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Editor's Introduction

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Welcome to the first issue of the sixth volume of the new series of *Amicus Curiae*. We are grateful to contributors, readers, and others for supporting the progress that the new series of the journal is continuing to make.

In his essay "What Have Introductory Books on Legal Reasoning Ever Done for Us?", Professor Geoffrey Samuel provides a critical examination of contemporary introductory texts on legal reasoning, scrutinizing their methodological, ontological, and epistemological foundations. He concludes that, while the rule model has long dominated legal education and reasoning, it falls short in capturing the full complexity of legal thought and practice. He calls for a more expansive approach that includes insights from social sciences, historical analysis, and a nuanced understanding of legal reasoning, providing a more accurate and comprehensive foundation for legal education and practice. Samuel critically analyses current approaches, particularly within the common law tradition, questioning whether the focus on rules and syllogistic reasoning sufficiently addresses modern legal complexities. He argues for a more holistic approach to legal reasoning, considering broader contexts alongside rules. Samuel argues that many of these texts rely excessively on what he refers to as the "rule model". This perspective reduces legal knowledge to the simple acquisition and application of rules, offering an incomplete and potentially misleading representation of legal reasoning. Samuel characterizes the rule model as being oversimplified in nature, tending to reduce legal reasoning to mere rule application. This model, pervasive in numerous introductory texts, emphasizes the importance of learning and applying legal rules. But it gives insufficient regard to the complexity inherent in legal reasoning, including value judgements and contextual rule interpretation. He cautions that this model tends to promote a narrow, positivist view of law, to the detriment of legal education. The essay contrasts approaches to legal reasoning in common law and French legal traditions, with references to Roman law. Samuel highlights the differences in the manner in which

legal reasoning is taught and perceived across these systems. While the rule model is dominant in common law, French jurists often adopt a more formalistic approach, emphasizing categorization and distinctions. Roman law, by contrast, offered a more flexible approach, prioritizing factual scenarios over rigid rule application. Another concern is "legal singularity and AI", pointing to the ways the rule model appeals to those who develop artificial intelligence (AI) systems for legal decision-making. This approach involves translating legal rules into algorithms to create an orderly system. However, argues Samuel, this vision is flawed because it overlooks the nuanced, interpretative nature of legal reasoning—a nature that cannot be fully encapsulated by rules alone. The essay critically appraises the impact of the rule model on legal education, particularly its promotion of a form of legal knowledge focused on exam success rather than understanding broader legal implications. Samuel suggests this model fails to equip students with critical thinking and legal interpretation skills essential for real-world practice. Instead, argues Professor Samuel, we need to incorporate social science methodologies into legal education, thereby deepening our understanding of legal reasoning. Approaches in social science, including functionalism, structuralism, and hermeneutics, provide insights that can enrich legal reasoning by considering the broader social, economic, and moral contexts of law. Further, the essay explores the historical development of legal reasoning, in particular through the influence of Roman law on modern systems. The historical evolution of legal concepts and methods can provide valuable context and counter the reductionist view of law as merely a system of rules.

In "The Conflicting Categorization of Kings and Chiefs in Ghana: The Status of the Asantehene", Justice Sir Dennis Adjei dissects the system of chieftaincy within Ghana, showing it to be intricate and dynamic, and emphasizing the Asantehene's dual role as both a chief and a king. This article brings to light the unique cultural, political, and legal aspects underpinning the chieftaincy institution, exploring the historical evolution, the hierarchical structure, and the contemporary significance of traditional leadership in Ghana. Through a comprehensive analysis, the author clarifies the categorization of the Asantehene, challenging the colonial and modern perceptions while reaffirming the Asantehene's revered status.

The Asantehene emerges not merely as a traditional leader but as the embodiment of the Asante Kingdom's historical resilience and cultural wealth. From the foundation laid by Osei Tutu I and his advisor Okomfo Anokye, who unified the various Asante states and established the Kingdom's centralized political system, the narrative evolves through the British colonial era, where the Asantehene's status was contested

and redefined by external forces. The article traces the vicissitudes of the Asante Kingdom, highlighting key historical milestones such as the formation of the Asante Confederacy in 1935 and the critical roles of paramount chiefs within this framework.

Moreover, the author examines the Asantehene's contemporary relevance, exploring the constitutional recognition of chieftaincy and the legal nuances surrounding the Asantehene's role. The Chieftaincy Act of 2008 and the 1992 Constitution of Ghana enshrine the Asantehene's position, reflecting a blend of traditional authority with modern legal frameworks. The Asantehene not only presides over the Kumasi Traditional Council and the Asanteman Council but also plays a pivotal role in national governance through institutions like the National House of Chiefs and the Council of State.

The legal structure of the chieftaincy institution is intricately detailed in the Constitution of Ghana, which establishes three levels of chieftaincy courts: the National House of Chiefs; the Regional Houses of Chiefs; and the Traditional Councils. Each level exercises exclusive jurisdiction over chieftaincy matters, ensuring that disputes related to chieftaincy are addressed within a framework deeply informed by customary laws and traditions. The entrenchment of chieftaincy in the legal regime is further exemplified by statutory instruments and the codification of customary laws, which provide a robust legal foundation for the operation and governance of chieftaincy.

This study not only enhances our understanding of Ghanaian traditional governance but also contributes to the broader discourse on indigenous political systems in Africa. By presenting a detailed examination of the dual capacity of the Asantehene—balancing the roles of a local chief within Kumasi and the overarching king of the Asante Kingdom—the article underscores the complex layers of authority and identity within Ghana's chieftaincy system. Justice Sir Dennis Adjei's work is a critical resource for scholars and practitioners interested in the intersection of traditional leadership and contemporary governance in Africa.

The article, entitled "Equity in Tax—All Change after 1873", by Chris Thorpe examines the enduring influence of equitable principles on modern United Kingdom (UK) tax law and courts, highlighting equity's ongoing importance in these areas. Even though procedures have changed over the centuries, the essence of equity still plays a key role in shaping how tax laws are applied. The article traces the roots of today's tax courts back to the medieval English courts of equity, pointing out that equitable principles have always been a part of tax law, even after the Supreme Court of Judicature Act of 1873 merged equity and common law

courts. The article suggests that this fusion brought together the courts and their procedures, rather than merging the distinct bodies of equity and common law, which have always been closely linked. It asserts that equity is crucial in tax law, especially in recognizing beneficial ownership over legal ownership, a fundamental aspect of tax liability. Both courts and legislation give priority to beneficial ownership, an equitable idea, when determining tax obligations. The article also delves into the issue of whether equity and common law were ever really separate or have always been a unified body of law, with equity softening the rigidity of common law. It leans towards the idea that they have always been one, with equity easing common law's strictness. It gives examples from modern tax cases where equitable principles were put to use, acknowledging beneficial ownership and correcting potential injustices from strict legal interpretations. Cases like *Rebecca Vowles v HMRC* and *David Patmore v HMRC* are discussed, showing how tax tribunals applied equity to reach fair outcomes, stepping in when necessary to override strict legal interpretations. The author makes it clear that tax courts are, at their core, courts of equity. The 1873 Act formalized the fusion of procedures and courts but did not change this foundational characteristic. Equitable principles continue to play a significant role in guiding modern tax law, attempting to make sure that justice and fairness prevail in tax matters.

In the section which follows, a discussion is provided of the new and important book by Dr Luca Siliquini-Cinelli entitled *Scientia Iuris: Knowledge and Experience in Legal Education and Practice from the Late Roman Republic to Artificial Intelligence*.[1] Siliquini-Cinelli's study represents a significant contribution to legal philosophy and historical jurisprudence. Its strengths are found in its philosophical analysis, its linkage of historical and contemporary issues, and its challenge to conventional legal thought. This work is particularly pertinent for those interested in the future of legal education and the influence of AI on law and legal reasoning.

Professor Geoffrey Samuel's essay "Can Historical Jurisprudence Inform the Artificial Intelligence and Law Debate?" examines the implications of Dr Luca Siliquini-Cinelli's work for the historical evolution of legal knowledge and its future with AI. Samuel highlights the crisis in legal education and practice that has resulted from the separation of knowledge from human experience, exacerbated by AI's growing role in legal decision-making. He discusses the challenge of law becoming detached from human input and the potential risks of AI replacing human judges. Samuel questions the transformation of legal knowledge

[1] In the series *Ius Gentium: Comparative Perspectives on Law and Justice*, Cham, Switzerland: Springer, 2024.

into models independent of human input, addressing the "map and territory" debate. He critiques the idea of "legal singularity" and the growing dependence on AI for legal reasoning. While acknowledging the value of Siliquini-Cinelli's critique, Samuel raises concerns about implementing an experience-based epistemology in legal reasoning, calling for more clarity on this approach.

In his essay, "The (In)efficiency and (Un)certainty of Non-propositional Structures of Reality … or, Adventures in Philosophy of Understanding", Dr Robert Herian examines the impact of certainty and efficiency on legal understanding within legal and jurisprudential contexts and explores the implications of Luca Siliquini-Cinelli's book, *Scientia Iuris*, for the concept of "understanding", distinguishing that concept from knowledge and suggesting that contemporary law has become overly focused on knowledge, to the detriment of experience. Herian engages with Siliquini-Cinelli's thesis that the regulatory function of law has expanded in recent decades to encompass and embody knowledge while neglecting the crucial dimension of experience. Understanding is posited not merely as an adjunct to knowledge but as a distinct cognitive state. It involves comprehending the structures of reality, both propositional and non-propositional, as distinct from the mere possession of factual knowledge. He emphasizes that understanding is a crucial yet undertheorized cognitive function in law, offering more than just factual knowledge. Herian observes that understanding, as a cognitive function, has been undertheorized and not given the attention it deserves, despite its significance. He argues that understanding serves as an intermediary between knowledge and experience and requires greater recognition and exploration. He advocates educational approaches that prioritize understanding, suggesting it is essential for achieving true legal certainty and efficiency.

The essay "Law without Lawyers, Lawyers without Law" by Dr Joshua Neoh explores the relationship between law and lawyers by examining two contrasting viewpoints. First, Luca Siliquini-Cinelli's argument that law can exist without lawyers because law transforms subjective human experience into standardized, rational conduct, which can exist without the need for individual lawyers—law is primarily about knowledge rather than experience. Secondly, the perspective of American legal realism (particularly that of Felix S Cohen), which suggests that lawyers can operate without the necessity of law as an independent entity—what is called "law" is essentially what lawyers, including judges, do in practice. Neoh suggests that both positions hold partial truths. He explores the idea that law can be both Procrustean (rigid and categorical) and Protean (flexible and adaptable), implying that law and lawyers are

interdependent in complex ways. The essay concludes by proposing that law is multifaceted, potentially embodying both the structured logic that Siliquini-Cinelli champions and the experiential, practice-oriented approach of American legal realism.

The essay entitled "Symposium on *Scientia Iuris*: A Reply" contributed by Dr Luca Siliquini-Cinelli provides a reflective and critical engagement with the essays contributed by Geoffrey Samuel, Robert Herian, and Joshua Neoh, and written in response to his new and important book *Scientia Iuris: Knowledge and Experience in Legal Education and Practice from the Late Roman Republic to Artificial Intelligence*. Siliquini-Cinelli argues that legal education and practice are in crisis due to the historical distinction between knowledge and experience. He traces this crisis back to Roman jurists of the Republican era who began to establish law (*ius*) as a body of constructed knowledge (*scientia iuris*) independent of human experience. This shift, according to the author, has led to a legal system increasingly capable of performing its regulatory function without relying on the experiential input of legal experts. The concern is that this trend is exacerbated by the rise of AI in legal decision-making. The book presents a critical analysis of legal knowledge and its detachment from human experience, highlighting the potential challenges posed by this shift, especially in the context of advancements in AI. The book argues that, while the pursuit of knowledge is central to legal education and practice, it is the individual experience that defines who we are as individuals. This distinction between knowledge and experience is critical in understanding the crisis in legal education and practice. The author critiques the traditional focus on knowledge over experience in law, arguing that this imbalance has led to a crisis in legal education and practice. He suggests that law's fixation on knowledge has made the experiential contribution of legal professionals obsolete, which in turn has contributed to the existential crisis in legal education and practice.

The review essay itself is a reflective dialogue between the author and his commentators, engaging with the reflections on his work and reaffirming in particular the importance of distinguishing between knowledge and experience in understanding the current crisis in legal education and practice. The author agrees with Professor Samuel's critique regarding the lack of an index in the book and reflects on the broader implications of Samuel's concerns about a law-world focused solely on experience. He emphasizes that his goal is not to replace knowledge with experience but to highlight their distinction and the consequences of their imbalance in legal education. In response to Herian's essay, which is focused on the neglected topic of "understanding" in legal education, Siliquini-Cinelli acknowledges Herian's observation that legal education has generally

overlooked the distinction between knowledge and experience, a theme central to his book. He agrees with Herian's point that understanding is often neglected in legal education, and that this is indicative of broader issues within the field, and suggests that the prevailing focus on knowledge at the expense of understanding has significant implications for how law is taught and practised. Dr Siliquini-Cinelli acknowledges Herian's analysis and reflects on the importance of addressing understanding as a crucial component of legal education. He concurs with Herian's call for greater pedagogical awareness, emphasizing that teaching should involve more than just imparting knowledge; it should also inspire critical thinking and self-awareness in students and offer a more integrated approach that includes understanding and experience. He also acknowledges Neoh's insights, agreeing that, while experience is crucial in legal education and practice, the intellectual nature of law means that knowledge eventually surpasses experience. He suggests that Neoh's perspective—that law encompasses both knowledge and experience rather than one over the other—presents a valuable avenue for further exploration. Siliquini-Cinelli notes that this aligns with the broader aim of his book: to inspire deeper inquiry into the philosophy of legal education and practice, rather than to provide definitive answers.

The section which follows is Part 3 of Maria Federica Moscati's major contribution to the analysis of the rights of children—Children's Rights: Contemporary Issues in Law and Society.[2]

There are two papers. First, Nejla Tugcem Sahin Bayik and Ceyda Durmus's essay, "Children's Rights in the Early Childhood Education Curriculum and Activity Book in Türkiye", explores how children's rights are portrayed within Turkey's Early Childhood Education (ECE) Curriculum and Activity Book. The study underscores the critical role of ECE in childhood development, emphasizing it as a strategic phase for instilling core virtues such as tolerance, appreciation for diversity, and an understanding of human rights. However, the curriculum lacks explicit outcomes related to children's rights, offering only indirect references through social-emotional development. While there are mentions of non-discrimination and freedom of expression, essential rights like healthcare and protection from violence are significantly underrepresented. Additionally, there is a pressing need for incorporating age-appropriate teaching methods. The research work shows the need for a comprehensive integration of children's rights into the curriculum and suggests revising the programme so as to include teaching strategies that

[2] For Part 1, see *Amicus Curiae* Series 2 5(2) and, for Part 2, see *Amicus Curiae* Series 2 5(3).

effectively communicate these rights to young children. Methodologically, a content analysis of the ECE Curriculum and Activity Book reveals sparse representation of fundamental rights, such as healthcare, shelter, and protection from violence, despite references to non-discrimination and freedom of expression. The essay concludes that children's rights are currently addressed in an indirect and fragmented manner within Turkey's ECE curriculum, calling for a more coherent and explicit approach to embedding these rights across all developmental domains to ensure they are central to early childhood education.

Secondly, the essay "What's in a Name? Children's Rights and Legal Voice within Administrative and Juridical Procedures of Recognition of Same-Sex Filiation" by Alice Sophie Sarcinelli and Monika Weissensteiner is a contribution to both the collection of essays edited by Dr Moscati, and "Visual Law". It delves into the role of children's voices in legal processes related to same-sex parenting. Employing a novel methodology that blends long-term ethnographic observations, biographical interviews, and visual methods, the essay examines how children's perspectives are considered in court proceedings concerning same-sex filiation. By merging qualitative research with performative text and visualizations, it enriches its findings significantly. This research sheds light on the often-overlooked perspectives of children within legal processes involving same-sex parenting, providing a critical analysis of the legal systems in France and Italy, particularly their approach to recognizing children in same-sex families. The essay employs an interdisciplinary approach, with visualizations enhancing understanding and contextual awareness, adding depth to its thematic coherence. It makes a substantial contribution to discussions on children's rights and legal studies related to same-sex parenting, highlighting the gap between legal and practical kinship and emphasizing the symbolic versus substantive recognition of children's voices in legal proceedings. Drawing insights from anthropology, law, and visual studies, the visualizations not only illustrate points but also serve as analytical tools, fostering a unique form of understanding and engagement with the material. This essay is a valuable addition to the fields of children's rights, legal studies, and social anthropology, especially in the context of same-sex parenting and its related legal challenges.

In her article, "The Need to Update the Equality Act 2010: Artificial Intelligence Widens Existing Gaps in Protection from Discrimination", Tetyana Krupiy examines the deficiencies in the UK's Equality Act 2010 in addressing discrimination arising from the use of AI in decision-making processes. This is the final essay in the special sections on

AI and its Regulation.[3] Drawing on Sandra Wachter's scholarship, Krupiy discusses the problem that the employment of AI as part of the decision-making process can give rise to inequalities due to using correlations in the data as a basis for generating a decision. While these correlations may not directly relate to protected characteristics such as race, gender, or disability, they can still lead to biased outcomes.

Krupiy asserts that the current framework of the Equality Act 2010, which assumes a direct and simple relationship between a protected characteristic and discriminatory treatment, is inadequately equipped to address the complexities that the employment of AI as part of the decision-making process introduces. For example, the scholarship of Bart Custers shows that AI systems may rely on attributes, such as shoe size, which do not conform neatly with the Act's definitions of protected characteristics, resulting in discriminatory outcomes that challenge the enforcement of legal protections afforded by the Act.

In order to address these challenges, Krupiy argues for a substantial revision of the Equality Act. Any revisions should include redefining protected characteristics. The definition of a protected characteristic should account for multidimensionality. Krupiy builds on Lily Hu's, Reuben Binns' and Shreya Atrey's scholarship. She argues that the grounds of legal protection should encompass any attribute or combination of attributes that contribute to structural inequality. This approach to defining a protected characteristic allows for a more nuanced understanding of discrimination. Krupiy suggests that the term "group membership" should be understood as having a multidimensional character. It should be redefined as encompassing four elements. Furthermore, Krupiy underscores the importance of reevaluating the relationship between protected characteristics and group membership. She suggests adopting a more flexible and inclusive definition that accounts for the dynamic and complex nature of AI-driven decision-making. Finally, the author recommends that the legislature incorporate multiple legal tests into the Equality Act 2010, defining what constitutes discrimination in the context of AI use. The courts should be able to employ these tests, either individually or collectively, depending on the circumstances, in order to better capture the diverse ways in which the operation of AI decision-making processes can disadvantage individuals. By doing so, the Equality Act 2010 could more effectively protect individuals from the subtle and often complex forms of discrimination that the use of AI decision-making processes may produce.

[3] For Part 1, see *Amicus Curiae* Series 2 4(2) and, for Part 2, see *Amicus Curiae* Series 2 5(1).

The Advocate Lecture delivered by Sir Robin Knowles CBE, entitled "Justice and Access to it", at Lincoln's Inn in March earlier this year, stresses the fundamental role of the justice system in serving the public. By examining the often-challenging experiences that individuals face within the justice system, particularly the numerous barriers to accessing justice—ranging from the prohibitive costs of legal representation to the shortcomings and deficiencies in legal aid—Sir Robin highlights the gap between the justice system and those it aims to serve. This disconnect is especially critical for vulnerable populations who bear the brunt of the problem of limited access to justice. He argues for enhanced integration and coordination across various sectors, including legal aid, *pro bono* initiatives, and government resources, and provides practical reform suggestions. These include more effective utilization of legal expenses insurance, deeper involvement of universities in social welfare law, and the imperative of increasing public understanding of the justice system in order to maintain public trust. The speech places the UK's justice system within a global framework, acknowledging its international standing and the necessity to address emerging challenges such as AI and climate change.

