liability in deposit only for fraud. The immediate source of art.1134 is in Jean Domat (1625-1696), *Les loix civiles dans leur ordre naturel*, 1.1.2.7:

When the agreements are completed, whatever has been agreed on stands in place of a law to those who made them; and they cannot be revoked except by the mutual consent of the parties, or by the other ways to be explained in the sixth section.⁴²

Domat refers to the *Digest* text just quoted, and to others that are, at the most, to the same effect.⁴³ There is no indication that Domat was going beyond the Roman law to reach the proposition that

38. D. 19.2.15.2,3.

39. D.19.2.25.2.

40. *Traité du Contrat de Louage*, art. 113.

41. Si convenit, ut in deposito etiam culpa praestetur, rata est conventio: contractus enim legem ex conventio accipiunt. See also along the same lines, D.50.17.23.

42. Les conventions étant formées, tout ce qui a été convenu tient lieu de loi à ceux qui les ont faites; et elles ne peuvent être revoquées que de leur consentement commun, ou par les autres voies qui seront expliquées dans la section VI.

43. D.50.17.23; 2.14.1; 50.17.34.

judges have no right (as they had in Roman law) equitably to alter the terms of a contract when conditions had drastically altered. Indeed, Domat accepts at 1.4.2.18 that if, as a result of *force majeure*, the lessee was unable to enjoy the object of the lease he is excused paying rent. French law before the *code civil* did not know these 'ancient principles' spoken of by the *Cour de Cassation*.

The wording of art. 1134 follows that of Domat closely and, from that alone, one would probably be justified in thinking that the draftsmen of the *code civil* also were not going beyond Domat and the Roman rules. But we have the *travaux préparatoires* which also contain no indication that the draftsmen considered themselves to be departing from Domat.⁴⁴ The *Cour de Cassation* either misunderstood or deliberately (and without express recognition) extended the scope of art. 1134. The decision was a consequence of the legal culture which put a distance between the *code civil* and earlier French law. Not surprisingly, the decision which might appear inequitable was applauded by the French jurists of the time on account of the mode of reasoning by the judges.⁴⁵

IV

Examples even more remote from us in the legal tradition bring home in a particularly clear manner the absurdity of some aspects of judges unnecessarily adopting a mental process to establish that their decisions are governed by principles of lawness. Thus, it was common in medieval Germany for a town to adopt a 'mother' town in legal matters to which it looked for legal opinion even though it was in no political dependency on the 'mother'. The 'mother' might have been chosen for the 'daughter' town by the founder when the town was established or it might have been voluntarily selected. Especially in the latter case could another 'mother' town be subsequently chosen, and 'mother' towns in their turn often selected a 'mother' town for themselves. Magdeburg in Saxony is the prime example of a 'mother' city and its law prevailed in most of the towns of Ostfalen, Mark Brandenburg, Mark Meissen, Lausitz, Silesia, Lithuania, the Prussian territories of the Teutonic Order and the kingdom of Poland; in Stettin and, for some time, in Stargard in Pomerania and in some towns in Moravia. In general, moreover, it was the main influence on the law in Bohemia and Moravia. Many of the towns, though, had a very different law of family property

44. See Fenet, *Recueil Complet des Travaux Préparatoires du Code Civil*, vol. 13 at 54 (1827, reprinted 1968). The sole discussion related to the last sentence. Portalis successfully suggested the deletion of "contractées et" before "exécutées". See also Baudry-Lacantinerie & Barde, *Traité Théorique et Pratique de Droit Civil: des Obligations*, Vol. 1 at 381 ff. (3rd ed., 1906).

45. See, Baudry-Lacantinerie & Barde, *id* at 383 and n. 1.

and hence of succession. Above all, Magdeburg had the old Saxon arrangement of the administration and use of the wife's property by the husband with direct descent and widow's portion in the event of death, whereas many towns of Thuringia had the Frankish system of common property in all acquisitions or of general community of property.⁴⁶ This difference in law did not stop judges of such 'daughter' towns from presenting problems on such matters to the *Schöffen*—the title given to the non-professional judges—of Magdeburg. The following case gives a 15th century opinion rendered by the *Schöffen* of Magdeburg to the court of Schleiz in Thuringia:⁴⁷

The honorable *Schöffen* of Magdeburg: A legal reply made for the court at Schleiz relating to succession.