In a memorial honouring Professor Zhang Wanhong, a distinguished Chinese legal scholar who passed away earlier this year at a relatively young age, several of his former colleagues and students highlight and pay tribute to his significant professional achievements. These include his contributions to human rights, legal education, and public interest law in China, as well as the significance of law in the movies. The tribute also emphasizes his pioneering work in disability rights and his participation in substantial national and international projects, highlighting the breadth and depth of his impact. Professor Zhang's personal qualities encompassed not only academic rigour and academic contributions but also empathy, dedication to social justice, and his role as a mentor and educator. The enduring impact of his work will be reflected in his legacy, marked by his influence on human rights law in China, his mentorship, and his involvement in critical rights initiatives. His contributions will continue to resonate long after his passing.

In the reviews section of the journal, Professor Patrick Birkinshaw presents an analysis of *A Research Agenda for Administrative Law*, edited by Carol Harlow. This collection of essays reflects on the future of research in administrative law and, as Birkinshaw notes, it offers a comprehensive view of the field extending beyond judicial review into public administration and its significant changes. It encompasses a wide range of issues such as policy development, rule-making, grievance redress, management efficiency,

accountability, public interest promotion, and transparency. The increasing role of private entities in public administration and the global nature of some administrative powers are also highlighted, particularly in the context of AI and digitization. The review suggests that the volume is full of good ideas and interesting areas for future research in administrative law, encouraging in particular emerging academics to explore the complex, often opaque organizational structures in administrative law and processes.

Birkinshaw observes that several contributing authors investigate different approaches to judicial review, including its impact on public administration and specific groups of litigants, research methods in judicial review (complicated by the fragmented and polarized nature of the field), the effect of judicial review on public administration, as well as the nature of immigration law and the role of tribunals. McClean examines the disaggregation of executive power for accountability, questioning the meaning of the "Crown" in official action and its implications for responsibility and liability. The reviewer addresses further the concept of the Crown, especially its use as a metonym for the state. In English usage, power seldom resides in the Crown in the literal sense of the monarch. When analysing the often-debated distinction between the Crown's personal and political (governance) roles, it becomes evident that political power is not, nor is it intended to be, vested in the Crown itself. Rather, the Crown as an entity of governance is dispersed into a complex network of natural and corporate entities, whose powers collectively constitute the "Crown". Birkinshaw references Stephen Sedley's insight in *Lions under the Throne*, noting that the "Crown" serves as the repository of these powers, not their origin.[4] As Maitland pointed out, it is crucial to precisely identify who holds the Crown's power, and the concept often serves as a convenient cover for ignorance, especially when used to represent the nation and symbolize comforting unity. Birkinshaw's review also comments on contributions examining the role of parliamentary oversight in the legislative process (particularly in the context of Brexit, Covid-19 regulations, and devolution), challenges to the binary existence of public and private law, and the argument that this division is overstated in common law jurisdictions and that public law possesses a more complex history and scope than traditionally acknowledged. It also notes the importance of government contracts in administrative law, the role of regulation, particularly in the post-Brexit context and in response to the Covid-19 pandemic, the impact

[4] Stephen Sedley, *Lions under the Throne*. Cambridge: Cambridge University Press, 2015: 228. See also Professor Birkinshaw's review article "Lions in the Whirligig of Time—Stephen Sedley's Lions under the Throne Essays on the History of English Public Law and Law and the Whirligig of Time." *Amicus Curiae* Series 2, 2(1) (2020).

of AI and digital technologies on administrative law, and the extent to which European Union law, grounded in national systems of liberal constitutionalism, is equipped to address the challenges of multilateral cooperation. Overall, Professor Birkinshaw points to the value of the edited book's comprehensive and forward-looking approach, recognizing it as a significant contribution to the field and an inspiration for future generations of legal scholars.

Emma Cooke's review of the book by Catrina Denvir, Jacqueline Kinghan, Jessica Mant, and Daniel Newman entitled *Legal Aid and the Future of Access to Justice* offers an in-depth analysis of the state of legal aid in England and Wales. Dr Cooke sees the book as a timely exploration of legal aid's critical role in justice, especially after the 2012 LASPO cuts. She points to the fact that the book is structured to be both academic and practical, appealing to a broad audience. Grounded in data from the 2021 Legal Aid Census, the book in her view offers insights into education, training, pay, and barriers in the legal aid sector. It also addresses the impact of austerity, Covid-19, and economic challenges, revealing vulnerabilities and advocating for radical reform to ensure justice access. Cooke praises the book's comprehensive and accessible approach, recommending it as essential reading for those interested in legal aid.

In her review of *Arbitration and Mediation in Nineteenth-Century England* by Francis Calvert Boorman and Rhiannon Markless, Dr Ling Zhou identifies several pivotal insights in the study under review. The book offers a compelling examination of the evolution and significance of arbitration and mediation during this period in England, building on Derek Roebuck's earlier work to enrich our understanding of dispute resolution's development. The authors delve into the roots of arbitration in English law, tracing its origins to the medieval era and highlighting significant legislative milestones, notably the Arbitration Act of 1889. The study explores the changing dynamics between the courts and arbitration, remarking on the judiciary's initial hesitation to relinquish control over legal matters to arbitrators, which gradually shifted towards embracing arbitration as a practical solution to burgeoning caseloads. With industrialization and commercialization, arbitration gained popularity, especially among businesses, due to its efficiency and flexibility compared to traditional litigation. The book also highlights shifts in societal attitudes, noting the growing acceptance of arbitration and mediation as legitimate alternatives to litigation. It discusses the influence of religious communities, particularly Nonconformists, who championed arbitration as a means of conflict resolution aligning with their values of peace and reconciliation. Despite its expansion, arbitration encountered challenges such as procedural complexities, nepotism in appointments, and resistance from

the legal community. The integration of arbitration into the judicial framework also lessened its conciliatory nature. The book comprehensively explores how arbitration and mediation nevertheless became essential components of nineteenth-century England's legal and social landscape. However, Dr Zhou also suggests that the book might have been enhanced by incorporating more comparative analyses and references to other historical studies, particularly Jerold S Auerbach's work on dispute resolution in the United States,[5] and to thereby offer a more robust view of the processes and issues surrounding the integration of legal and non-legal justice methods.

The Editor also thanks Eliza Boudier, Narayana Harave, Patricia Ng, Maria Federica Moscati, Simon Palmer and Marie Selwood, for their kind efforts in making this issue possible. I should add that because of my ill-health, Dr Amy Kellam has in effect been a co-editor of the issue, and so a special note of thanks to her for her kind and most helpful cooperation.

[5] Jerold S Auerbach. *Justice without Law? Resolving Disputes without Lawyers*. New York: Oxford University Press. 1983.

What Have Introductory Books on Legal Reasoning Ever Done for Us?

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Abstract

The purpose of this article is to investigate, and to review, a number of recent introductions to law with the emphasis being on those introducing students to legal reasoning. The investigation will have as its focus not just reasoning methodology but equally the ontological and epistemological foundations upon which the reasoning is based. The investigation will be comparative in its orientation; it will examine, in particular, works from common lawyers and French jurists, with references also to books produced by Roman law specialists (Romanists). It will show that many introductions are based on an ontological foundation that emphasizes rules—the rule model—and that, with regard to some of the introductory books, this emphasis has engendered what is arguably a simplistic view of legal knowledge and method. Are such books, it might be asked, epistemologically reliable? To help answer this question, another comparative orientation to be undertaken is to examine some introductory works in the social sciences in order to see not only how these works may differ in their approach to knowledge and methodology but also how methodological discussions in the social sciences could be valuable for lawyers.

Keywords: analogy; epistemology; introductions; logic; ontology; perception; rule model; syllogism.

The recent publication of an introductory book on legal reasoning provides an opportunity to reflect on two fundamental themes. The first, evidently, is the nature of legal reasoning itself. The second is the content and epistemological importance of introductory books: do they, as a genre of books, provide an interesting insight into legal knowledge? This second theme is of course wider than legal reasoning and so deserves a separate treatment in itself, especially from a comparative perspective. Nevertheless, it is a theme that can, and should, be partly embraced by an examination of legal reasoning since introductory works, as opposed

* All translations of foreign language texts quoted in this article are by the author.

to scholarly monographs or detailed textbooks, are claiming to set out for students early in their law programme the fundamentals of a, supposedly, special type of reasoning. Yet what kind of methodological approach should be adopted in the investigation of these two themes? And, just as important, how epistemologically reliable are these introductory books on legal reasoning?

[A] INTRODUCTION: WHAT HAS EPISTEMOLOGY EVER DONE FOR US?

Introductory books to law are, almost by definition, introductions to what it is to have legal knowledge. They thus have an epistemological role even if this role is implied rather than expressed openly (see Altwegg-Boussac 2021). In the past such books would never, or very rarely, have employed such expressions as “epistemology” and it would not be surprising if there remain some lawyers who might find the word pretentious or even a form of intellectual “wokery”. More reasonably, some writers might feel that such a term should not be introduced at an early stage in legal studies. So how is the knowledge issue to be presented to a student at the outset of her studies?

One contemporary introduction to law starts off with a description of a social event—a lively party—within in which a whole range of different, and sometimes unpleasant, incidents occur, each of which is designed as a factual situation which has, or could have, legal consequences (Barnard & Ors 2021: 1-4). Few could surely complain about such an approach, especially as it embraces so many different aspects of public and private law. The same book then goes on to use a definition of law that describes law as a “body of rules” (ibid 4), but immediately suggests that this definition is not as helpful as it may at first seem since “it does not tell us much about what law really is”. Indeed at the end of the book this point is developed in a much more detailed chapter. The substance of this chapter—together with points made in previous chapters—cannot be criticized as being unhelpful or inaccurate in setting out why law is not just a matter of learning and applying legal rules; the authors spend time examining difficult cases and comparing majority and dissenting judgments, concluding, for example, that value judgements are as important as the rules themselves. This prompts the authors to pose a question: “do non-legal considerations and values form part of the law or not?” (ibid 219). The authors do not give a definitive answer to this question; instead, they simply say that it takes one into “difficult debates about the meaning of law and, in particular, its relationship with

morality" (ibid 220). They follow this comment with a brief description of the natural law versus positivism debate, concluding that positivism does not "tell us precisely what is going on when a judge is interpreting a given law" (ibid).

One cannot, surely, criticize this statement or the analysis of those particularly difficult cases used as illustrations throughout the book. But it is asserting a particular epistemological view of law. Law is essentially about rules: "what is the relevant rule here?" (Barnard & Ors 2021: 35). And the authors continue:

> Does it [the rule] apply to this case or can it be distinguished? Should it apply? If not, why not, and what rule should apply instead? All lawyers need to think—logically, clearly and critically. This is what judges have to do, what practising lawyers have to do when giving legal advice to their clients, and what all law students must do too (ibid).

Two general points about knowledge need to be made here. The first is, as indicated, that what might be called the "ontological"—that is "what exists"—basis of law is essentially the rule. Such a rule might be difficult to determine and apply, and it might be very general (a principle) or extremely precise (regulation); but that is what the student needs to be investigating. Secondly, given this rule-ontology, the methodology associated with the discipline of law is reasoning on and around rules. In short, legal reasoning is rule reasoning. And given that there are plenty of other books, both introductory and more substantive, which would equally assert that legal reasoning is about rule-reasoning (see, for example, Alexander & Sherwin 2008; Eisenberg 2022; and note also the French Code of Civil Procedure, article 12), it can probably be said with confidence that what is being asserted by many publications is that legal methodology and epistemology is founded on a particular model, namely the rule model. This, then, is what legal ontology and epistemology seemingly have to say about legal knowledge.

[B] WHAT HAS THE RULE MODEL EVER DONE FOR US?

This epistemological conclusion, were it to be correct, may seem a statement of the obvious. Yet it does have some profound implications both for methodology (which includes legal reasoning) and for epistemology. One profound implication is that rules, and thus the rule model, is most attractive to those who are keen to produce an artificial intelligence (AI) programme aimed at, ultimately, replacing the need for expensive lawyers

and judges—and seemingly for the need for law schools. What has become known as "legal singularity" is essentially about the translation of legal rules, envisaged as a perfectly complete and systematic whole, into a mathematical algorithm. As two authors point out:

> Underlying the project to apply machine learning to law is the goal of a perfectly complete legal system. This implies that the content and application of rules can be fully specified ex ante no matter how varied and changeable the social circumstances to which they are applied. In this world of a "legal singularity" the law operates in a perfect state of equilibrium between facts and norms (Deakin & Markou 2020: 66).

It would be most unjust to accuse Professors Barnard, O'Sullivan and Virgo of promoting, in their introductory book, this kind of vision of law. They are not. Indeed, they emphasize the importance of value judgements and do not shy away from recommending further reading that includes work on the politics of the judiciary. However, despite this more open-minded view of the rule model, in promoting the idea that legal knowledge is essentially a matter of rules they are promoting what might be termed an internal view of law. This is a lawyer's view of legal knowledge. And this internal view is largely a positivistic one even if such positivism is not of a kind that necessarily excludes moral, social and economic values when it comes to reasoning about the rules. Positivism, one perhaps should add, means, in this context, a body of rules enacted and accepted as law in a particular society (Gordley 2013: 195), although, as will be seen, in the civil law world it has a more precise ideological meaning as well.

Another implication—again one that would no doubt horrify the three professors—is that an emphasis on rules can have detrimental effect on legal education. Half a century ago the French jurist and comparative lawyer René David (1906-1990) wrote this about the French law school:

> The lecture course (*le cours magistral*) and the tutorials (*les travaux dirigés*) have as their function, in their eyes, to get students to know what they have to know on the day of the examination; they fill this role well enough and it matters little whether or not they be the tools for a satisfactory legal education. One basically learns, within a positivist perspective, the rules of today's law without preoccupying oneself with what will be the law of tomorrow, what will have to be applied in life (quoted in Orianne 1990: 207).

One might ask if this observation is equally relevant for United Kingdom (UK) law schools. Certainly, those schools which profess to teach whole legal domains such as contract, property, public law and tort in just 10- or 12-week modules might certainly attract such criticism. Yet even those faculties offering the traditional year-long courses could easily fall into the same trap if they insist on emphasizing each subject in terms

of a rule model. There is a message that one just learns the rules for a set of exams in which hypothetical factual problems are presented to the candidates. Indeed, the University of Law internet site, in its tips for passing law exams, repeats a claim that: "Your answer should be more like filling out a very difficult form & less like painting a wall." Law schools, it would appear, are there to teach students how to fill in forms.

There is also an implication for legal reasoning. Another French jurist, Christian Atias (1947-2015) (who was in fact a specialist on *épistémologie juridique*), noted, first, that legal knowledge:

> is based on rules, on classifications and on distinctions between the different domains, on notions and categorisations, on legal dispositions, on the principles formulated by legal decisions considered as being particularly important, on the modes of interpretation, but also on various types of situations, on difficulties (Atias 2011: 174).

And secondly that:

> This knowledge does not of itself permit one to reason in law. It only provides the base. Its effect is to provide a legal framework into which the reasoning can be inserted; the consequence is that it makes the reasoning relevant and constrained, or at least it facilitates its acceptance by the respondent or listener said to belong to the world of lawyers (ibid).

What this insertion into a particular knowledge framework implies is that there are limits to the types of reasons that can be employed within this world of lawyers. There are, as Atias said, certain arguments that cannot be invoked on the ground that they are not legal arguments. And so "philosophical, economic and sociological arguments have little chance of being convincing in themselves". Such arguments must be translated into legal terms (2011: 114). Summing up the contemporary position in France one recent work confirms the Atias view:

> At present, unlike economic approaches to law which have succeeded in gaining a certain visibility in the academic and political field, neither the sociology of law (despite the existence of a journal such as *Droit et Société*), nor anthropology of law (despite the journal *Droit et Cultures*) have managed to achieve a serious presence in the education of French lawyers and rare are, amongst the latter, those who are engaged with these subjects (Audren & Ors 2020: 240).

There may be the occasional exception, but this must not mask "the orientation profoundly positivist of a large part of the legal community little affected by the questions that contemporary social sciences pose" (ibid).

It is not being asserted that these French descriptions mirror exactly law schools in the common law world. But it may well apply to some (see Priel 2019). However, what does seem to be the case is that when it comes to legal reasoning there is little reference to work in the social or human sciences in general. Legal reasoning, it would seem, can be discussed almost entirely within what has been described elsewhere as the authority paradigm (see Samuel 2009). Accordingly, in one of the latest introductions to legal reasoning in the common law world, the author states that courts in this tradition "have two functions: resolving disputes according to legal rules and making legal rules" (Eisenberg 2022: 5). Thus, he says, legal reasoning "in the common law is almost entirely rule-based, that is, based on the application of legal rules to the facts of the case to be decided". Moreover, he asserts, all those jurists who have claimed that reasoning in the common law is analogous rather than rule-based "are incorrect", for the "common law courts seldom reason by analogy" (ibid 7). In addition, this author goes on to state that commentators who "claim that legal reasoning depends on a finding of similarity between a precedent case and the case to be decided … are also incorrect" (ibid 8-9). If Melvin Eisenberg is right, it would surely seem that the rule is the sole focal point of ontological attention in the law school. In fairness to him, he appears to be implying that this is not the sole focal point of *epistemological* attention. For, Eisenberg sees "good judgment" as an important legal quality and good judgment, while attaching to rules, is a matter of rule application. Such good judgment is, however, something that "cannot be taught and is hard to acquire" (ibid 89).

[C] WHAT HAVE THE RULE THEORISTS EVER DONE FOR US?

Professor Eisenberg is entitled to his opinions of course. But, when viewed from the position of the English common law, could it not be said that he is the one who is "incorrect"? At least it could be said that he is incorrect from a strict authority paradigm position in that his assertions are contradicted by the opinion of a House of Lords judge—Lord Simon—who, in a judgment, took it upon himself to describe the nature of the *ratio decidendi* and the application of a precedent. According to Lord Simon:

> A judicial decision will often be reached by a process of reasoning which can be reduced into a sort of complex syllogism, with the major premise consisting of a pre-existing rule of law (either statutory or judge-made) and with the minor premise consisting of the material facts of the case under immediate consideration. The conclusion is the decision of the case, which may or may not establish new law—in the vast majority of cases it will be merely the application of existing

> law to the facts judicially ascertained (*Lupton v FA & AB Ltd* [1972] AC 634, at 658-659).

It might be worth noting at this point that Eisenberg asserts that "the syllogism is not important in legal reasoning" (2022: 87). However, Lord Simon went on to say:

> Where the decision does constitute new law, this may or may not be expressly stated as a proposition of law: frequently the new law will appear only from subsequent comparison of, on the one hand, the *material facts* inherent in the major premise with, on the other, the material facts which constitute the minor premise. As a result of this comparison it will often be apparent that a rule has been extended by an analogy expressed or implied. I take as an example … *National Telephone Co v Baker* [1893] 2 Ch 186. Major premise: the rule in *Rylands v Fletcher* (1866) LR 1 Exch 265, (1868) LR 3 HL 330. Minor premise: the defendant brought and stored electricity on his land for his own purpose; it escaped from the land; in so doing it injured the plaintiff's property. Conclusion: the defendant is liable in damages to the plaintiff (or would have been but for statutory protection). Analysis shows that the conclusion establishes a rule of law, which may be stated as "for the purpose of the rule in *Rylands v Fletcher* electricity is *analogous* to water" or "electricity is within the rule in *Rylands v Fletcher*". That conclusion is now available as the major premise in the next case, in which some substance may be in question which in this context is not perhaps clearly *analogous* to water but is clearly analogous to electricity. In this way, legal luminaries are constituted which guide the wayfarer across uncharted ways (*Lupton v FA & AB Ltd* [1972] AC 634, 658-659, emphasis added)

Lord Simon would appear to be contradicting much of what Eisenberg asserted. This judge does emphasize the rule model, but he equally emphasized the role of reasoning by syllogism, analogy and similar case facts. Indeed, he paid particular attention to the idea of material facts and their role as acting as the basis for analogical reasoning. Given Lord Simon's status as an authority oracle, this would suggest that Eisenberg's views must, at best, be confined to the United States (US).

Yet, having suggested that Professor Eisenberg is "incorrect", this is, in one sense, a very formalist argument. In substance the professor actually engages directly with this view of Lord Simon since the latter appears to have taken his opinion from Arthur Goodhart (1891-1978) who set out his views in an American law journal (Goodhart 1930). Eisenberg argues that the Goodhart (and thus Lord Simon) description of how the *ratio decidendi* notion functions is itself incorrect for two reasons. The first is that "the courts seldom if ever single out some facts as material and there is no metric for objectively determining which facts a court deemed material" (2022: 25). And secondly, "even if it could be determined what

facts the precedent court deemed material every such fact could be stated at various levels of generality and each level would yield a different result" (ibid). Quite so, one might say. Plenty of introductory courses and books on legal method would undoubtedly confirm both of these assertions by Eisenberg. Many students have been taught in the past—and one imagines are still being taught in some schools—that the material facts in *Donoghue v Stevenson* ([1932] AC 562)—the case employed by Eisenberg to support his thesis—were not ever to be determined in the case itself. The material facts of *Donoghue* would emerge only in the light of subsequent cases interpreting the 1932 precedent and such interpretation would in turn fix the level at which the facts were to be perceived (bottle of ginger-beer, bottled drink, product or act of negligence). So why does the professor think that his reasons prove the Goodhart and Lord Simon thesis is wrong?

Eisenberg's assertion is based on his view that "a precedent stands for the rule established in its holding, that is, the rule the precedent court stated [that] determined the result of the case" (2022: 26). No doubt many English lawyers and law teachers might respond with the observation "well good luck with that one". Determining the *ratio* rule is often notoriously difficult. But Eisenberg's retort is that whatever the position might have been in the past, things have changed. Cases are determined "not so much by analysis of facts, the issue, and the outcome, but by careful scrutiny of the words written in the opinion" (ibid 27). In short, the "courts are beginning to treat the common law as legislation" (ibid). Now, whatever one thinks of this view, it can probably be stated with confidence that most UK senior judges have not yet reached this "beginning" and quite possibly never will (at least before they are made redundant thanks to AI replacements). As Lady Hale noted:

> The common law is a dynamic instrument. It develops and adapts to meet new situations as they arise. Therein lies its strength. But therein also lies a danger, the danger of unbridled and unprincipled growth to match what the court perceives to be the merits of the particular case. So it must proceed with caution, incrementally by *analogy with existing categories*, and consistently with some underlying principle (see *Caparo Industries plc v Dickman* [1990] 2 AC 605). *But the words used by judges in explaining why they are deciding as they do are not be treated as if they were the words of statute, setting the rules in stone and precluding further principled development should new situations arise.* These things have been said many times before by wiser judges than me, but are worth repeating in this case, where we are accepting an invitation to develop the law beyond the point which it has currently reached in this jurisdiction (*Woodland v Swimming Teachers Association* [2014] AC 537, para 28, emphasis added).

In a similar vein, Lord Justice Leggatt has said recently:

> The potential for such interpretation reflects the difference between judicial decision-making and legislation. A court, even the highest court in our legal system, does not have authority to enact rules of law in the form of a canonical text which is to be interpreted and applied like a statute. The doctrine of precedent operates in a more flexible and open-textured way, which recognises that the primary task of any court is to decide the case actually before it, and which gives scope for the law to evolve and adapt as circumstances change or new factual situations are presented (*R v Parole Board* [2019] 3 All ER 954, at para 56).

Clearly, if Eisenberg is right, the common law in the UK is on a different reasoning track than in the US.

One might note, also, how analogy appears to be a perfectly acceptable form of reasoning for the UK judges. Indeed, there are many other analogy examples that could be given. Yet, in fairness to Professor Eisenberg, care must be taken because, however many examples of analogical reasoning that can be drawn from the law reports, the professor would claim that the analogy is always rule based—because there is always *ex post* a rule or principle somewhere in play—and that "rule-based analogical reasoning is a valid mode of legal reasoning" (2022: 85). As for the syllogism, which Lord Simon seems to think is a basic formal element in legal reasoning (even if a complex one), Eisenberg claims that such deductive reasoning is rare and thus not important (ibid 87). Examples of syllogistic reasoning can be found in the law reports, but his comment is a fair one, and of course it has been said often enough that the life of the common law has not been logic but experience (although, as will be seen, what is meant by "logic" is more complex than it might seem). So, should Eisenberg's strict rule model be acceptable as a convincing ontological and epistemological model for legal knowledge and the reasoning associated with it?

[D] WHAT HAVE SOCIAL SCIENTISTS EVER DONE FOR US?

The gap, so to speak, in these rule-model epistemologies is that, as Christian Atias once pointed out, "the passage from the general rule—or the previous decision—to the solution of the concrete case cannot be analysed in a simple deductive process of application" because "the subsuming of a specific case under a rule brings into play multiple circumstances, elements and variables which prevent any claim to predict with certainty its result" (Atias 1994: 119). A good many rules are very general in their formulation—one thinks, for example, of some of the classic

legal maxims—and so any legal reasoning book worth its salt ought to engage in some detail with these "multiple circumstances, elements and variables". Eisenberg does not ignore this gap as such, but what he does is to incorporate these circumstances, elements and variables into both the rule itself and the reasoning about rules by judges. They become part of the rule model. Consequently, unlike say Ronald Dworkin, Eisenberg has no problem with issues of policy and thinks that such policies can be taken into account "in establishing or revising common law rules" (2022: 54). The same can be said of moral ideals and principles. The point is that these issues are part and parcel of rule-based reasoning; they are part of applying, formulating, avoiding or whatever of a legal rule.

This still leaves a gap. There is still the question of the "good judgment" and what amounts to a good judgment rather than a bad one. In the words of Professor Eisenberg:

> The role of the good judgment in legal reasoning is pervasive. For example, good judgment is needed to apply the penumbra of a rule to a given case, to understand when a rule should be distinguished and when exceptions to a rule should be made, to establish new rules where a case is not governed by an existing rule, and to establish transitions in the law (2022: 89).

However, he says:

> The importance of good judgment as an element of legal reasoning is frequently overlooked, perhaps because the faculty of good judgment cannot be taught and is hard to acquire. It is a quality, like grace or a discerning eye, that some have and some don't. It differs from intelligence; a person can be very intelligent but still not have good judgment. Good judges have good judgment. Great judges have excellent judgment. It is the quality that makes them great (ibid).

So, it would appear, the gap cannot be filled by jurists—or indeed by the rule-model epistemology. It is beyond the law school. The rule model, in other words, is not adequate to account for the evaluative circumstances, elements and variables—surely fundamental to the good judgment?—in the process of reasoning. Perhaps it would be unfair to say that what he is advocating is analogous to a professor of peace studies claiming that "All You Need Is Love" as a model for the basis of methodology and reasoning in the department of peace studies. Yet "All You Need Is the Rule Model" is unlikely to impress the thoughtful social scientist who would in all probabilities be particularly sensitive to questions of methodology.

This, of course, takes one onto the question of what a social scientist—perhaps a specialist on social science methodology and epistemology—might have to say about Eisenberg's book, or, more likely, about legal

reasoning in general as an object of analysis. There is no shortage of publications on social science methods, and the epistemological issues attaching to them, and so it cannot be claimed that research by lawyers beyond the kind of rule-model books that dominate the law school shelves is somehow impractical or unreasonable. The problem is ideological in the sense that interdisciplinarity has traditionally been seen by lawyers as unnecessary (see Priel 2019; Husa 2022). This is to be regretted because social science epistemology can provide serious insights into the way lawyers and judges reason while, arguably, the doctrinal rule-model introductions will endow, at best, a very superficial knowledge of methodology.

What, then, is meant by methodology in the social sciences? According to Jacques Herman, the analysis of language in sociology will permit one to grasp the main foundational methodological, philosophical and historical currents of the discipline. This will involve drawing on the lessons from the epistemology and philosophy of science while at the same time appreciating the ideological and cultural factors that attach to the discipline of sociology (1988: 3). "Six languages", he says, "are distinguished: Positivism, Dialectics, Understanding (*Compréhension*), Structuro-Functionalism, Structuralism and Praxeology" (ibid). He later explains:

> If methodology is the practical art of scientific research, general epistemology is the study of the conditions of possibility and validity of theoretical knowledge. Epistemological problems are those of the validity of the forms of scientific explanation, the relevance of the rules of inferential logic, the utilisation conditions of the concepts and symbols in the theories. Scientific ontology is the philosophical discipline which deals with the problem of the reality of objects on which knowledge rests. What is the level of reality of social phenomena (individual, group, organisation, class, role, institution, society …)? Has a social group a reality in itself, different from that of the sum of the people who compose it (holism), or is the only reality the individual? Is culture a domain of autonomous symbolic objects (culturalism), or are the significations just phenomena of consciousness (psychologism)? (1988: 6)

Each method, says Herman, "such as Positivism or Structuralism, operates its own specific selection of epistemological schemes, ontological exceptions and methodological devices" (ibid). In other words, there is not just one form of knowledge. There are different forms depending upon which method one adopts.

These are not the only methodological schemes identified by social science theorists. The late Jean-Michel Berthelot (1945-2006) isolated a slightly different set of six schemes of intelligibility. These were:

> [T]he *causal* scheme (if *x*, then *y* or *y* = *f(x)*); the functional scheme (S→X→S, where one phenomenon X is analysed from the position of its function – X→S – in a given system); the *structural* scheme (where X results from a system founded, like language, on disjunctive rules, A or not A); the *hermeneutical* scheme (where X is the symptom, the expression of an underlying signification to be discovered through interpretation); the *actional* scheme (where X is the outcome, within a given space, of intentional actions); finally, the *dialectical* scheme (where X is the necessary outcome of the development of internal contradictions within a system) (Berthelot 2001: 484).

Functional, structural and dialectical schemes of engagement—or *grilles de lecture*—are commonly shared between the two social scientists. In fact, Herman's positivism is essentially equivalent, or at least largely equivalent, to Berthelot's causal scheme. But what Berthelot does add, which is of importance, is hermeneutics. Added to these two works, a recent edited book on ideas in anthropology has chapters on the causal explanation, the functionalist perspective, structuralism and historical models (Descola & Ors 2022).

[E] WHAT HAVE SCHEMES OF ENGAGEMENT EVER DONE FOR US?

What, then, is the methodological importance of these different schemes of engagement or intelligibility? They may be summarized in the following way:

- ◊ A causal approach, which is the principal scheme in the natural sciences, is one where one phenomenon (A) is examined in terms of its cause by another phenomenon (B). A patient arrives at a doctor's surgery with a particular symptom (A): the doctor will try to find the disease (B) which is the cause of this symptom. The relationship between A and B is thus causal.
- ◊ A functional approach is a scheme of importance in the social and human sciences and the focus of this scheme is on the function (B) of the object (a text or some physical object) (A) with which the researcher is engaged. What does this object do? What is its function? One works back from the function (B) to the object (A).
- ◊ A structural *grille de lecture* is a scheme that has enjoyed a transdisciplinary success moving from the natural sciences to the social sciences and into the humanities (see eg Eagleton 2008: 79-

109). It analyses the object of its engagement (A) in terms of the interaction of a number of elements (B, C, D and so on) that are seen to constitute the object (A); B, C, D and so on are regarded as elements in a coherent system whose reciprocal interaction constitutes the object (A).

- ◊ A hermeneutical scheme is one where the object under investigation (A) is merely a sign which points to a deeper meaning (B). It is one of the principal schemes of engagement with texts—especially ancient texts—and with artistic objects and the like. What does this painting (A) mean (B)?
- ◊ A dialectical engagement is one in which the object with which the researcher is engaged (A) is understood as being the result of an internal contradiction or series of contradictions (B and non-B). It is often associated with medieval scholasticism in which a text is examined through an analysis involving division and sub-division (and often sub-sub-division), each class and sub-class category being seen in opposition to its other class and sub-class category. It is at the foundation of the algorithm in which the analysis is a series of either/or alternatives; and is also associated with Marxist philosophy which regards society as being a matter of contradiction between the capitalist and the working classes. Moreover, it underpins the idea of arriving at knowledge through argumentation: knowledge (A) results from two opposing arguments (argument B opposed by argument non-B).

Another *grille de lecture* mentioned by the anthropologists is what might be described as historical models. This kind of engagement can take different forms and involve a variety of different models reflecting different levels and dimensions, but at a general level it raises an important epistemological question concerning approaches. As the epistemologist Robert Blanché (1898-1975) expressed the question: does one study science from a static or synchronic point of view, its actual and present structure, or does one study it in its formation and development in focusing on its diachronic or evolutionary point of view (1983: 33-34)? This is by no means an easy question. Moreover, it is a question of importance for the lawyer and jurist in that the general assumption is, as is confirmed by many introductory books on law and on legal reasoning, that one studies law from a strictly synchronic perspective. One might note that in the Barnard, O'Sullivan and Virgo book there is no chapter on legal history and almost nothing on the 2000-year historical tradition of law. Eisenberg's book is equally entirely synchronic in its approach.

One might start, then, by adopting a synchronic approach. How might the various schemes or *grilles de lecture* be relevant for lawyers and law students wishing to have a deeper understanding of legal reasoning? Take, first, this piece of judgment:

> The trend in the cases, as I see them, is to shift the focus, or the emphasis, from structure and components to function and appearance – what a family does rather than what it is, or, putting it another way, a family is what a family does. I see this as a functionalist approach to construction as opposed to a formalist approach. Thus whether the *Joram Developments Ltd. v. Sharratt* [1979] 1 WLR 928 test is satisfied, i.e. whether there is "at least a broadly recognisable de facto familial nexus," or a conjugal nexus, depends on how closely the alternative family or couple resemble the traditional family or husband and wife in function if not in precise form (Ward LJ in *Fitzpatrick v Sterling Housing Association Ltd* [1998] Ch 304, at 337)

This is, of course, reasoning about a legal (statutory) rule and as such the approach adopted can be regarded, by a strict rule theorist, as ancillary to the rule itself. The judge—who was dissenting—was simply offering a social and moral policy in support of his interpretation of the rule (see eg Eisenberg 2022: 49). He saw the rule as operating in one way while the other judges saw it operating in another way. A social scientist, however, would surely be struck by the different *grilles* or schemes in play: the majority were, it seemed, structuralists while the dissenter was a functionalist.

In fact, it might be worth returning to the Barnard, O'Sullivan and Virgo book on this scheme of intelligibility point. In their section on legal method the authors make some helpful observations for students regarding the handling and applying of precedents and the interpreting and applying of statutory provisions. They follow these observations with a section on "imagination" in which they examine a particular tort case concerning a child in the care of a foster mother who had been badly scalded by hot water from a tap that the child had accidentally turned on (*Surtees v Kingston Upon Thames BC* [1991] 2 FLR 559). The question, in theory, was one of fact: had the foster mother been in breach of the duty of care she owed to the child (in other words had she been negligent)? At first sight, it might well be said that the child had a good case. As the authors say, the "claimant's lawyer had a relatively easy task, detailing why it was dangerous to leave a two-year old child in the vicinity of the hot tap, as it only takes a moment to turn it on". But the authors then go on to observe that "the defendant's lawyer retorted with lots of very imaginative arguments as to why the foster mother had *not* acted unreasonably". They then add more detail:

> These included the fact that she was looking after lots of other children, so if she carried the claimant around everywhere she would have neglected the others; that it is not necessarily a good idea to cushion children from *all* risks, because that way they grow up with no idea of how to assess risks and therefore might end up more seriously injured in the future; that carrying the child out of the bathroom might itself have been more dangerous; and that demanding too high a standard from foster parents might put people off volunteering for the role, which would be detrimental to more children in the long term (Barnard & Ors 2021: 28, emphasis in original).

A social scientist reading this argument would no doubt be interested by this piece of legal rhetoric, but one wonders whether she would regard it as that imaginative. Was it not simply a functionalist argument advanced in order to offer a different perspective to the claimant's structuralist "safe system" assertion? The functionalist argument succeeded in front of the judges, yet this, in itself, might well have raised a question in the social scientist's mind. Did the defendant counsel offer any empirical evidence about cushioning children from risks? Did the counsel offer any empirical evidence supporting the assertion that people might be put off from volunteering? Maybe they would be put off from volunteering. But, she might think, mere rhetorical assertion is hardly to be considered as serious, not to mention imaginative, reasoning.

[F] WHAT HAVE IMAGINATIVE ARGUMENTS EVER DONE FOR US?

This is not to suggest that lawyers are incapable of imaginative arguments. One area of law where imagination, or at least perception, has (seemingly) played a role is where one person is sued for damages in respect of a wrong committed by another. In fact, this is an issue that partly arises in Eisenberg's book. In order to illustrate how the common law is a matter of rule-based reasoning, Eisenberg discusses an American case in which a house-building company hired a roofing contractor to install a roof on one of the homes it was building. The roofing contractor was very seriously injured when he fell from a ladder which slipped while the contractor was descending. Was the house-building company to be liable for this injury?

One important rule—or set of rules—that can come into play in this type of situation is vicarious liability. The rule is that an employer will be liable for a tort committed by an employee acting in the course of his or her employment. The rule did not come directly into play in the American case because the roofing contractor did not injure a third party, but it does have something of a relevance in that it raised the question of who is an "employee" (or "servant" as the old common law rule once said).

Tort writers and teachers often use the following illustration to explain the operation of this rule. A company executive is taken to the airport in a company car driven by a company employee; on the way the driver is negligent and injures another road user. The company will be vicariously liable. This is compared to the situation where the executive is taken to the airport in a taxi; in this situation the company will not be vicariously liable because the taxi firm is an independent contractor. These are two poles on a spectrum, of course, and there will be situations where it is ambiguous as to whether the person employed is an employee or not.

In the American case it is clear from the outset that the roofing man was an independent contractor and so the question was whether the house-building company owed a direct duty to the contractor regarding a safe system of work. The US courts held that there was no such duty because the contract did not assign control of the roofer to the house-building employer and there was no evidence that the latter had actual control over him. As Eisenberg illustrates, all this can be reduced, seemingly, to a series of rules (2022: 6-7). Yet, can it? Is not the question of whether a person is an employee (servant) or independent contractor becoming a more difficult one in the light of contemporary employment practices? And, even if a person is deemed an independent contractor, is not the question of a direct (non-delegable) duty equally one that cannot easily be reduced to rule-reasoning?

With respect to the employee question, one judge has certainly indicated that the application of the law seems to involve something more than just looking at the words of the relevant rule. In *Hall v Lorimer* ([1992] 1 WLR 939) Mummery J said:

> In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another (ibid 944).

Does not this "paint a picture" exercise suggest that there is more to legal reasoning than just a rule being applied to the facts of a case? Perhaps

Professor Eisenberg would say that the "painting a picture" is an aspect of the "good judgment" dimension of rule-application and thus is something that cannot be taught in law schools (2022: 89). Professor Barnard and her co-authors might say that it is an example of the "imagination" requirement.