Since you sent us writings of two parties, namely the charge and accusation of Hans Krebs and the counter-plea and reply of Hans Helwig as guardian of his wife, and requested us to state the law, etc., and as each of the two parties in their writings allege some privilege [i.e. a particular right of a legal community, and especially of a town] and town custom, which appears to state, express and be to the effect that 'If a man die without heirs of the body, if the same man graces his wife with all his goods, to enjoy them personally after his death until the end of her life'—of such custom it does not please us to take notice in law. But we, the *Schöffen* of Magdeburg give our reply on the matter in accordance with law on the complaint and answer:

If Hans Helwig, defender of this matter as guardian of his wife, demonstrates with the testimony of the court and completely, in so far as is correct, that Hans Krebs in sound body and good mind gave by way of inheritance, delivered and properly left to his wife before the court, in fear of his death, a meadow situated in Ollssenicz [Olsnitz(?) in Saxony, 60 km south from Leipzig], a barn, a garden, and in addition all his moveable goods, that she might do with them as she pleases; if he proves that completely, if the same woman [Frau Helwig] has held the gift and possession for a year and a day and longer without the legal objection of anyone, then the same gift must in law remain in effect; and the widow of Hans Krebs, now the wife of Hans Helwig, has a closer title and better right to such aforementioned goods, namely the meadow, barn, garden and all

46. See e.g., Schröder, *Geschichte des Ehelichen Güterrechts in Deutschland*, Teil 2, Abt.3, 69.ff. at 187 ff. (1967, original edition 1874).

47. It appears as no. 123 of the first book of the collection of *Schöffen* opinions of the town of Pössneck: *Die Schöffenspruchsammlung der Stadt Pössneck*, vol. 1 at 118 ff. (Grosch, ed., 1957). See also vol. 3 at 7 (Buchda, ed., 1962).

moveables, than that Hans Krebs, the nephew of her deceased husband can prevent her and claim from her on account of succession.⁴⁸

The judges of Schleiz do not need to take the case to the *Schöffen* of Magdeburg, but they do. They also do not need to follow the opinion of the *Schöffen*. The pleadings sent by the Schleiz court made it plain that the law at Schleiz is, on the issue, not the same as the law in Magdeburg. The *Schöffen* of Magdeburg made it equally plain that they are giving their opinion based only on the Saxon law. Nor were the Magdeburg *Schöffen* here following a course unusual for them: they did not usually decide according to the law of the petitioners.⁴⁹ The judges of Schleiz are unlikely to be unaware of the Magdeburg practice. We do not know if the judges of Schleiz eventually decided according to the ruling from Magdeburg or not. If they did, then they were overturning the established and usually followed local custom when they did not need to do so and for reasons not inevitably connected with the welfare of the populace or the expectations of the parties to the lawsuit. If they did not, then an outsider might wonder at the odd, superfluous, behavior of the Schleiz judges in approaching the *Schöffen* of Magdeburg. Whether they did or did not follow the opinion of the Magdeburg *Schöffen*, the judges of Schleiz were, for the insider, establishing that they were following the proper principles for lawness. It was appropriate but not

48. Die erbarn schepphin zcu Magdeburg: eynen rechtspruch getan an gerichte zcu Slouwicz umbe erbegud.

So ir uns zcweyer part schriffte, als nemelichin Hanssen Krebiss anlage unde schulde unde Hanssin Helwiges in vormundeschaft synes elichin wybes kegenrede unde antwert, gesant, uns recht daruff zcu sprechin gebetin habit etc., als unde so danne beyde part in yren schriffthen ettlich fryheit unde statgewonheyt uffbringen, dy danne sal inhalden, ussdrukken unde lutt von sich gebin, sterbit eyne man ane libeserbin, daz derselbe man denne sin wip met allem synem gute befellet, der nach synem tode czu yrem libe zcu genyssen biss an yres lebens ende : uff solliche gewonheyt uns in recht nicht geboret zcu erkennen. Sundern wir schepphin zcu Magdeburg sprechin uff den grunt der sachen vor recht nach clagen unde antworten:

Mag Hanss Helwigk, desser sachen eyne antwerter, in formundeschaft syner elichin husfrouwen met gerichtsgczugkeniss bewisen unde volkomen, also recht ist, daz Hanss Krebiss by gesundem lebin unde in guter vornunfft synem elichem wybe im gerichte unde geheyer bang eyne wese in der Olssenicz gelegen, eyne schune, eyne garten, darczu alle syn farnde gut, darmete nach yrem willen zcu thunde, erblichin uffgegebun, geeygent unde mechtig uffgelassin habe: wanne her daz also bewiset unde volkommert, hadt danne dyselbin gabe unde uffreychunge pobin jar unde tag unde lenger ane eyne idermans rechte weddersprache bestanden, so muss durch recht dyselbe gabe in crafft unde macht bliebin, unde Hanssen Krebiss nachgelassin wetwe, iczunt Hans Helwiges elich wip, [ist] by sollichen vorbenanten guttern, als nemelich by der wesin, schune unde garten unde by aller farnden habe, wo dy Hanss Krebiss gehabit hat unde hinder sich gelassin hat, neher unde met besserme rechten zcu bliebin, danne sy Hanss Krebiss, yres vorstorbin manes vaterbruder son, darane vorhindern addir von erbeganges wegen abeerfordern moege.

49. Whereas the *Schöffen* of Leipzig did attempt to judge according to the law of the petitioners.

necessary in a difficult case to have the opinion of the Magdeburg *Schöffen*, and it was appropriate, though not necessary, to accept that opinion. The Schleiz judges are adopting the appropriate course even when the law of Schleiz and of Magdeburg differ and when the Magdeburg *Schöffen* will base their opinion solely on the law of Magdeburg.

A system similar to that in Germany of applying to the *Schöffen* of a 'mother' town also existed elsewhere, in Belgium for instance from the 12th century⁵⁰ and in parts of Spain between the 12th and 14th centuries. In Spain, the *fuero* (that is, town charter or town privileges) of one town might be granted to others by the king or other lord, or the redactors of a *fuero* might take another as a model. A town whose *fuero* was highly regarded by others, whether it had been granted, borrowed, imitated or simply admired, would be visited by notables from the other towns. For instance Alfonso II of Aragón said in 1187 that people continually came from Castile, Navarre and other lands to Jaca to learn the good customs and *fueros* and take them home.⁵¹ In fact such was the reputation of the extensive *fuero* of Jaca (of 1063) and of its lawyers that towns inhabited by *francos*—a term indicating foreigners on whom had been bestowed particular privileges—such as Estella (whose *fuero* of 1164 received part of the law of Jaca elaborated until that date), San Sebastián (in Viscaya: whose *fuero* authorised by King Sancho el Sabio of Navarre [1150-1194] derived from that of Estella), Fuenterrabía (in Castile) and Pamplona (which was granted the *fuero* of Jaca by Alfonso I in 1129), not only consulted Jaca on the interpretation of certain rules, but in the case of litigation actually sent appeals to the authorities of Jaca as the true interpreters of the law: this although the law in their towns was by no means identical with that of Jaca. King Sancho el Fuerte of Navarre (died 1234) forbade appeals to Jaca. But later the '*jurados y hombres buenos*' of Pamplona wrote to the judges and notables of the city of Jaca that they had many books of *fueros*, supposedly of Jaca, that however did not always give the same law, and they asked that their *fueros* be corrected by the master *fuero* held by the judges of Jaca. The reply of 27 August 1342, refused the request, pointing out that the habit of appealing to

50. For what is now modern Belgium, see Gilissen, *Introduction Historique au Droit* 247 ff. (1979). He observes that there were very many jurisdictions, even in small communities, and that the *échevins* who were both administrators and judges had no legal training. When difficulties arose in a law suit, it became habitual to send the issue to the *échevins* of a larger town or village "which followed approximately the same custom." In the 12th and 13th centuries, the law of many towns was granted to other towns: Bruges, for example, was mother-town to more than twenty others.

51. See e.g., Lacarra, *Fueros Derivados de Jaca, 1, Estella-San Sebastián* 21 (1969); Lacarra & Duque, *Fueros Derivados de Jaca, 2, Pamplona* 56 (1975).