More interestingly, Professor Scarciglia might well argue that this text from Mummery J is an illustration of the importance of perception as a methodological question. This professor discusses what he considers the importance of perception not in the context of legal reasoning as such, but in the context of comparative law methodology. Nevertheless, in his discussion he encompasses the thought processes of judges. Perception, he points out, underlies everything we think, know and believe (Scarciglia 2023: 65); and to support this assertion the author employs visual illusions such as the duck-rabbit and Necker Cube images. With respect to the thought processes of judges, Scarciglia says:

> My short analysis of perception and comparative law also refers to judicial behaviour, based on the belief that judges may make mistakes or that their choices may be influenced by factors such as memory, moral judgement or emotions. The contribution of neuroscience, developed in the early 1980s to study the brain's basis of thought, and its relation to law, especially procedural law, has been decisive in ascertaining how and what factors contribute in the determination of judges' decisions (2023: 75, footnote omitted).

The author then goes on to set out some of these factors:

> Posner identifies, in addition to personal factors, five phenomena that can determine judicial behaviour: (a) conscious falsification; (b) precedents determined by experience, temperament, ideology and other extra-legal factors; (c) cognitive illusions; (d) precedents shaped by irrelevant reactions; (e) distortion of the facts to avoid an alteration of precedents (ibid, referencing Posner 2008).

Needless to say, none of these perception factors are discussed or are even mentioned in Eisenberg's account of legal reasoning. The only object of perception is the rule, together with the extremely vague "good judgment", a notion that has absolutely no epistemological value.

Now, whatever one may think of this perception thesis, an English case concerning the non-delegable duty problem (often associated with vicarious liability) arguably confirms that Professor Scarciglia (and Richard Posner) has (have) a point. A school girl suffered very serious injury as a result of an accident in a swimming pool. The swimming session had been organized by her local (and small) state school but the session itself was supervised by an independent contractor whose negligence was the

cause of the damage. An action was brought by the child against, *inter alia*, the school and the question arose as to whether the school should be liable given that it was an independent contractor who was negligent. The Court of Appeal held that the school was not to be liable. This was an act by an independent contractor and was analogous to a situation where the pupils of a school are taken on a trip to a zoo and a child is injured as a result of the negligence of a zoo employee. In such a situation the school would not be liable. As Tomlinson LJ said:

> Provided that undertaking a trip to the zoo in question did not itself amount to negligence because, for example, of the known incompetence with which the zoo is run, or, possibly, its lack of adequate liability insurance, I do not consider that we have been given any justification for such an outcome [that the school should be liable]. Furthermore, the imposition of such liability would be likely, I think, to have a chilling effect on the willingness of education authorities to provide valuable educational experiences for their pupils (*Woodland v Essex CC* [2012] EWCA civ 239, para 57).

At first sight this reasoning would appear to be based on a very clear rule that found its particular expression in the zoo example. The zoo image was the dominant perception and this perception was transferred by analogy to a swimming trip. Moreover, such a rule would appear to be supported by a policy dimension: to impose liability on the school might well have a chilling effect on education authorities to provide school trips. One gets the feeling that this Court of Appeal decision would provide an excellent example to support Eisenberg's rule-model thesis.

So, why did the Supreme Court disagree with the Court of Appeal? The Eisenberg response would no doubt be that the higher court was taking a broader view of the non-delegable duty rule in tort. It was, in other words, a rule-application decision. Swimming lessons were not like trips to the zoo and thus the rule applicable to zoos and the like were not applicable to schools and school-time swimming lessons. However, the analogy drawn by Lord Sumption was that the school situation was like the situation where a patient in a National Health Service hospital was damaged by the negligent act of an independent contractor surgeon. The hospital in such situations, so the precedents clearly indicate, cannot claim that they owed no duty to the patient (see *Woodland v Swimming Teachers Association* [2014] AC 537, paras 14-16). More interestingly, Lady Hale in the same case justified liability in saying this:

> Consider the cases of three 10-year-old children, Amelia, Belinda and Clara. Their parents are under a statutory duty to ensure that they receive efficient full-time education suitable to their age, ability and aptitude, and to any special needs they may have (Education

> Act 1996, section 7). Amelia's parents send her to a well-known and very expensive independent school. Swimming lessons are among the services offered and the school contracts with another school which has its own swimming pool to provide these. Belinda's parents send her to a large school run by a local education authority which employs a large sports staff to service its schools, including swimming teachers and life-guards. Clara's parents send her to a small state-funded faith school which contracts with an independent service provider to provide swimming lessons and life-guards for its pupils. All three children are injured during a swimming lesson as a result (it must be assumed) of the carelessness either of the swimming teachers or of the life-guards or of both. Would the man on the underground be perplexed to learn that Amelia and Belinda can each sue their own school for compensation but Clara cannot? (para 30).

No doubt it can be said that Lady Hale was applying a rule to the facts. But such an assertion tells us almost nothing regarding the actual legal-reasoning process. The reasoning process of Lady Hale has virtually nothing to do with the rule itself which is simply there in the background rather like the maxim "all you need is love" is there in the background when a professor of peace studies explains the complex reasoning processes in difficult and delicate peace negotiations. Lady Hale could be said to be adopting something of a functional approach in that decisions need, functionally, not to perplex the ordinary person in the street. Yet, arguably, it is more structural in its form. It is setting up a structural pattern of educational institutions and how the perception of this pattern would play out in different ways according to the status of the school. The way this pattern functions, as Lady Hale explained, would lead to a perception of unfairness or a lack of justice if liability was not imposed on the small school. Rules are there, of course, but they do not tell one much about actual legal reasoning.

[G] WHAT HAVE THE ROMANS EVER DONE FOR US?

If one returns to the various schemes of engagement set out by social scientists, one of them is engagement through historical models. Can a diachronic approach to legal reasoning provide important methodological and epistemological insights? This is a dimension often ignored by introductory books to legal reasoning, Eisenberg's contribution being no exception. Yet, modern synchronic thinking about law has not appeared *ex nihilo*; it has built up over two millennia and such a data bank (so to speak) contains a wealth of legal ontological and epistemological information. If one starts with Roman law—or at least the texts bequeathed to later Europe—this is largely a mass of legal-reasoning material and

this material, over the many centuries after the death of Justinian, has itself attracted a vast amount of commentary. Again, of course, the point must be noted that one can be an excellent lawyer without knowing any of this historical material. But what is potentially useful for AI research is that the Roman law texts have been presented to Europe in the form of a closed body (*corpus*) of material that ought to prove more appealing for those attracted by the idea of legal singularity.

This said, from an Eisenberg perspective, the most interesting point to emerge directly from the Roman texts is the apparent rejection of the rule model. Law was not to be found in rules (*regulae juris*) since these were only mere summaries of the law, said the jurist Paul (D.50.17.1). As Peter Stein put it:

> [A *regula*] is no different from a *definitio*. It is a brief statement of the subject-matter, that is, the existing law. The law is not derived from the *regula*; rather the *regula* is derived from existing law. (It is significant that *sumatur* and *fiat* are both in the subjunctive, which suggests that the writer is not stating fact but putting a point of view.) A *regula* is a convenient means whereby a summary statement of the law can be passed on to others (*traditur*), but it has no more validity in itself than a *causae coniectio*. This was a technical term of procedure … [which] was a short gathering up of the relevant facts (Stein 1966: 69).

Eisenberg might easily refute Paul's view not just in highlighting Stein's point about the use of the subjunctive but also in pointing out that there is plenty of other evidence in the Roman texts seemingly contradicting Paul. A text, that might have been written by Gaius, asserts that it is most important for students to know rules (*regulae*) (Stein 1966: 72). Anyway, he might continue, whatever the position in classical Roman law, the *regulae* were to become central to European legal thinking in post-classical Roman law and in its subsequent history from medieval times onward. In other words, Eisenberg might say, Paul was incorrect.

Yet, even if Paul was incorrect, this does not alter the fact that when one examines the Roman texts themselves, in particular the *Digest*, it is difficult to conclude, except as a very general assertion, that legal reasoning is simply about the formulation and application of rules. There are engagements with the rule text; and these engagements can vary in their methodology. Take this famous rule:

> In Chapter one of the *lex Aquilia* it is set out: "one who unlawfully (*injuria*) kills another's slave or female slave, or a four-footed animal belonging to the class of *pecudes*, let him be condemned to pay to the owner an amount that was the highest value in the previous year" (D.9.2.2pr).

The rule was stated by the jurist Gaius who goes on to engage with the words of this rule by way of interpretation. What is included in the term "*pecudes*"? He says that it embraces animals kept in herds such as sheep, goats, cattle, horses, mules and asses and maybe pigs, but not dogs. However, elephants and camels are included because they are beasts of burden, but not other wild animals such as bears, lions and panthers (D.9.2.2.2). The jurist Ulpian then discusses the word "*injuria*" (D.9.2.3). Yet, while he is no doubt involved in an interpretative engagement, his method is to consider some factual situations in which a killing might be lawful, such as self-defence, before concluding that *injuria* in this rule means some kind of fault (*culpa*) even if the actor did not intend to injure (D.9.2.5.1). Ulpian now continues with a whole range of other factual situations where a person might or might not be at fault: the shoemaker who strikes his apprentice; the person who has overloaded himself and who kills a slave when he throws the load down; the boxer who kills; the person who pushes one person against another; the person who hands a sword to a lunatic; the person who throws another off a bridge; and one or two other cases (D.9.2.7). Gaius follows giving some factual examples, after which Ulpian is back with a mass of factual examples most of which raise causation issues. The whole of this title in the *Digest* is given over to factual situation after factual situation with the result that the rule itself, as a text, is virtually lost from view, the legal emphasis being largely on the question of whether or not, on the facts discussed, an action is available to the victim.

Most of the titles in the *Digest* follow this pattern of moving from one factual example to another. Yet, the method of analysis is not always the same. Gaius, as has been seen, starts by interpreting a word in the Aquilian rule, but the emphasis on facts in the texts that follow means that the actual methodological engagement is not so much with the rule—which, in fairness to Eisenberg, is, of course, there in the background—but with facts. Here several methods other than linguistic interpretation come into play. One is dialectical opposition, where a factual situation is engaged with through a series of either this or either that analysis. Take, for example, this factual situation:

> A boar fell into a trap set by you for hunting; unable to escape, I got it out and carried it off. Does it seem to you that I have carried off your boar? And if you judge it to be yours, if I let it go having taken it into the woods does it cease to remain yours? And, I ask, what action against me might you have if it ceased to be yours, should it be one *in factum*? He [Proculus] has replied: let us see whether the trap was placed on public or private land and, if placed on private land, whether mine or some other's property, and, if some other's property, whether with the permission of the other or without permission of the

> owner of the land. In addition, whether it was so completely trapped the boar could not have extricated itself or whether struggling longer it would have extricated itself. In short, however, I think this, if it comes into my power (*potestas*), it is mine. But if however the boar, being mine, you send it away back into its natural environment, and it ceases being mine, an action *in factum* against me ought to be given, as if (*veluti*), according to an opinion (*responsum*), a cup belonging to another had been thrown overboard from a ship (D.41.1.55).

There is, surely, much going on here in terms of methodological engagement. The most striking is the series of dialectical oppositions which today one might describe as almost algorithmic in method (see D.9.2.52.2 for another example; but see Rabault 2024: 82-84). Yet, note also the use of analogy as a means, not of arriving at a solution, but of justifying the solution once given (again see D.9.2.52.2 for the use of analogy). Underpinning the whole situation is a structural scheme involving the law of property—not just ownership (*dominium*) and possession (implied by *potestas*) but also the nature of things that can be owned and possessed, namely, in this case, wild animals. The facts are not, then, brute facts; they are facts as envisaged through a structural system made up of empirical elements (persons and things) and conceptual elements (ownership and possession).

Another well-known text dealing with the Aquilian rules as applied to a factual situation is one by the jurist Julian:

> So badly wounded was a slave from a blow that it was certain he would die; then, in the time between the hit and death, he was made an heir and following this he died from a blow by another person. I ask whether an action for killing under the *lex Aquilia* can be brought against each of them. He [Julian] replied: in fact it is commonly said to have killed whoever is the cause of death (*qui mortis causam*) by whatever means; but under the *lex Aquilia*, is considered to be held liable only he who applied violence and by his own hand, so to speak, caused the death, that is to say in extending the interpretation of the words “to kill” (*a caedendo*) and “to hit” (*a caede*). Again, however, under the *lex Aquilia*, have been held liable not only those who wound in such a manner to deprive immediately life but also those who as a result of wounding it is certain that life will be lost. Therefore if someone mortally wounds a slave, and another, during the interval, hits him in such a way that he dies more quickly than he would have done from the first wound, it is determined that the two are held liable under the *lex Aquilia* (D.9.2.51pr).

This text is famous in that it appears to contradict an opinion by Ulpian dealing with the same situation (D.9.2.11.3). Indeed, relatively recently, the two texts have been investigated in depth both in Roman law itself and in the second life of Roman law from the 11th century to the present

day (Ernst 2019). However, what is interesting for our purposes is the way in which Julian justifies his decision. He said:

> With regard to this, if anyone thinks that what we have decided is absurd, he should reflect that it would be far more absurd if neither is held liable under the *lex Aquilia*, or one rather than the other [be held liable]; for wrongs ought not to go unpunished and nor is it easy to establish which of the two is to be held liable under the statute. Many are the examples that can be proved in civil law that go against rational reasoning and argumentation (*contra rationem disputandi*) in favour of the common policy good (*pro utilitate communi*). I shall content myself with one example. Where several people with an intent to commit theft carry off a wooden beam belonging to another that no single person could do himself an action for theft lies against all of them, although subtle reasoning (*subtile ratione*) says it would lie against no one of them because in truth no one of them could carry it (D.9.2.51.2).

The engagement with the Aquilian rule here is one that today would be described as functional or a policy engagement (*pro utilitate communi*). It can still be described as an interpretative approach, but it is not an engagement that focuses on the words (*verba*) or on the actual intention of the legislator (*mens legislatoris*) or indeed on the structure and rationality of the text as such (*ratio legis*). This is where Julian's opinion is different from Ulpian's decision.

One might add that Ulpian seems to be treating the two incidents of violence as individual and separate events while Julian is, in effect, seeing the whole situation as a single holistic event. In other words the way the facts are envisaged is actually fundamental to the legal outcome and this is a process that is not dictated as such by the Aquilian rule. It results from the permanent tension to be found in Roman law—indeed in all Western and Western-influenced legal systems—between the whole and its parts, something which finds expression in the old epistemological and ontological debate between nominalism and universalism. Sometimes this tension can be governed by a specific rule—for example in the law of property there are *regulae* about things made up of other things. Can one own a flock of sheep as a holistic *res* or does one own only each animal separately? What if a person builds a house out of bricks owned by another? The same applies to people. Is a college (*universitas*) a separate legal subject from its members? Yet, if there is one lesson to be drawn from the Roman texts it is the way in which society as a factual "reality" is nothing less than a reality that is being constructed. The structure is a legal model in which the empirical elements of people and things are merged with the ideological notions of person (*persona*), thing (*res*), ownership (*dominium*), servitudes, contracts of various types, fault

(*culpa*), risk and so on. Such a model can, in one sense, be reduced to an ontology of rules which then can be employed as the means—a model as one might say today—for viewing the facts. However, what Roman law tells us is that such a rule model has glaring gaps.

One such gap is ownership. This is a fundamental notion in Roman law, yet it is nowhere defined or described in terms of a rule. The usual definition that is attributed to Roman law is not actually Roman; it comes from the medieval jurist Bartolus (1313-1357). How, then, does ownership figure so prominently in the Roman texts? It does so by ricochet and by oblique factual and legal references; it is specifically described as a form of power (*potestas*) (D.50.16.215) and this power is either there in the background or assumed, as is the situation for example in the title on the *rei vindicatio* (D.6.1). Even when there is a statement that appears rule-like, as is to be found in the title on possession (D.41.2.3.1), this statement in itself does not act as a starting point for an analysis of possession. The starting points are factual example after factual example. Often what appear as rule-like statements are in truth just descriptions of what the law is and precede a discussion of various factual examples. Of course, one can project onto these texts normativity; that is to say one can claim the existence of a rule either by turning a descriptive statement into a normative one or by implying a rule into every factual discussion. Yet this is, in effect, to reduce to a two-dimensional plan what is a three-dimensional approach to law. Roman law, at least as set out in the *Digest*, is not to be engaged with as a two dimensional "map"; it is much more of a book of many, many "photographs".

[H] WHAT HAVE THE ROMANISTS EVER DONE FOR US?

This said, there is one book among the *corpus* of Roman laws that is more map-like. This is the Institutes, a book that can be regarded as one of the first introductions to law. The *Institutes* (*institutiones*) that arrived (actually rediscovered) in Europe in the 11th century, and thus came into the hands of what might be called the Romanists, was Justinian's, but he said that it was based on the apparently very successful predecessor, namely the *Institutes of Gaius* thought to have been first published in the middle of the second century AD (see Birks & McLeod 1987). In fact it is evident from the *Digest* that other jurists also wrote *Institutes* and so it would appear that introductions to law were seen as an important aspect of legal education. What is notable about the Romanists—that is the generations of jurists and philosophers who studied and wrote

commentaries and other texts on Roman law from the 11th century to the present day—is that they not only transformed the laws through their own interpretations but also reduced them to the kind of two-dimensional "map" that was characteristic of the *Institutes*. They laid the foundations for, and later brought to fruition, legal singularity.

The process started with the medieval jurists who were increasingly influenced by the translation and circulation of the works of Aristotle in the 12th and 13th centuries (Errera 2006). The syllogism provided the means both for extending the Roman factual cases to new situations that were not faced by the Roman jurists and for underpinning the authority of legal decisions by a methodology that seemed to guarantee "truth" of outcome (Gordley 2013: 28-81). The syllogism was founded upon universal principles (major premises) and one thus finds the jurist Baldus (1327-1400) famously stating that he who wishes to know things must first know its principles (*principia*) (Comment on D.1.1.1). One of the first Romanist introductory works to law, reflecting both the work of the medieval jurists and the new humanist ideas, by Mattheus Gribaldi (1505-1564), equally asserted that *regulae*, which he described also as *axiomata*, were fundamental for students (Gribaldi 1541). In fact the 16th century saw some of the humanist jurists not just asserting that the *regulae iuris*—that is the maxims to be found in the last title of the *Digest* (D.50.17)—were an actual source of law (Stein 1966: 162-170) but systemizing the whole of the *Digest* along the taxonomical scheme of Gaius' *Institutes*. This movement towards Roman law's two-dimensional singularity was completed by the French jurist Jean Domat (1625-1696) who, in his *Loix civiles* (1644/1735), reduced the whole of Roman law to a series of *principia* or *regulae* with the aim of aiding students and professionals to comprehend Roman law without having to go through the painful process (*si difficile et si épineuse*) of trying to make sense of the Roman texts themselves. Roman law was now simply a book of *principia*, all supported by references to Roman texts, but, seemingly, it was hardly Roman law as conceived by the Romans themselves. Domat's project, with the help of subsequent jurists (especially those jurists who saw law as analogous to mathematics), was finally to result in the French *Code civil* of 1804, which was, arguably, the ideological triumph of two-dimensional legal singularity. As Alan Watson pointed out, this code was also, in effect, an elegant introductory book—an elegant "nutshell" (Watson 1994).

Did the influence of the Romanists extend into the world of the English common law? Perhaps not so much in the 16th century, but, as many legal writers and historians have noted, William Blackstone's *Commentaries on*

the Law of England (1765-1769) was a Domat-like project to re-present English law not just in terms of generalized statements but arranged in accordance with the Roman *Institutes* plan (Watson 1994: 12-13). It offered a two-dimensional view of English law. Blackstone's work was lauded as an introductory book to the foundations of law, but it did not have that much impact on legal practice which was still rooted in the system of thought based on the forms of action (Lobban 1991: 47). Indeed, even in the middle of the following century, an introductory book to English law was entitled an "analysis of pleading" (Garde 1841) which, to a contemporary student, would seem to be a work devoted almost entirely to different types of action and to pleading procedure. Nevertheless, what is interesting about this small introductory book is its preface where the author states:

> There is nothing more necessary in all sciences than to possess a thorough knowledge of their first principles … The law, like every other science, has its first principles, which must be understood before any progress can be made in the study of it. This was, indeed, the opinion of those celebrated writers on Jurisprudence, the President Domat and the Chancellor D'Aguesseau among the French; and our own no less distinguished countrymen, Lord Coke and Lord Bacon (Garde 1841: vii, 'Preface').

Despite the use of the terms "principles" and "axioms" by the author, the book sees English law simply as a code of procedure. There is little or nothing about substantive law—that is to say about the law of property, contract, tort and the like. Indeed, in 1841 these categories had not fully established themselves in English legal thought and so the book is revealing about what constitutes the "scientific" axioms necessary to become a barrister.

Five years after the publication of the "analysis of pleading", a report from a Parliamentary Select Committee on the state of legal education in England, Wales and Ireland was somewhat pessimistic, to say the least. The Committee concluded:

> That the present state of Legal Education in England and Ireland, in reference to the classes professional and unprofessional concerned, to the extent and nature of the studies pursued, the time employed, and the facility with which instruction may be obtained, is extremely unsatisfactory and incomplete, and exhibits a striking contrast and inferiority to such education, provided as it is with ample means and a judicious system for their application, at present in operation in all the more civilized States of Europe and America … That it may therefore be asserted, as a general fact to which there are very few exceptions, that the student, professional and unprofessional, is left almost solely to his own individual exertions, industry, arid opportunities, and that no

> Legal Education, worthy of the name, of a public nature, is at this moment to be had in either country (1846: lvi).

The result was, said the Committee:

> That amongst other consequences of this want of scientific Legal Education, we are altogether deprived of "a most important class, the Legists or Jurists of" the Continent; men who, unembarrassed by the small practical interests of their profession, are enabled to apply themselves exclusively to Law as to a science, and to claim by their writings and decisions the reverence of their profession, not in one country only, but in all where such laws are administered (1846: lvii).

One of the recommendations, then, was that there should be a "scientific" legal education. In terms of legal knowledge substance, the Committee recommended:

> That it would be advisable to begin with the great branches only of the Law, but highly desirable, as the system advanced, to add such other Chairs as in the first instance the exigencies of the Profession itself required, and, in the next, as might be of utility to the Profession and to the Public generally, such as Chairs of International, Colonial, Constitutional Law, Medical Jurisprudence, Municipal, and Administrative Law, &c. &c. In this view also, and for the purpose of giving more extension, and at the same time more energy and efficiency to the plan, a system somewhat analogous to that in use in Germany might be adopted, namely, lectures might be given (1846: ix).

The importance of this Select Committee report was to suggest a new direction in the approach to legal knowledge. It should be more continental (civil law) in a "scientific" or jurisprudential sense, and it should see legal knowledge in terms of the kind of categories that were to be found in 19th-century Romanist thinking. One might have thought that the report would have been quietly ignored, but this was not the case. "There was", said Peter Stein, "an immediate reaction to the Report, and efforts were made to remedy the calamitous state of affairs which it had revealed" (1980: 79). One effect was to be the creation of an English corps of Romanists whose influence on introductory law books was, for a time, definitive, and perhaps remains in some ways influential.

[I] WHAT HAVE COMMON LAW ACADEMICS EVER DONE FOR US?

Peter Stein has shown how Roman law became an established part of the legal education curriculum in England through the appointment to academic positions of Romanists such as George Long (1800-1879) (Stein 1980: 79-82). Stein also noted how English law, while strong and

independent in terms of its legal rules, was "weak on its legal theory" and so while it "has remained relatively free of Roman influences, English jurisprudence has traditionally turned for inspiration to the current continental theories, necessarily based on Roman law" (1980: 123). This Romanist influence became evident in the introductions to law published in the second half of the 19th century and well into the 20th century.

One of the first notable introductions to law to be published in England after the 1846 report was by William Markby. In his *Elements of Law* (1st edition 1871) the author states in the introduction:

> Being told that the law contains such and such a rule, it will be his [the student's] business to examine it, to ascertain whence it sprung, its exact import, and the measure of its application. Having done so, he must assign to it its proper place in the system; and must mark out its relations with the other parts of the system to which it belongs. This will require a comparison with analogous institutions in other countries, in order to see how far it is a deduction from those principles of law which are generally deemed universal, and how far it is peculiar to ourselves (1871: xii).

Markby then adds:

> For this purpose some acquaintance with the Roman Law will be at least desirable, if not absolutely necessary; because the principles of that law, and its technical expressions, have largely influenced our own law, as well as that of every other country in Europe (ibid).

One might note that, for Markby, the ontological foundation of law seems to be rules, but that some of these rules have their ultimate source in universal ones and these universal rules in turn have their roots in Roman law. Another introductory book from the early 20th century similarly emphasizes both the rule and the system ontology:

> The laws of a country are thought of as separate, distinct, individual rules; the law of a country, however much we may analyse it into separate rules, is something more than the mere sum of such rules. It is rather a whole, a system which orders our conduct; in which the separate rules have their place and their relation to each other and to the whole; which is never completely exhausted by any analysis, however far the analysis may be pushed, and however much the analysis may be necessary to our understanding of the whole. Thus each rule which we call a law is a part of the whole which we call *the* law. Lawyers generally speak of law; laymen more often of *laws* (Geldart 1911: 7-8).

These introductory books—or at least Markby's book (1871)—are introductions not only to what might be said to be the positive law of England but also to jurisprudence, that is to say to legal theory and philosophy. No doubt this was a reaction to the 1846 criticism that legal

education lacked a scientific dimension. However, this is in contrast to some of the contemporary introductions to the common law. The jurisprudential aspect is equally evident—more so in fact—in Frederick Pollock's *A First Book of Jurisprudence* (1st edition 1896), yet the book is nevertheless aimed at "readers who have laid the foundation of a liberal education and are beginning the special study of law" (1896/1929: v). It also places great stress on the rule ontology, summarizing law as the "sum of such rules as existing in a given commonwealth" (ibid: vii). Indeed, in a later edition, Pollock (1854-1937) writes that "the safest definition of law in the lawyer's sense appears to be a rule of conduct binding on members of the commonwealth as such" (ibid: 29). One might, in fairness, object to the implication here that Pollock was a Romanist; he is not known as a specialist in this subject. But he does say in the preface to his *First Book* that his greatest debt is to Savigny (ibid: vii) and this debt is discussed in some actual detail by Neil Duxbury in his masterful history of the jurist (Duxbury 2004: 23). One might add that the influence of Gaius is in evidence in the arrangement of the positive law in Pollock's introductory book (persons, things and obligations).

This rule-ontology is to be found in other introductory books of the time. For example, Paul Vinogradoff (1854-1925) in his *Common-Sense in Law* (1914) defined law "as a set of rules imposed and enforced by a society with regard to the attribution and exercise of power of persons and things" (1914: 59). Moreover Vinogradoff, who can certainly be considered as having been a Romanist, saw legal reasoning, even in the common law, as fundamentally based on the syllogism. "The principles formulated in precedents", he wrote, "correspond in a system of case-law to the clauses of a statute in enacted law." And in "both cases the problem for the judges may be compared to the process of logical deduction which leads to a so-called syllogism" (1914: 182). It is a question of bringing a case within the major premise of the common law (1914: 186). This, of course, echoes, to some extent, the view of Eisenberg about a common law rule arising from precedent now being treated, at least in the US, as equivalent to a statutory rule, although the two jurists differ about the role of the syllogism. Interestingly, Vinogradoff's view of case law reasoning can be compared to Markby's account. This latter author thought that the "nature of the process of reasoning which has to be performed in order to extract a rule of law from a number of decided cases by the elimination of all the qualifying circumstances, is a very peculiar and difficult one" (1871: 29). He thought that the process was a "competition of opposite analogies" and that what counsel does when arguing a case is to urge different analogies with the object being to determine the stronger

analogies from the weaker ones (1871: 29-30). The judges thus "determine the law only *by applying it*" (1871: 30, emphasis in original).

This seems a quite different approach from the logical process advocated by Vinogradoff, but not one with which Eisenberg would agree since he asserts, somewhat forcibly, that the "common law courts seldom reason by analogy" (2022: 7). The reason why they seldom reason by analogy, says Eisenberg, "is simple: a court will never reason by analogy if the case before it is governed by a binding legal rule and the common law is rich with binding legal rules" (2022: 8). Markby would no doubt take issue with this assertion. He thought that "English judges are absolved from the necessity of stating general propositions of law" and, when they do make them, "they are always read as being qualified by the circumstances under which they are applied" (1871: 28). Indeed, he goes on to say:

> Whether it would be found possible to combine our practice as to the generally unquestionable authority of prior decisions, with the practice of laying down in every case abstract propositions of law separate from and independent of the particular facts, is an experiment which, as far as I am aware, has not yet been tried (ibid: 29).

Eisenberg might respond in noting that Markby was writing about the common law well over 150 years ago and that things are rather different today. But, for English law, are they? Writing just over a century after Markby, Lord Diplock asserted:

> In a judgment, particularly one that has not been reduced into writing before delivery, a judge, whether at first instance or upon appeal, has his mind concentrated upon the particular facts of the case before him and the course which the oral argument has taken (*Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192, 201).

Even in the Court of Appeal this factual dimension must not be lost from view:

> The primary duty of the Court of Appeal on an appeal in any case is to determine the matter actually in dispute between the parties. Such propositions of law as members of the court find necessary to state and previous authorities to which they find it convenient to refer in order to justify the disposition of the actual proceedings before them will be tailored to the facts of the particular case. Accordingly, propositions of law may well be stated in terms either more general or more specific than would have been used if he who gave the judgment had in mind somewhat different facts, or had heard a legal argument more expansive than had been necessary in order to determine the particular appeal (ibid).

And he went on to add:

> Even when making successive revisions of drafts of my own written speeches for delivery upon appeals to this House, which usually involve principles of law of wider application than the particular case under appeal, I often find it necessary to continue to introduce subordinate clauses supplementing, or qualifying, the simpler, and stylistically preferable, wording in which statements of law have been expressed in earlier drafts (ibid).

If Lord Diplock is right, and he was speaking from a position of legal authority, it would seem that Markby might be a more useful introduction to legal reasoning than Eisenberg.

[J] WHAT ARE INTRODUCTORY BOOKS IN GENERAL DOING FOR US?

Whatever the position concerning Markby's book, are some introductory law books more useful than others, at least with respect to legal reasoning? Are there considerable variations between introductory books, not only in respect of different legal cultures but also regarding books within a single legal culture? Or are introductory books epistemologically beholden to the standard type of doctrinal syllabus that is characteristic of most Western law schools? A book that does not inform the incoming law student about what she will in all likelihood encounter over the next three years might well be considered by many as not fulfilling its stated purpose. One should, of course, make the point once again that general introductions to law may not be the same as introductions to legal reasoning, although, as has been seen, many such general books do cover the topic in greater or lesser depth.

On general introductions to law, there has been an increasing interest in France witnessed by the publication of two books of conference papers, one some years ago (Cabrillac 2017) and one more recently (Altwegg-Boussac 2021). The book edited by Professor René Cabrillac is useful in the way that it is not restricted to French law; the editor invited contributions from England, Germany, Italy, Spain, Belgium and Luxembourg and this endows the work with a certain comparative flavour. Similarly, the collection edited by Professor Altwegg-Boussac also contains contributions looking at various legal cultures, namely British common law, German law, Spanish law and Italian law. However, this latter book is more theoretical and philosophical in its orientation and, in addition, it has a concluding section containing a discussion by the contributors of their individual experiences in teaching introductory courses.

What emerges from these books is a mixed picture. Professor Cabrillac, in the preface to his edited collection, notes that the contents of his book display great uniformity in the development of introductions to law, mainly consisting of the notion of law, sources, evidence and procedure, an outline of the contents of the categories of positive law via the notions of legal rights and objective laws. He equally concludes that the book is dominated by a positivist approach (2017: XI). One learns, however, that in Germany and Italy the emphasis has traditionally been less on introductions to law and more on introductions to legal science (Schulze in Cabrillac 2017)—which, in Germany at least, stresses amongst other things legal method itself centred around the syllogism (echoing Vinogradoff, discussed earlier). One writer offers something of a general conclusion in stating that these introductions offer on the whole—at least in the civil law tradition—an image of law's unity as a science, which more specially breaks down into historical-philosophic, general theory and conceptual elements (Deumier in Cabrillac 2017: 93). John Cartwright (in Cabrillac 2017) offers an English perspective where he makes the point that the very different history of legal education in England, together with the lack of any requirement of a law degree to become a professional lawyer, means that the various introductory courses to be found in English universities do not speak with a single voice. He alludes, also, to the role that first-year Roman law courses once played in providing an introduction to law.

Professor Céline Roynier, in the Altwegg-Boussac's collection, offers a different perspective to Cartwright. She examines introductions to English law in the 17th and 18th centuries and one of the key points she makes is that, thanks to the introductory books of this period, the methods of the civil law were absorbed into the common law. What she says is by no means particularly original—Alan Watson had highlighted the importance of introductions to law ("nutshells") many years before (Watson 1994)—but she adds a little more detail to the period covered and reiterates the point that this was a time when there were some serious attempts to structure the common law along Roman institutional lines. However, the lack of university law schools teaching the common law during this period—and even when it was taught, it attracted few students—meant that the civil law influence made little headway in the world of the common law practitioners. This said, the importance of Watson's and Roynier's contributions lies in the type of books that were being written. It could be argued that during the 17th and 18th centuries it was these introductions to law that were attempting to advance, in England, legal knowledge in a context when legal education was at a low

ebb. Yet, where was one to look for such advances? One obvious answer was to look at works from the civil law.

Other contributions in the Altwegg-Boussac collection confirm Cabrillac's view that introductions, at least in France, are both uniform and positivistic (or at least doctrinal) in outlook. In the 19th century, Roman law remained of considerable influence, but this was a Roman law that had been fashioned into a rationalized and ideal model suggesting not just a French law but a *science pure* or *jurisprudence universelle* (Richard in Altwegg-Boussac 2021: 29-30). There was an increasing German influence as well, often accompanied by an evolutionary view of legal history. Indeed, of particular value is Richard's reproduction of a number of course plans from the middle of the 19th century (2021: 38-40). Of course, in the civil law tradition, the codes (including constitutions) dominated the conceptual structure of legal knowledge and its methods. Law was not just a matter of rules, but an independent structural and coherent form; unity and autonomy were what dominated introductions to legal science in Germany (Corre-Basset in Altwegg-Boussac 2021: 80). And this "specificity would be such that only the jurists could be the appropriate people to write on these matters, and without having to preoccupy themselves with the state of the literature in the other disciplines" (Corre-Basset 2021: 85). One might think that this epistemological outlook would now be something that belongs to the past, but this would appear not to be the case, even within the common law world (Priel 2019). One can see why one contributor to the collection argues that introductions to law tend to reflect what the law was rather than what it actually is today given the changes of epistemological outlook during the last half century (Libchaber in Altwegg-Boussac 2021). Are introductions to law, in other words, a kind of nostalgic view of a supposed knowledge?

[K] WHAT HAS LOGIC EVER DONE FOR US?

Professor Altwegg-Boussac's book does not, however, limit itself to this descriptive aspect of introductions to law in their historical and conceptual setting. One of the most interesting aspects of the collection is a section devoted to the "theories of introductions to law". This section brings one back to the epistemological aspect that attaches to these introductions. What is the phenomenon that they are supposed to be describing? If the phenomenon is a model or indeed a science, what is the object that is being modelled? Why has law as a body of knowledge seemingly been able to resist its critics? Is this resistance the result of a more general epistemological issue concerning the dividing-up of knowledge into distinct

disciplines? Is law simply a fiction? This last question is by no means a novel one since fictionalism can be seen as one important trend in the history of legal theory (Jones 1940: 164-186). Indeed fiction theory, it has been argued elsewhere, might still be the most viable epistemological model for understanding legal knowledge and legal reasoning (Samuel 2018: 229-257), although such a thesis has attracted fierce criticism (Penner 2019).

One way in which an introduction to law can avoid any confrontation between fiction and reality is to focus on method rather than theory. Is law a matter of logic, asks one very recent introductory book? One can understand neither a range of problems in law nor law's fundamental concepts, says the author, if one fails to take into account the logical structure of law (Rabault 2024: 1). Logic is a topic that has already been touched upon since Eisenberg, as has been seen, rejected the syllogism as being important in common law legal reasoning. One should add that in French law the role of the syllogism, while central to the French "official portrait" of reasoning, loses its status, according to one American specialist on French law, the moment one examines the "unofficial portrait" (Lasser 2004). Such an unofficial portrait is to be found in the reports and opinions of the reporting judges and advocate-generals within which are to be found reasoning schemes and *grilles de lecture* well beyond the syllogism. However, Professor Rabault offers a more nuanced view of legal logic; legal rules or norms contain conditions and it is the presence and absence of these conditions when applied to factual situations that determine the outcome of cases. This explains, he says, "the profound relationships between the legal mind and the mathematical mind" (2024: 7).

By way of example, Rabault takes article 311-1 of the French Criminal Code which states that "theft is the fraudulent taking (*soustraction*) of another's thing". The conditions in this rule are, he points out, "taking", "thing" belonging to "another" and where the taking is "fraudulent". If these four conditions are to be found in a factual situation, then there is "theft". If they are not, then there is no "theft". This methodological approach is one of logic: if p, then q. This perspective on law, says the author, "puts the emphasis on the logical dimension of the law and establishes a parallel between the processing of legal situations and the computer processing of data" (2024: 60). Rabault, drawing inspiration from the sociologist and system theorist Niklas Luhmann (1927-1998), considers that the law is largely constituted by a *programmation conditionnelle* and it is this *programmation* that provides the dominant structure of modern law (2024: 61). And this leads him to assert that his starting point is

the structuration of law by the *programmation conditionnelle* which provides the conceptual basis for a logic by implication (2024: 64). Yet, what kind of logic is in play in legal reasoning? Rabault says that it is largely founded on a binary logic (*une logique bivalente*) which, at its highest level of abstraction, is a matter of legal/illegal (2024: 77). Either something is legal or it is illegal. At lower levels of abstraction one finds, as with the rule on theft, the same kind of dichotomy: either there is theft or there is no theft; there is nothing in between. Again one is back to the analogy with computer processing: there is, he says, "a striking similarity between legal methodology and computer algorithms" (2024: 81).

This binary logic is in turn founded on a system of legal classification. Professor Rabault says that the kind of classifications to be found in law—he gives the example of the division of things (*biens*) into moveable and immoveable property (French *Code civil*, article 516)—constitutes a reduction of complexity permitting a standardized processing of problems. In order to illustrate this point in more detail he turns to the *Institutes of Gaius* in which social complexity is reduced to the threefold scheme of persons, things and actions, each of which in turn contains sub-categories and sub-sub-categories. Here is a system of information processing, he asserts, that is relatively simple and consists (as has already been seen earlier in this article) in a series of questions reflecting the various categories and sub-categories into which a factual situation must be analysed. This is why, he says, that in certain legal systems Roman law is still taught, not as a historical subject, but as a practical model made up of a logical rigour. "The *Institutes* of Gaius", he concludes, "show how litigation disputes appear, across the legal classifications, as a pathway determined by the tree-like structure, which offer the alternatives, the possibility of bifurcation and so on, and which allows one to set out the problem to be submitted to the judge" (2024: 83).