Jaca was observed also by cities ruled by the king of Navarre, and referring to the ancient bond of love between Jaca and Pamplona.⁵² Presumably the judges of Jaca refused because if the jurists of Pamplona had the correct text they would not need to send appeals to Jaca.⁵³

No doubt the judges of Jaca, like the *Schöffen* of Magdeburg, deserved their high regard, but it would be stretching human credulity to believe that at times the appeal to them was not also inappropriate.⁵⁴ The approach to Jaca seems unnecessary, but again intended to show that the judges of the other towns had a proper attitude to judging.⁵⁵

V

Thus, contemporary House of Lords judges in England have such regard for the will of the legislature that they interpret absence of legislation as indicating a deliberate intention not to act and therefore follow, when they need not, their own ancient precedent to a judgment that they declare unjust; in uncodified civil law or 'mixed' systems, courts in 17th century Scotland and 20th century South Africa rely on Roman or Roman-Dutch law, which is not binding on them, even when circumstances are very different and the reliance is inappropriate; judges in France a half century and later after the promulgation of the *code civil* so wish to keep themselves removed from the law before the *code* that they do not look for it when it is relevant, and come to misinterpret the basis of provisions of the *code*; judges in 15th century Germany have such regard for the *Schöffen* of a 'mother' town that they consult them, though they have no obligation to do so, even in a case where they know their law is different and can expect an answer based on the 'mother's' law; in 13th and 14th century Spain judges even sent their appeals to the town whose *fuero* was at the root of their own.

The cases discussed in this paper have been put together not for the purpose of comparing or contrasting the approaches but to bring

52. The reply is printed by Lacarra & Duque, *Fueros Derivado*, id. at 235 ff. But the accurate version of four chapters was sent.

53. See e.g. Lacarra & Duque, *Fueros Derivados*, id. at 57.

54. Jaca was by no means the only town whose *fuero* spread widely. Estella itself is another notable example. See in general Valiente, *Manual de Historia del Derecho Español* 150 ff. (4th ed., 1983).

55. There is no direct evidence that it was the judges of, say, Pamplona and not the parties to the lawsuit who appealed to the judges of Jaca, but it is difficult otherwise to imagine that the decision of Jaca would have any impact otherwise on the enforceability of the decision in Pamplona. Moreover, the reply from Jaca of 27 August 1342 makes little sense if it were not the judges of Pamplona who raised the appeal.

No such decisions of the '*jurados y hombres buenos*' of Jaca seem to have been published.

out a common theme within the Western legal tradition. Judges set out to establish themselves as good judges, to show that they are correctly analysing the legal implications of the case before them, by a particular mental process—which may differ from system to system. This process shows a high regard for “lawness”; for the establishment of the decision on a foundation other than that of the judges’ authority or of their right or power to make law. The process has a legitimating function: the judges have the right and power to choose their decision, but they must not exercise their choice arbitrarily. The process involves going beyond the boundaries of the existing law, and it is culturally determined. The mental process, of course, belongs to the culture of the judges and of those who practise before them, not specifically to the culture of the population at large or of the ruling elite. The influence of the legal culture is so powerful that the mental process is used even when it leads to results that are inappropriate whether because the decision—which is not inevitable—is unjust in the eyes of the judges themselves, or societal conditions have altered in a significant regard, or the legal basis for the approach has gone. Of course, it is precisely when the results are inappropriate that the impact of culture on the judges’ attitudes is most apparent, but the cases are not otherwise atypical.

One subsidiary but rather uncomfortable, conclusion follows. It is not possible to read any judgment so as to understand fully the judges’ approach without very considerable understanding of the legal culture in which they operate, which means in effect that a great deal of knowledge of legal history is needed: legal history in fact which in many instances involves the history of other legal systems.⁵⁶

56. A version of this paper formed part of the materials for a seminar discussion at Cornell Law School and the University of Miami Law School during the Fall semester, 1984. I am grateful to all participants for vivacious discussion. I am also grateful to my friends Stephen B. Burbank, Charles Donahue, Jr., and Michael H. Hoeflich, who read the paper in draft, for friendly criticism; and to Hugh McDonald, formerly of the Scottish Law Commission, who first called my attention to the then unreported *Pintada* case.