It might at this point be useful, by way of comparison, to return to Professor Eisenberg's book since he, as has been seen, seems to be offering a rather different view about legal reasoning and problem solving. According to this introductory book to the common law, logic and the syllogism are "not important" (2022: 87). However, this professor is focusing on common law rules—rules emerging from precedents—rather than statutory ones which are at the basis of civil law thinking. Some of the reasons that he offers to support his legal reasoning view—for example that a common law rule cannot often be stated with certainty or that the rule itself has a penumbra of uncertainty (2022: 88)—might not be so relevant when it comes to legislation (although this is not to suggest that there are not ambiguous statutory texts). But he offers little or nothing on

the methods of statutory interpretation, an area of legal reasoning that is actually more relevant given that the great majority of cases that come before the courts in common law jurisdictions involve a legislative text. This said, on a closer reading, one finds that Eisenberg does not actually dismiss deductive reasoning; what he dismisses is formal syllogistic reasoning by judges in the sense that their judgments do not openly display this methodological form. Instead "most or all common law cases involve implicit informal deductive reasoning". He says that this "is partly because the law is concerned with truth but formal deduction is not" (2022: 87).

It is not entirely clear what the professor means here by "truth". Certainly, Rabault would probably not contest the idea that the binary logic underpinning the judicial syllogism is founded on fictions; for the reduction of the legal model to an either/or structure is simply a process that permits the reduction of social complexity to a state where binary logic can operate (2024: 72-73). The model is not a reflection of the real world; the law just wants to exclude as far as possible "fuzzy logic" (*floue*) and this comes at a "reality" cost. Eisenberg, in contrast, would seem to suggest that the common lawyer wants to get beyond this kind of surface binary structure with a reasoning model that embraces the facts and the application, and justification, of the rule to the facts as found by the court. Such an exercise, while evidently rule-based, is by its nature, he might say, a complex process because it embraces far more than just formal logic; legal reasoning does, and ought, to be supported by social morality, social policy or both (2022: 41-59). Indeed, for this writer, functional arguments are just as valid as formal ones (2022: 55-57)

What Eisenberg does not do, however, is to spend time on the internal structure of the common law in terms of classification and binary categories. Yet, there are many precedent decisions whose "logic" was dependent upon a re-categorization of a factual situation—from, say, defamation or contract to the tort of negligence—with the result that a litigant succeeded in situations where, before the re-categorization, the existing law suggested that he or she would not. There are, equally, endless legislative texts that display a binary category logic: one thinks of the distinction between consumer and business contracts or between animals belonging to a dangerous species and animals that do not (Animals Act 1971, section 2). Both of these latter binary category choices bring into play different liability rules. Sometimes, particularly in statutory interpretation cases, it is the judges themselves who use a binary category method to solve a problem. For example, in order to avoid holding a local authority liable for a statutory nuisance with regard

to the "state" of one of their premises, the majority established a binary choice between "state" and "layout", the latter not being covered by the legislative text (*Birmingham CC v Oakley* [2001] 1 AC 617). Are these, as Rabault would say, examples of logic in law? Is there an underlying conceptual structure to the common law that permits legal reasoners to apply binary logic?

Rabault may well respond that they are such examples. But he would also emphasize the historical point he makes in his book that the judicial syllogism is the result of the move towards positivism—what he calls the "positivisation of the law"—which he associates in particular with the Italian jurist Cesare Beccaria (1738-1794) and with a new way of writing about law. "The judicial syllogism", says Rabault, "is explained by the emergence of the primacy of positive law, by the rise of a law decreed by the state, which liberated law from the tradition of Roman law" (2024: 40). The primary form of this state-enacted law was the code which acted as a body of major premises to be applied neutrally by the syllogism; and "codification is in itself the logic project of a formalisation and of a systematisation of the law" (2024: 43). Rabault considered, therefore, that the 18th and 19th centuries saw a radical transformation of law and legal reasoning. It was "an historical evolution" that consisted "of an effort to take control, by the political authorities, of the application process of the law, and that this evolution had been able to deal with the tension that opposed the political authorities against the corporation of lawyers" (2024: 110). As for the new writing, this emerged, notes Rabault, in the 17th-century writings of the natural lawyers such as Jean Domat (1625-1696) and Samuel von Pufendorf (1632-1694) who, inspired by the methods of geometry and mathematics, wanted to endow law with a logico-axiomatic coherence (2024: 111).

Beccaria, Domat and Pufendorf were not unknown in England and indeed Beccaria was an influence on Jeremy Bentham (1748-1832) who himself was an advocate of a positivist conception of law and codification (Lobban 1991: 120). This said, Bentham's criticism of Beccaria and others was, as Michael Lobban has pointed out, that "while they began with general principles, they failed to work them out in practical detail" (1991: 157). And so, despite his particular interest in classification and arrangement, Bentham "showed no interest in discussing the nature and function of the syllogism or logical reasoning". Rather, his method was one of "acquiring knowledge … through induction and observation—and then arranging it correctly" (1991: 163). It was the dialectical scheme of bifurcation rather than the syllogism that mattered for Bentham (1991: 164), for he had an "empiricist epistemology" that "would not lead to

a deductive code" (1991: 168). How influential, then, was Bentham on English law thinking? Michael Lobban concludes that it is mixed, but that his greatest contribution was that common lawyers "did take on board Bentham's ideas on the nature and form of the law, seeing law as a set of rules" (1991: 222). Bentham, in other words, helped establish the rule model as the ontological and epistemological foundation of the common law, yet he did not shift it from an inductive stage to a deductive one.

This does not mean that deductive reasoning is irrelevant in common law legal reasoning, despite Eisenberg's assertion that syllogistic deduction is not important. There are plenty of examples where a legal conclusion can be seen to follow necessarily from logical premises (MacCormick 1978: 19-52). The important point that Rabault makes with respect to deductive reasoning and the syllogism is its ideological role in the 18th and 19th centuries, an ideology of particular importance in post-revolutionary France given the immense distrust of judges. It was an ideology associated with codification and the suppression of judicial decision-making as a source of law. The ideological atmosphere in 19th-century England was not the same, even if, thanks to the writings of Bentham and John Austin (1790-1859), it could be said that there was a "positivisation" of English law. There was not the same distrust of judges, and, anyway, the common law itself was seen as being the product of the judiciary and not the legislature.

Another important point made by Rabault is the meaning of "logic" itself. It is not confined to syllogistic reasoning but embraces the systematization of law, the principle of non-contradiction, the inductive method, and the treatment of like cases alike. Just because it is often said the life of the common law has not been logic but experience, it does not follow that the common law reasoning is illogical. As two common lawyers point out, the "place of formal logic in legal reasoning is one of the most problematic topics in jurisprudence" and even to ask the question about the role of logic in legal reasoning is to ask a question that is "ambiguous and misleadingly simple" (Twining & Miers 2010: 346). What can be said with confidence is that logic has a role in common law reasoning even if it manifests itself in several different ways and not always in ways that are immediately evident (Guest 1961).

[L] WHAT HAS ANALOGY EVER DONE FOR US?

One such non-manifest (or lesser) form of logic is, perhaps, reasoning by analogy. Professor Rabault sees this as a form of casuistic reasoning which is quasi-logical and is employed in situations where the resolution of a case cannot be achieved through strict logic (2024: 109). He returns to his example of theft which, as has been seen, is defined as the fraudulent taking of a thing. Does the fraudulent extracting of electricity amount to the taking of a "thing"? Rabault thinks that when the *Cour de cassation* decided that it was theft, the court was extending the notion of a "thing" by way of analogy, something that the Imperial German Court refused to do a few years before (2024: 114).

Eisenberg is sceptical about this kind of reason when it comes to the common law. He certainly quotes many writers who claim that analogical reasoning, rather than rule-based reasoning, is a feature of the common law, but he argues that these writers "are incorrect" and that "common law courts seldom reason by analogy" (2022: 7). He asserts that when one actually studies the data—the cases—they rarely reveal analogical reasoning and this is because "a court will never reason by analogy if the case before it is governed by a binding legal rule and the common law is rich with binding legal rules" (2022: 8). Larry Alexander and Emily Sherwin, in their introductory book to philosophy and law, think, anyway, "that there is no such thing as analogical decision making" because judges "who resolve disputes by analogy either are acting on a perception of similarity that is purely intuitive and therefore unreasoned and unconstrained, or they are formulating and applying rules of similarity through ordinary modes of reasoning" (2008: 234). Or, put another way, there is a lack of logic because the "outcome of one case, without more, carries no logical implications for the outcome of another case" (2008: 118).

Two particular problems therefore seem to arise regarding analogy. Is it just a question of perception and intuition rather than reasoning? And can all apparent cases of analogical reasoning be explained as being in reality rule-based reasoning? With respect to the first problem, reference has already been made to Professor Scarciglia's view of the importance of perception in understanding how judges function; and so the issue here is the legitimacy of what might be seen as a psychological theory of legal reasoning—that is to say a theory or theories based on the "mental processes" behind decision-making in law (Jones 1940: 187). Alexander and Sherwin, if not Eisenberg, clearly think that intuitive reasoning is not legitimate. And, of course, they are more than entitled

to their opinions. But it is perhaps to be regretted that these jurists who dismiss analogy as a form of reasoning seem reluctant to do much serious research into this process. As one specialist on reasoning wrote, "analogy is a certain relation which can play a role in reasoning, and this by virtue not of its actual meaning but of its formal properties alone: reflexivity, symmetry and non-transitivity" (Blanché 1973: 184). In other words, analogy invites one to investigate, amongst other things, a structural reading of a problem; it is a form of isomorphic thinking. One is saying that there is a symmetric relationship between one factual situation and another. One can call this intuition if one wishes, which, for judicial reasoning, has a distinctly pejorative meaning since judges are not supposed to arrive at intuitive decisions. But structures are structures and, in the natural sciences, for example, they "have become the base of modern mathematics, [and] the elaboration of theoretical structures the essential object of physics" (Blanché 1973: 180). Indeed, as Robert Blanché noted, reasoning by analogy has played an immensely important and creative role in the history of science, and, when one comes to think about it, classification into genus and species is actually an analogical exercise since it is founded upon certain similarities between things (1973: 180-181).

As for the second problem, it is always possible to assert that it is not the symmetry or isomorphic structure—or indeed the quality of a thing—that is at the basis of analogical reasoning, but a rule. Analogy is, then, just induction where the rule inducted is implicit. Given that *ex post facto* it is probably always possible to describe any analogical reasoning in terms of some apparently implicit rule-like statement, it is difficult, if not impossible, to argue that analogical reasoning is essentially different from induction. As Neil MacCormick (1941-2009) said, "no clear line can be drawn between arguments from principle and from analogy" (1978: 161). If one returns to the example given by Lord Simon concerning the rule in *Rylands v Fletcher* and the requirement that in any subsequent case the dangerous "thing" that escapes and does damage must be something analogous to water, what is going on in terms of reasoning? When the court concluded, in a case concerning the escape of electricity, that this fell within the precedent because electricity was analogous to water, was this just an example of implicit inductive rule-reasoning? The same question might be posed with regard to Professor Rabault's example of the theft of electricity. Professor Scarciglia might say that this is an issue of perception and thus found analogy on a psychological model of reasoning; the rule-theorists might reply that underpinning water and electricity is an implicit rule about fluidity.

In fact this dichotomy itself is incomplete because there are also questions of schemes of engagement. A reasoner might employ analogy simply as a device to apply a functional scheme of engagement: extending the rule in *Rylands*, or the notion of theft in France, to cover electricity is to be justified on the ground of public interest or utility. Another judge might take a hermeneutical approach, arguing (perhaps implicitly) that the author of the *Rylands* or the theft rule intended that it should cover new forms of "thing". The structuralist, of course, would simply use analogy to assert that there is an identical structural relationship between person and water and between person and electricity. One might say accordingly, following MacCormick, that in many cases "analogy provided legal support for, and not legal compulsion of, the decision given" (1978: 182). Does it follow, therefore, again referring to MacCormick, that analogies "only make sense if there are reasons of principle underlying them" (1978: 186)? The rule-theorists would undoubtedly agree, but this is perhaps to underestimate the role of analogy both as a structural scheme of engagement—one is extending a structure rather than a rule—and as a spatial-reasoning process. Rule-theorists operate in a flat two-dimensional world, whereas reasoning through factual images permits one to think in three-dimensions. As a French jurist, reflecting on how law is represented, notes: the loss of a dimension—that is the reduction of a three-dimensional world to a two-dimensional one (or flat world)—just adds a further constraint to problem-solving (Mathieu 2014: 140).

Perhaps this spatial or perception point has been recognized by an Australian judge who seems to have insisted on a distinction between a rule and an analogy:

> When a legal rule or result is attached to certain relationships or phenomena, the perception of similar characteristics in another relationship or phenomenon leads to the attachment of a similar legal rule or result. Unless the analogy is close, the applicability of the legal rule or result to the supposedly analogous relationship or phenomenon is doubtful. It is fallacious to apply the same legal rule or to attribute the same legal result to relationships or phenomena merely because they have some common factors; the differences may be significant and may call for a different legal rule or result. Judicial technique must determine whether there is a true analogy (Brennan J in *Dietrich v R* [1992] HCA 57, para 10).

Analogy according to this judge is not a means as such for arriving at a conclusion. Rather, it provides a contextual picture which permits the reasoner to appreciate whether or not a rule applying to one situation should actually be applied in another, seemingly similar, situation.

[M] WHAT, THEN, HAVE INTRODUCTORY BOOKS TO LEGAL REASONING DONE FOR US?

Returning, by way of conclusion, to the principal question concerning introductory books on legal reasoning, perhaps the first consideration to note is the insistence of many of them, especially the more recent, that the ontological foundation of legal knowledge is the rule model. The student arriving at the law faculty will, so the books indicate, have to gain knowledge of a mass of rules emanating from official legal sources (primarily legislation and cases) and to learn how to apply these rules to practical legal problems. Such an application process will, it would seem, involve a methodology that is largely "analytical" and "interpretative". The rules themselves, as the Barnard, O'Sullivan and Virgo book (2021) indicates, will be divided up into various categories, each category representing an individual course or module. In the common law world, some of these categories—crime, contract, tort, property and public law, for example—will be regarded as fundamental and will usually be obligatory. Other courses will be optional and may range from the strictly doctrinal (company law, family law, immigration law and so on) to the more reflective (international law, comparative law, legal history, for instance), and indeed to some that are even philosophical in their substance (jurisprudence or legal theory).

In the civil law world introductory books will equally regard the foundation of legal knowledge as being rules or norms themselves categorized into subject-areas dictated, regarding private law (strictly separated from public law), by the civil codes (well expressed in the French Code of Civil Procedure, article 12). In other words, it is not just the rules or norms which make up official legal knowledge but also the taxonomical plan. And the plan to be found in most of the civil codes is one that has been largely dictated by the *Institutes of Gaius* and so (with some variations) usually means the tripartite plan of the law of persons (status, personality and family law), law of property (ownership, possession and rights in another's property) and the law of obligations (contract, delict and unjust enrichment). Criminal law, which in theory belongs in public law, will have its own code and in the French model is, for historical reasons, regarded as part of private law. As for public law itself, this is usually sub-divided into constitutional and administrative law. In addition to introducing students to these different areas of the law, these introductory works stress that the legal system is one of coherence and

order. Introductory books thus present law as a taxonomical structure to the extent that "the law is the language of order" (Libchaber 2021: 161).

This idea of coherence and order is at the basis of the civilian idea that law is a science. As a German professor has pointed out, in Germany there is not a tradition of introductory books to law; instead, there are introductions to legal science (Schulze 2017: 119). Moreover, in Germany, law has traditionally been seen not just as an actual science but one that is independent of the social sciences and which has its own particular set of methods (Corre-Basset 2021). This leads to a "sentiment largely shared by professors of law that the critique of law cannot be developed by any science other than legal science itself" (Miaille 2021: 181). In other words, "the specificity of the law would be such that only lawyers could usefully write on this material, and without having to preoccupy themselves with the state of the literature in other disciplines" (Corre-Basset 2021: 85). Legal writers might claim that law is a social fact, but in the pages of an introduction "society disappears and it is not a matter of introducing the law as a social fact, but as a legal phenomenon" (Geslin 2021: 117). Other social sciences are seen as auxiliary and, if not ignored completely, they are discussed for their utilitarian function, the frontiers of law itself being studiously maintained. "Rare are the works", says one French Professor, "where are presented, if only in a few lines, epistemology, linguistics, literature, the cognitive sciences, psychology, legal geography and so on" (Geslin 2021: 119). Erica Thompson would say "welcome to model land" (Thompson 2022).

Common lawyers, in contrast, do not on the whole see law as a science, only as a social science if the word is to be used at all. The Roman institutional scheme has been used by writers of introductions to law, as has been seen, but this scheme has rarely been considered as a highly coherent and systematic (logical) structure whose principal method of application is through the syllogism. However, what many of these books—especially the more recent—do seem to be asserting is a legal ontology based on rules. What perhaps is more disturbing is that some of these books provide at best academic assertions that a colleague from the philosophy department might find surprising. Take this example from Eisenberg:

> American private law is made by the courts. Accordingly, American common law courts have two functions: resolving disputes by the application of legal rules and making legal rules (2022: 3).

The second assertion does not actually follow from the first. It may be that both are true (whatever "truth" means)—although the idea that knowledge

of law is knowledge of rules is highly debatable. But the passage from one to the other is not logically consistent. In fact, Eisenberg's assertion takes one on to another dubious statement:

> In our view, there are two plausible models of common-law reasoning, and only two. The first is the "natural" model, in which courts resolve disputes by deciding what outcome is best, all things considered. In the courts' balance of reasons for decision, prior judicial decisions are entitled to exactly the weight they naturally command. The second model of common-law reasoning is the "rule" model, in which the courts treat rules announced by prior courts as serious rules of decision, but then revert to natural decision making when rules provide no answers (Alexander & Sherwin 2008: 31-32).

The aware student will notice immediately that this second assertion is not actually compatible with the one by Eisenberg—not that this is necessarily a bad thing—but also that any serious debate about legal reasoning and legal knowledge is immediately closed off by the "only two" assertion. The two models may not be wrong as such: there are undoubtedly many cases in the law reports in common law countries where the judicial reasoning might well seem to fit into one or other of the two proposed models. Yet, by setting up a dichotomy between "best outcome" and "rule" reasoning models the authors are making what might be termed a category mistake. One cannot oppose the generic or universalist category of best outcome with a specific ontology category of the rule model, for it is like comparing "cauliflower" with "vegetables". Judges strictly applying a rule using syllogistic logic might well believe that this leads to the "best outcome" of a case.

What would be more useful, arguably, is for the rule model to be compared with models based on other institutional possibilities such as the rights model, interest model or remedies model (see further Samuel 2018: 87-116). Such different models are not, of course, strictly isolated one from another—the rights model may well intersect with the rule model just as the remedies model can intersect with the interest one. Yet, operating at the level of these different ontological approaches can better highlight—arguably—the types of argument and schemes of intelligibility employed by judges in their reasoning. Instead, what the student will get from these rule-model authors is a very simplistic view of legal reasoning—and one that even many strictly doctrinal lawyers might find unhelpful. One only has to look at two of the leading French doctrinal textbooks on legal method to appreciate that legal reasoning is a highly complex and doctrinally sophisticated area of study (Bergel 2018; Rouvière 2023; and see also Waddams 2003).

What, then, are introductory books on legal reasoning doing for the law student? In fairness, before answering this question, one perhaps ought to recognize that much depends upon the expectation of the reader. One might also recall how introductions to law in the past have played a major role in transporting legal knowledge—or aspects of legal knowledge—from one society to another (Watson 1994). However, from the viewpoint of some kind of sophisticated insight into legal knowledge and the reasoning based on it, if the books examined in this contribution are to be seen as typical, the answer ranges from "modest" to "not much". Most of them are too fixated on the rule model. Indeed, in the case of Eisenberg's book, whatever its value for US students, it is positively misleading, in several respects, for English readers. And so, on the whole, the books examined in this survey are unlikely to act as any kind of vehicle for transporting any serious knowledge of legal reasoning from one society to another—or even from law faculties to the intending students of law. They are far too limited in their intellectual scope.

Yet, the problem is not so much the introductory books themselves. Some of them, like the Barnard and colleagues, are basically just informing students what they will face—particularly at Cambridge—over the three years of their degree, and they do this well enough given the nature of most law programmes. Indeed, the chapters on the various legal subjects are informative and sometimes imaginative. As one of the chapters says, the students have to know what the law is (if such a thing is possible). Yet, there is a 2000-year history of legal knowledge: should this not figure, somewhere, in the university programme? Should there not be some serious comparison between different legal traditions? Introductory books to English literature (Eagleton 2008) or to art history (Cothren & D'Alleva 2021) inform students about how to "read" a novel, poem or picture; that is to say they inform students about structural, functional, hermeneutic and other schematic engagements. Should not law students be told how structuralism, functionalism, hermeneutics, psychoanalysis and so on are fundamental to legal reasoning? If Dan Priel is right (2019), it would seem not.

AFTERWORD

This said, it has to be pointed out that this critical survey—as will be evident—is restricted in its scope. It has focused only on some of the recent books published in the common law world, and primarily on those that emphasize or at least discuss legal reasoning. Moreover, it is not always easy to distinguish between an introductory book and a more sophisticated work. And so, to give just one example, there has been no

discussion of the monograph from the late Ronald Dworkin (Dworkin 1986) on the ground that this book, like Herbert Hart's *Concept of Law* (1961, supposedly published in an introductory series), is less an introduction and more a serious work on legal philosophy. The reason for this limited scope is that much more scholarly research needs to be undertaken regarding introductions to law and so this present survey should be seen more as an "opening gambit" rather than as any kind of definitive project. One future project, for example, will be a comparative survey comparing introductions to law with introductions to other disciplinary subjects in the hope of gaining further epistemological insights (a project that has already begun: see Samuel 2024). Another project is to undertake comparative research into introductions to legal theory. One final acknowledgment needs to be made. There is no doubt that this investigation into introductions to law has been stimulated by the two French-edited books on this topic (discussed in the article). However, the original idea of investigating these introductions actually came out of a discussion with Professor Fiona Cownie, many years ago. Professor Cownie has more recently denied any knowledge of suggesting this research topic, but anyone who knows her first-class and original work on legal education will have no difficulty in recognizing her as the source of this kind of scholarly research.

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The Conflicting Categorization of Kings and Chiefs in Ghana: The Status of the Asantehene

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Abstract

This article aims to explore the historical development and contemporary role of the chieftaincy institution in Ghana, highlighting its enduring significance and adaptability. The institution of chieftaincy has been with the people of Ghana for centuries. Chiefs, now known as traditional rulers, are distinct from political rulers. The laws of Ghana require chiefs to maintain neutrality by forbidding their engagement in active politics. Chiefs are royals who have been validly nominated, elected, or selected by their respective kingmakers to be enstooled or enskinned according to the relevant customary law and usage. When Europeans came to Africa to trade, chiefs governed independent states, each with its own laws, courts, police, and military. The chieftaincy institution is organized hierarchically, ranging from the lowest rank to the apex, and among the Asantes, the Asantehene is the apex. Before 1901, when the British colonized the Asantes, the Asantehene served as the political, executive, and legislative head of the people of the Asante Kingdom.

The Asante Kingdom covers the Ashanti Region, Ahafo Region, parts of the Bono and Bono East Regions, and a paramountcy each in Ghana's Eastern and Oti Regions. The traditional capital of the Asante Kingdom, Kumasi, was initially at Kwaman. In the 1670s, Chief Osei Tutu from the Oyoko Abohyen Dynasty became the chief of Kwaman after succeeding his late uncle Nana Obiri Yeboah, who reigned from 1640 to 1680 and united all the Asante chiefdoms, which were independent and had their political autonomy. The occupants of the Golden Stool are designated as kings and have held the title to this day. Although the British succeeded in changing the name of some kings to paramount chiefs, they failed to change the name of the royals responsible for the nomination, election or selection of a person to be enstooled or installed as an Asantehene, paramount chief or chief, who are still called the kingmakers.

Keywords: Asante Kingdom; Asantehene; enstooled; fetish-priest; Gold Coast; golden stool; kingmakers; Oyoko clan; paramount chief; traditional ruler.

[A] INTRODUCTION

Beginning about 1200 CE, the Mali, Songhay and Ghana empires and kingdoms spread their sequential influence across the western horn of Africa, making advances in trade, language, culture and economy. These empires and kingdoms flourished and grew under influential leaders, including one Mansah Musah, whose skills were celebrated in European capitals (Conrad 2010). A kingdom is a government or political organization where a monarch, such as a king or queen, rules as the head of state. In a kingdom, the monarch holds significant power and authority over the territory and its people. The monarch's position is usually hereditary and passed down within the royal family from one generation to another. Kingdoms vary in size from small territories to vast empires. The monarch may govern with the assistance of advisors and governing council or ministers. The structure and organization of a kingdom usually differ on the grounds of historical, cultural, political and other factors. Historically, kingdoms have been a common form of government in various regions worldwide. They have consistently played a pivotal role in shaping societies' vision, aspirations, culture, laws and political systems towards achieving economic growth and development, all in the people's interest.

The Asante Kingdom evolved around the 17th century. The Asante people established the kingdom before the establishment of the Gold Coast and now modern-day Ghana. The Asante Kingdom was an independent nation with its own courts, judges, administrators, soldiers, police and laws. The Asante Kingdom grew in power and influence through military conquest, trade and diplomacy. The rise of the kingdom was characterized by the unification of various Asante states or nations under the leadership of King Osei Tutu I, who is credited with founding the kingdom with his advisor and priest Okomfo Anokye, who played a significant role in consolidating the Asante people and establishing a centralized political system. The kingdom peaked in power and prosperity in the 18th and 19th centuries. The kingdom was known for its military strength, elaborate court ceremonies, rich cultural traditions and thriving trade networks. The Asante Kingdom had a complex political and social structure, with the Asantehene at the top of the hierarchy, followed by various sub-chiefs and officials who administered aspects of governance. The King was the administrative head, the military head, the religious head, and the head of the judiciary (Busia 1951: 233).

The Asantehene, as the head of the military of the Asante Empire, determined whether or not the nation should go to war and fight with

its neighbouring states or have an alliance with them. In the 1750s, the Asante Empire was the most powerful empire in the region and was very wealthy. It had acquired its wealth by trading gold, slaves and through mining.[1] The Asante Empire was made up of three categories of states. They were the provinces, protectorates and tributaries. The provinces comprised the different chiefdoms in the area that formed the empire. The protectorate comprised states that were in alliance with the Asantes and were protected from attacks by the other states. The third category was the tributaries, which formed the economic and manpower source for the empire's expansion (Arhin 1967).

[B] THE FORMATION OF THE ASANTE EMPIRE

The Asante Kingdom, started with Kwaman as its headquarters. This was later moved to Kumasi by King Osei Tutu I, who, aided by his friend, Komfo Anokye, entrenched its monarchy through the conquest of the other neighbouring states, including Gyaman and Takyiman. The Asantes subsequently waged a war against the most powerful Denkyira Kingdom, which at some point in time had controlled the Asantes. In 1701, the Asantes, led by King Osei Tutu I, engaged in a war against the Denkyiras, killed their king, Ntim Gyakari, and divided his dismembered body into four to symbolize the defeat and fall of the Denkyira Kingdom. Robert Sutherland Rattray, GBE, known as Captain R S Rattray, a renowned barrister and anthropologist who came to Ghana in the 1920s and whose collected works spanned from 1881 to 1938, stated thus: "Ntim Gyakari's head was given to the Asantehene, his left leg bone to Asumegya, the right leg bone to Mampon, and the vertebrae to Aduaben. Kumasi permitted these three stools to copy the regalia of Ntim Gyakari" (Rattray 1929: 132). The Asante Kingdom was rich in gold, traded this gold with the Europeans on the coast and tried to overpower any states that attempted to act as intermediaries between them and the Europeans. Through their geographical position, wealth, and fearless people, the Asantes expanded their frontiers through war. The Asantes, the Asantehene and the Golden Stool became popular, making them an enviable kingdom in the 1700s.

[1] See African Studies Centre, Leiden.

[C] THE LEGAL SYSTEM AND LAW ENFORCEMENT

The Asantes had their own laws, judges and law enforcement bodies. The laws of the Asantes were unwritten, as customary law knows no writing, but were mainly sins against the gods, the king, chiefs and other Asante people. The sins were considered wrongs and were tried by the King and his chiefs, with appropriate sanctions imposed on those found liable. The punishments for severe acts included death, banishment and imprisonment. The King had his executioners and persons responsible for prisoners who were also chiefs. The constabulary was known as Abrafuo. The Toprefuo were responsible for the execution of people sentenced to death (Ampene & Kwadwo Nyantakyi III 2016).

The Asante Kingdom was a theocratic state that believed in God, deities and gods, and it invoked religious sanctions for acts that showed disrespect to the gods or cursed or disrespected the King, chiefs and fellow Asantes. Some serious acts attracted death sentences, including mutiny, rebellion, murder, the practice of sorcery and witchcraft, incest, intercourse with a menstruating woman, cursing a chief or the king, committing adulterous acts with the wife of a chief or king, rape of a married woman, insulting a chief or the king, and sometimes war captives. The King imposed all death sentences in his court. There were two types of death sentences. Persons sentenced to death for certain acts, such as cursing the king, invoking powers to harm the king and practising witchcraft and sorcery, were burned, strangulated, or drowned for the reason that they had committed unspeakable acts, and their blood should not be shed. The other convicts were executed with knives or other metals.[2]

[D] THE RISE AND FALL OF THE ASANTE EMPIRE

The Asante Empire engaged in several wars intended to expand its territory and also for trade and the protection of its people, and it was not until 1874 that the British defeated the Asantes at Fomena and set Kumasi ablaze. The war, led by a British soldier known as Sir Garnet Wolseley, became known as the Sagrenti War. In the early part of the 19th century, when the Asante Empire was an independent state, it had serious issues with the coastal states, who were preventing it from dealing directly with the Europeans; notably among them were the English, Dutch and Danes. The coastal chiefs, among others, of Assin, Elmina, Cape Coast and

[2] African Studies Centre Leiden.

Komenda, entered into an agreement with the British to protect them from the attacks of the Asantes in 1844, which became known as the Bond of 1844. In 1863, the British signed a peace treaty with the Asantes, stating they were not at war with the southern states. Still, the southern states wanted to impose themselves on the Asantes as intermediaries and, as a result, the Asantes periodically fought against them. The leading cause of the Sagrenti War was that the British wanted to punish the Asantes for breaking the agreement.

The intervening states between the Asantes and the Europeans at the coast became obstacles to the Asantes, preventing them from selling directly to the Europeans and buying arms from them to expand their empire after the main obstacle, the Denkyiras, had been defeated. After defeating the Denkyira state, which was the most formidable one, the Asantes could not understand the importance of the coastal chiefs acting as intermediaries between them and the Europeans. J D Fage stated the causes of wars between the Asantes and the coastal states as follows:

> The defeat of Denkyira had brought Ashanti into touch with the apparently inexhaustible demand for slaves and gold created by the European traders on the Gold Coast. Their conquest of the peoples between Asantes and the sea was primarily inspired by the desire to trade in gold and slaves without putting money into the pockets of the chiefs and merchants of the intervening tribes. It also enabled them to secure guns and ammunition for their northern conquests, which provided them with more slaves and gold for sale to the Europeans and also with a protected market in which Ashanti could more profitably sell European imports (Fage 1962: 97).

The Asantes were justified in their wars with the intervening states, who wanted to impose themselves on them as intermediaries and, furthermore, know their trade secrets with respect to the arms and ammunition they were buying from the Europeans and using to enable them to buy slaves from the north. The support given by the British to the intervening states, who were their colonies, to impose themselves as intermediaries between the British and the Asantes was unjustified but, unfortunately, became the leading cause of the Sagrenti War. The Asante Kingdom remained autonomous until 1900, when it were defeated by the British and declared a British Crown Colony by right of conquest by an order of the King in the Council of 26 September 1901. All the other states south of the Asante Empire, including the Ewes, had been colonized by the British as far back as 1874. The Asante Empire lost its autonomy due to the conquest and became part of the erstwhile Gold Coast colony. The then-king of the Asante Kingdom was exiled to Sierra Leone and finally to Seychelles Island.

In 1935, the Asantes executed a deed to unite all the states to form a confederacy. The process of forming the confederacy became known as the "Restoration of the Ashanti Confederacy", which was to bring back all the states that became independent to weaken the front of the Asantes together to form a confederacy to promote their common agenda under their King. The Asante Confederacy brought all the states together as a nation, but no more as an empire, and in the process, it restored the kingship of Asantehene, which the British did not abolish. The Asanteman Council was formed with the occupant of the Golden Stool as its head, who maintained his title as King of the Asante Confederacy.

There are 16 political administrative regions in Ghana, each with its own Regional House of Chiefs. The members of the present-day Asantes are found in five of the political-administrative regions. A paramount chief exercises jurisdiction over all the chiefs within his traditional area. All 70 paramount chiefs form part of the Asante nation, known as the Kumasi Traditional Council. All the members of the Asanteman Council owe allegiance to Asantehene, and he is their overlord. The issue to be addressed is whether the Asantehene, who was autonomous and had his own military, court, laws and other state infrastructure but lost them through a war, is a chief or a king. There have been discussions on social media about the right designation of the occupant of the Golden Stool, going by the English definition. This article seeks to clarify the position by using appropriate interpretation tools. Most English dictionaries define a chief using attributes traditionally associated with the King of England. However, some people regard the overlord of paramount chiefs as a king. The 1992 Constitution of Ghana recognizes the existence of traditional authorities and their role in governance. The Constitution consists of its written text and underlying principles and values. The Constitution mirrors the actions, conduct, values, principles, customs, culture, practices, conventions, vision, aspirations and other desires of the people of Ghana.

The laws of Ghana, including the Constitution of Ghana 1992, are made up of both written and unwritten laws, which means that not all the laws of the land are written or codified. No law in Ghana states explicitly that the Asantehene is not a king. No law in Ghana has expressly stated that the Asantehene is a king. From the Gold Coast era in the colonial days to the present day Ghana, under the fourth republican constitution, no law has taken away the kingship of the Asantehene. He was a king before Gold Coast, during and after the establishment of the country called Ghana. By custom, convention, conduct, actions and practices of the people of Ghana, the Asantehene is revered and held as a king. In

the definition of who is a chief in the Constitution of Ghana 1992, the supreme law of Ghana mentioned chiefs without a king, and by parity of reason, some people hold and are of the view that there is no king in Ghana (Constitution of Ghana 1992, Article 277). The Chieftaincy Act 2008 (Act 759) also categorizes chiefs without explicitly mentioning the status of the Asantehene.

[E] THE GOLDEN STOOL OF THE ASANTE KINGDOM: ASCENSION TO THE GOLDEN STOOL

The ascension to the Golden Stool is by male children born of a woman in the Oyoko Abohyen Dynasty of Manhyia Kumasi. The monarchy of Asanteman is a hereditary sovereign form of government where the King reigns as the titular head of the people in his nation but under the President of the country. The name Asante means "because of war", demonstrating how warrior-like the Asantes are. The Asantehene does not publicly sit on the Golden Stool; however, the term "sits on the Golden Stool" is used figuratively to represent his wealth and the riches of the kingdom. Apart from the Asantehene, no other person touches the Golden Stool, the ark of the covenant, and when it is sent to the Asantehene, it is carried on a pillow. When a new Asantehene is installed, he is raised and lowered over the Golden Stool without touching it, but subsequently, he is the only person who can touch it, demonstrating how the people revere it.[3]

[F] THE OYOKO CLAN OF THE ASANTES

The Oyoko clan is one of the major clans among the Asantes. Only those who hail from the family and lineage within the clan have been validly nominated by the Asantehemaa (the Queen), elected or selected by the kingmakers, and installed by the Asante customary law and usage to become the King of the kingdom from time to time. The Queen knows the males born by women in the family and has the singular role of nominating those who, in her opinion, are eligible to occupy the stool. The ascension to the stool is determined after the death of the incumbent, unlike in the monarchy in Britain, where the successor is known during the occupant's life. In England, it is settled that Prince William, the eldest child of King Charles, will succeed his father, King Charles. The Princess of Wales will become Queen Consort when her husband William becomes King, and their first child, Prince George, will be in line to succeed his father (Morris

3 "The Golden Stool".

& Ors). See also the Succession to the Crown Act 2013, which amended the provisions of the Bill of Rights 1689, and the Act of Settlement 1701. The amendment repealed the provision that disqualified people married to Roman Catholics from becoming kings. Parliament now regulates the line of succession and can deprive sovereigns of their titles due to misgovernment.

[G] THE DEMAND FOR THE GOLDEN STOOL

The war between the British and the Asantes fought in 1900 is known as the Yaa Asantewaa War. Yaa Asantewaa was the queen of Ejisu, a subordinate stool of the Asante Kingdom. She stood up against the British Governor on the Gold Coast, Sir Frederick Mitchell Hodgson, who demanded the surrender of the Golden Stool. The Golden Stool holds the people's soul; its surrender would have signified their acceptance of British domination. The demand for the surrender of the Golden Stool provoked the Asantes, whose king had been captured and exiled in a friendly meeting held in Kumasi. As a result, Yaa Asantewaa, a 60-year-old queen mother, exhibited her bravery by mobilizing the people to engage in a war with the British. Yaa Asantewaa and her mobilized force fought fearlessly without their leader and other chiefs, who were captured in 1896, and kept the British in the Fort in Kumasi until a reinforcement of 1400 British soldiers was deployed to Kumasi to overpower her forces. She was captured with some of her troops and exiled to Seychelles Island, where the Asantehene, Prempeh I, had been exiled. Yaa Asantewaa died on 17 October 1921, at 81 years old. The Asantehene Prempeh I, exiled to Seychelles Island in 1896, was brought back to Ghana in 1924.[4]

[H] ELIGIBILITY OF A CHIEF

Who is a chief in Ghana is defined as follows?

> "chief" means a person who, hailing from the appropriate family and lineage, has been validly nominated, elected, or selected and enstooled, enskinned, or installed as a chief or queen mother in accordance with the relevant customary law and usage (Constitution of Ghana 1992, Article 277; Chieftaincy Act 2008 (Act 759), section 57).

A person eligible to become a chief shall be disqualified if that person has been convicted of any of the following offences: the security of the state, fraud, dishonesty, or moral turpitude, and it extends to all forms of chiefs (Chieftaincy Act 2008 (Act 759), section 57(2): furthermore, chiefs have been prohibited from engaging in active party politics, and a chief seeking

[4] "Prempeh I".

to become a Member of Parliament shall abdicate the stool or skin he occupies (Constitution of Ghana 1992, Article 276, and Chieftaincy Act 2008 (Act 759), section 57(3): a chief may be appointed to a public office that he possesses the qualifications to hold, but the caveat on this is not to participate in active party politics (Chieftaincy Act 2008 (Act 759), section 57(4)). A Member of Parliament for the Talensi Constituency on the ticket of the New Patriotic Party, Robert Nachinab Doameng, resigned from Parliament in 2015 to become the paramount chief of the Tongo Traditional area and was enskinned in that capacity. Presently, he is a member of the Council of State, a body that counsels the President of Ghana in discharging his functions, which is not considered a political wing of the Government. The Chairman of the Council of State, Nana Otuo Serebour, is the Paramount Chief of the Juaben Traditional Council, one of the paramount chiefs of the Asante Kingdom.

[I] THE POWER OF THE EMBLEMS OF CHIEFS

In Ghana, some chiefs are enskinned or enstooled, while others are installed. The enstoolment deals with chiefs who sit on stools as symbols of authority, while others sit on the skins of animals such as tigers, lions, elephants and pythons as symbols of authority. A person who is elected or selected as a chief is confined to learning the customs and traditions of his stool. A chief who dies honourably without embarrassment or through suicide has his stool or skin blackened and becomes one of the chiefs whose name could be selected by any of the successors of the stool. The Chief, who is in confinement, is taken to the stool room or skin room, where the blackened stools and skins are kept, with his eyes closed and any stool he touches becomes his name. When he touches the stool of Osei Tutu, the late Osei Tutu will become Osei Tutu I, and he will become Osei Tutu II.

The person elected as chief takes an oath before his subordinate chiefs and his superior chief, if any, to make a firm promise. When an oath is taken before the superior chief, the position of the stool or skin determines the appropriate sword to be used. The paramount chiefs within the Asanteman Council and other senior chiefs, including divisional heads and other divisional chiefs within the Kumasi Traditional Council, such as Krontire (the head of the town), Akwamu (centre chief), Adonten (a chief who leads), Kyidom (the chief at the rear), Benkum (a chief responsible for the left-wing), Nifa (a chief responsible for right-wing), Gyaase (the chief responsible for the palace, women and children), Akyeamehene (chief

linguist), Mawere (head of bodyguards), Adumhene (chief responsible for the safety of Asantehemaa, Queen Mother of Asante and some of the warriors including Essuowin, Ananta (double barrel) and Anamenako (he fights whenever he finds himself) swear on Mponponsuo (the big sword) during their swearing in to Asantehene or where an Asantehene is elected, and at the death of Asantehene.

Some divisional and sub-divisional chiefs who are members of the Kumasi Traditional Council swear on the Ahwiabaa sword before the Asantehene. The chiefs use both swords to solemnly promise to affirm their unalloyed allegiance to the Asantehene and the Golden Stool. They shall heed his invitation in the morning, afternoon, or night, whether rain or shine and only sickness will prevent them from attending to his invitation. Whenever they act contrary to the solemn promise, they violate the oath they have taken and are amenable to sanction in accordance with custom. This sanction includes destoolment, payment of fines and banishment from the palace. George Hagan, a renowned anthropologist who is a Fante from Central Region, wrote in his article, published about 40 years ago, the following statement about the chiefs' allegiance to the King: "When all the chiefs come together to enstool the King, their pledges do not only validate the power of a particular king, the person they are enstooling; they also reaffirm the constitution under which the kingship is established" (Hagan nd: 31)

The chiefs from the five northern regions of Ghana sit on skins, and their counterparts from the other regions sit on stools. The chiefs who sit on stools sit on stools made of wood, except Asantehene, who sits on a golden stool, and his second in command, Mamponghene, who sits on a silver stool. A chief sits in state with his elders, who are also chiefs, except Odikro (a chief responsible for a town), whose elders are not chiefs properly so-called. A chief is a traditional leader of his town, paramountcy, or state, and he takes precedence over all the people in his town, paramountcy, or state, as the case may be. Several chiefs and categories of chiefs in Ghana have been categorized as follows: the Asantehene and paramount chiefs, divisional chiefs, sub-divisional chiefs, Adikrofo, and other chiefs recognized by the National House (section 58 of the Chieftaincy Act 2008 (Act 759)): among the Asantes, a male who hails from an appropriate family and lineage is validly nominated by the queen, and he is elected or selected and, enstooled as a chief in accordance with the relevant customary law and usage, becomes a chief and exercises only customary function.

[J] THE DUAL CAPACITY OF ASANTEHENE

The Asantehene is the chief of the Asante Kingdom and, simultaneously, the chief of the Kumasi traditional area, the headquarters of the Asante Kingdom. When he sits as the chief of the Kumasi traditional area, he is the Kumasihene. He exercises the powers of a paramount chief in his traditional council, and he does so with the members of the traditional council. The members of the Kumasi Traditional Council are made up of 13 divisional chiefs, and each division is made up of many divisional chiefs and sub-divisional chiefs, including stools he has created and that have been recognized by the National House of Chiefs, mainly within the Nkosuo Sub-Division. Asantehene may recognize a person's contribution to the territory and appoint that person as a chief. The stool may be created for that person for his life, or he may make it hereditary, depending on the choice of Asantehene. Each of the 13 divisions has its head, and there are many more divisional chiefs in one division, excluding sub-divisional chiefs.

The Asantehene sits as Asantehene when he presides over the Asanteman Council, which comprises 70 paramount chiefs. Most of the paramount chiefs within Asanteman occupy large tracts of land with their subjects, including Asante Mampong, Nsuta, Kokofu, Kumawu, Juaben, Essumeja, Bekwai, Offinso, Manso Nkwanta, Bechem, Goaso, Mim, Brekum, Sampa, Worawora, Tuobodom and Akroso-Ntoonaboma in the Afram Plains. Each of the paramount chiefs has a traditional council, covering an area made up of the divisional chiefs, sub-divisional chiefs, Adikrofo, and other chiefs recognized by the National House of Chiefs within the traditional area. There are paramount chiefs who have other paramount chiefs under them, and they include Yaa Naa (chief of Dagon), Nayiri (chief of the Mamprusi Traditional area), and Yagbonwura (chief of the Gonja traditional area).

The mode of nominating, electing or selecting a person to become a chief varies from one tribe to the other, and the determinant factor is whether it is matrilineal or patrilineal. In the matrilineal system, it is the queen who nominates a person/persons who is or are eligible to be selected or elected by the kingmakers, unless the queen's stool is vacant, whereby the mantle will fall on the head of the family, acting with the consent and concurrence of the principal members of the family, including both males and females, to nominate a candidate/candidates to the kingmakers for consideration. There are few stools in the Asante Kingdom that do not have queens, and in that sense, the nomination is normally made by the head of the family or the overlord of the vacant stool. The stools

are Bantama, Asafo and Adum. Traditionally, they are either elected or selected by their overlord, the Asantehene. They are patrilineal, and, to be eligible to occupy the stool, it must be established that the person's father or grandfather, and in extreme cases, mother or grandmother, was born by one of the chiefs who sat on the stool. Among the Asantes, where the female stool becomes vacant, the election to the stool is made by the chief of the male stool unless the male stool is also vacant. Under such circumstances, the overlord queen plays a pivotal role in the election and enstoolment of the queen.

[K] THE NATIONAL REGISTER OF CHIEFS AND ITS LEGAL EFFECT

There is a register where the names of chiefs and queens are entered to give them statutory recognition. The register is known as the "National Register of Chiefs" (Chieftaincy Act 2008 (Act 759), section 59(1)). The contents of the National Register of Chiefs are *prima facie* evidence of the particulars entered in it with respect to a chief. A person who is aggrieved by the refusal of the National Register of Chiefs to register him or her as a chief has the right to appeal against the same to the Supreme Court within 30 days from the date of the refusal (Chieftaincy Act 2008 (Act 759), section 59(7)). A chief who has gone through the relevant customary laws and usages of his area shall not be considered a chief for the performance of a function under the Chieftaincy Act 2008 (Act 759) or any other enactment unless that chief has his name registered in the National Register of Chiefs for the performance of a statutory function and his name has been published in the Chieftaincy Bulletin (Chieftaincy Act 2008 (Act 759), section 57(5)).

There are constitutionally created bodies that chiefs are to serve on, and a chief cannot serve in his capacity as a chief unless his name is registered in the National Register of Chiefs and his name is published in the Chieftaincy Bulletin. A chief is to be nominated by the National House of Chiefs to serve on the Judicial Council, a body whose functions include the making of proposals for judicial reforms to improve the administration of justice and efficiency in the judiciary for the consideration of the Government, as well as assisting the Chief Justice in the performance of his duties to achieve effective and efficient justice (Constitution of Ghana 1992, Article 154(1)(a) and (b)). The President of the National House of Chiefs is a member of the Council of State, a constitutional body that counsels the President of Ghana in the performance of his functions (Constitution of Ghana 1992, Article 89(1) and (2)(b)). The chiefs have

representatives on the Prisons Council at the national level to advise the President of Ghana on matters of policy relating to the prison service. The chiefs also have a representative on the National Lands Commission and a representative each on the Regional Lands Commission to advise the Government, local authorities, and traditional rulers on land policies and governance (Constitution of Ghana 1992, Articles 206 and 258–261).

The participation of traditional rulers in governance is very important. The institution of chieftaincy is recognized by the Constitution of Ghana 1992, the supreme law of the land. The Constitution of Ghana is made up of 26 chapters, and chapter 22 is on chieftaincy. The chieftaincy institution has three layers of courts that determine the cause or matter affecting the chieftaincy, and they have exclusive jurisdiction. The "cause or matter affecting chieftaincy" over which the chieftaincy tribunals have exclusive jurisdiction only, with the Supreme Court exercising appellate jurisdiction, is defined as:

> a cause, matter, question, or dispute relating to the following: (a) the nomination, election, selection, or installation of a person as a chief or the claim of a person to be nominated, elected, selected,or installed as a chief; (b) the deposition or abdication of a chief; (c) the right of a person to take part in the nomination, election, selection, or installation of a person as a chief or the deposition of a chief; (d) the recovery or delivery of stool property in connection with the nomination, election, selection, installation, deposition, or abdication of a chief; and (e) the constitutional relations under customary law between chiefs (Chieftaincy Act 2008 (Act 759), section 76; Courts Act 1993 (Act 459), section 119).

[L] HIERARCHY OF CHIEFTAINCY INSTITUTIONS

The Constitution has created three levels of chieftaincy: the National House of Chiefs, the Regional Houses of Chiefs and the Traditional Councils. The National House of Chiefs is composed of five paramount chiefs elected from each of the 16 regions of the country. Where the paramount chiefs in the region are not up to five, that regional house of chiefs shall elect such a number of divisional chiefs to make up the number (Constitution of Ghana 1992, Article 271; Chieftaincy Act 2008 (Act 759), sections 1(1) and (2)). Currently, the National House of Chiefs is made up of 80 paramount chiefs from the 16 regions. The members of the National House of Chiefs elect their President, who becomes its head. The President of the National House of Chiefs is Nana Yaw Gyebi Gyeahohuo, the Paramount Chief of the Sefwi Anhwiaso Traditional Council. The President and the Vice President are elected for a four-year term and are

eligible for election again, but they shall only hold office as President or Vice President for up to two terms in succession. The election to the office of the President and Vice President of the House is supervised by the Electoral Commission, a constitutional body created, among other things, to conduct and supervise all public elections and referenda (Constitution of Ghana, Article 45; Chieftaincy Act 2008 (Act 759), section 2). There are 16 regions in the country, and each of the regions has a regional house of chiefs. The National House of Chiefs performs several functions. Among these functions are: to advise any person or authority who has been given responsibilities to perform by the Constitution or any other law; to interpret and codify customary law, which is one of the sources of law in Ghana; and to evaluate customs, usages and practices and outlaw those that are outmoded and obnoxious (Constitution of Ghana 1992, Article 272).

The membership of the Regional House of Chiefs is made up of members specified by legislative instruments made by the National House of Chiefs and issued under the signature of the President of the National House of Chiefs in accordance with Article 274 of the 1992 Constitution of Ghana. Where the paramount chiefs in a particular region are not enough to constitute a regional house of chiefs, the Legislative Instrument, the Chieftaincy (Membership of Regional Houses of Chiefs) Instrument 2020 LI 2409 in pursuance of section 6 of the Chieftaincy Act 2008 (Act 759) has prescribed that other divisional chiefs in the region should be appointed on a rotational basis to the regional houses of chiefs concerned. The Legislative Instrument clearly states that the mere membership of a person in the Regional House of Chiefs does not confer paramountcy on that person and his area. The regional houses of chiefs perform almost similar functions to those performed by the National House of Chiefs in the region concerned. They are further tasked with compiling the customary laws and the lines of succession concerning each stool in the region. The Chieftaincy Act provides that, except in the Ashanti Region, where the Asantehene and Mamponghene are the automatic President and Vice President, respectively, by their positions in Asanteman, each other region is to elect their President and Vice President, respectively, for four years. No chief shall hold an office for more than two terms in succession (Chieftaincy Act 2008 (Act 759), sections 7 and 8).

The creation of six other regions in Ghana has made two other paramount chiefs the automatic presidents in their respective regions, as all the chiefs within their respective regions owe allegiance to them. The position has been made statutory by a legislative instrument made per Section 6 of the Chieftaincy Act 2008 (Act 759) (namely, the Chieftaincy

(Membership of Regional Houses of Chiefs) Instrument 2020 LI 2409). The Yagbonwura, who is the overlord of Gonjaland, is the President of the Gonja Traditional Council and the automatic President of the Savanna Regional House of Chiefs. The overlord of Mamprugu Kingdom, Nayiri, has also become the automatic president of the North East Regional House of Chiefs because all the chiefs in the region owe allegiance to him. A paramount chief and members within a traditional area form a traditional council. The Asantehene is the automatic president of the Kumasi Traditional Council. Where there are two or more paramount chiefs in one traditional area, they shall hold the presidency on a two-year rotational basis, determined by the alphabetical order of the stool or skin name (Chieftaincy Act 2008 (Act 759), section 13).

[M] THE CHIEFTAINCY COURTS AND THEIR EXCLUSIVE JURISDICTIONS

The courts in Ghana are made up of the Superior Court of Judicature and the lower courts. The Constitution created the Superior Court of Judicature, which comprises the Supreme Court, the Court of Appeal, the High Court and Regional Tribunals (Constitution of Ghana 1992, Article 126(1)(a)). The Constitution empowers Parliament to create such lower courts or tribunals (ibid). In pursuance of Article 126(1)(b) of the Constitution, Parliament has created the following lower courts: the Circuit Courts, the District Courts, the Juvenile Courts, the Judicial Committee of the National House of Chiefs, the Judicial Committee of the Regional Houses of Chiefs and the Judicial Committees of the Traditional Councils (Courts Act 1993 (Act 459), section 39). The jurisdiction for causes or matters affecting chieftaincy has been exclusively vested in the judicial councils, depending on the parties involved. The Court of Appeal, the High Court, Regional Tribunals, Circuit Courts, District Courts and the Juvenile Courts have been ousted in exercising original and appellate jurisdictions in cause or matters affecting chieftaincy. Section 57 of the Courts Act provides thus:

> Subject to the provisions of the Constitution, the Court of Appeal, the High Court, the Regional Tribunal, a Circuit Court, and the District Court shall not have jurisdiction to entertain either at first instance or an appeal any cause or matter affecting the chieftaincy (Courts Act 1993 (Act 459), section 57).

The original and appellate jurisdiction of the traditional courts, except the Supreme Court, has been ousted to ensure that only the chiefs who are well versed in causes or matters affecting chieftaincy entertain and deal with them. It does not, however, oust the supervisory jurisdiction

of the High Court, which is exercised over all the lower courts and lower adjudicating authorities (Constitution of Ghana 1992, Article 141). The third position on exercising supervisory powers by the Court is about something other than the case's merits. There are five primary grounds for which a *certiorari* application is considered common law, which forms part of Ghana's law sources (Constitution of Ghana 1992, Article 11(2)).

The five grounds for which *certiorari* may be granted to quash the decision of a lower court or tribunal without bringing its merits to question are a breach of the rules of natural justice, lack of jurisdiction, excess of jurisdiction, patent error on the face of the record and violation of the Wednesbury principles. In the case of *Anisminic Ltd v Foreign Compensation Commission* (1968, 1969), Lord Pearce held that a breach of the rules of natural justice may be corrected by quashing the same. In the case of *R v Awashish* (2018), the Supreme Court of Canada held that *certiorari* may be granted where a lower court has decided out of its powers conferred on it by statute but shall not be extended to correct legal errors that are corrected by appeal. In the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948), it was held that a decision of a competent administrative body may be quashed on grounds of irrationality (unreasonableness), illegality and procedural impropriety.

[N] THE NATIONAL HOUSE OF CHIEFS

The National House of Chiefs exercises both original and appellate jurisdictions in causes or matters affecting chieftaincy, and the jurisdiction is exercised on its behalf by the Judicial Committee. The members of the House appoint the members of the Judicial Committee. In exercising its original jurisdiction and appellate jurisdictions, the House appoints three and five from among its members, respectively, and the majority determines their decisions. The Judicial Committee is assisted by a lawyer of at least 10 years at the bar. The House appoints that lawyer on the recommendation of the Attorney General. The lawyer's advice does not bind the members of the Judicial Committee, who are the repository of the customs and usages of the people (Constitution of Ghana 1992, Article 273; Chieftaincy Act 2008 (Act 759), section 25).

The original jurisdiction of the National House of Chiefs is exercised in cause or matters affecting chieftaincy that lie within the competence of two or more regional houses, a matter that does not lie within the competence of a regional house or a matter that cannot be dealt with by a regional house. A person dissatisfied with the National House of Chiefs' decision in exercising its original jurisdiction appeals as a right to the

Supreme Court (Constitution of Ghana 1992, Article 273(5); Chieftaincy Act 2008 (Act 759), sections 22 and 23). The National House of Chiefs hears appeals from the judicial committees of 16 regional houses of chiefs. A person dissatisfied with a decision rendered by the National House of Chiefs in exercising its appellate jurisdiction may appeal to the Supreme Court with the leave of the National House of Chiefs or the Supreme Court (Constitution of Ghana 1992, Article 273(6); Chieftaincy Act 2008 (Act 759), sections 23 and 24).

[O] THE REGIONAL HOUSES OF CHIEFS

The Regional Houses of Chiefs have original and appellate jurisdictions. The Judicial Committee of a Regional House of Chiefs comprises three members appointed by the members of the House from among its members in the exercise of its original and appellate jurisdictions. A judicial committee of a regional house is assisted by a lawyer of at least five years at the bar appointed by the House on the recommendation of the Attorney General, and the lawyer's advice does not bind the members of the house. The decision of the House is by majority. A Judicial Committee of a Regional House has exclusive original jurisdiction concerning the paramount chief or stool, the occupant of a paramount stool or skin, and the queen mother to a paramount stool or skin (Constitution of Ghana 1992, Article 274; Chieftaincy Act 2008 (Act 759), section 26). The Judicial Committee of a Regional House hears appeals from the decisions of judicial committees of traditional councils within its region (Constitution of Ghana 1992, Article 274; Chieftaincy Act 2008 (Act 759), section 27). A traditional council has jurisdiction to entertain causes or matters affecting chieftaincy within its area, to which the Asantehene, a paramount of stools or skins, occupants of paramount stools or skins, or a paramount queen mother are not parties. The jurisdiction of a traditional council concerning causes or matters affecting chieftaincy is exercised by the Judicial Committee, composed of three or five members appointed from among its members, and its decision is by majority (Chieftaincy Act 2008 (Act 759), section 29). The judicial committees of the National and Regional Houses and the Traditional Councils are composed of only chiefs. Still, they hear causes or matters affecting chieftaincy involving chiefs, stools and skins, and Queen Mothers. The author is of the considered opinion that the composition of the chieftaincy tribunals is discriminatory.

Furthermore, the National and Regional Houses of Chiefs and the Traditional Councils are made up of only chiefs. In places where queen mothers attend traditional council meetings, they attend as *ex*

officio without voting rights. The rationale is that chieftaincy is a male-dominated institution. Still, the queen mothers should be accorded status as members of those houses, as the definition of chiefs provided by the Constitution includes queen mothers (Constitution of Ghana 1992, Article 277; Chieftaincy Act 2008 (Act 759), section 57(1)).

[P] THE DESIGNATION OF THE ASANTEHENE

There have been different definitions as to who is a king. The *Oxford Advanced Learner's Dictionary* defines a "king" thus: "the male ruler of an independent state, especially one who inherits the right of position by birth, 'King Henry VIII'" [5] The above definition is that a monarch of an independent state qualifies to be called a king. The traditional meaning of an independent state is that a political community has its own government, is not subject to the control and authority of a larger body, and is recognized as sovereign by other countries. The above definition and the example it provided were in reference to the Crown of England and, therefore, limit the scope of a king as known in other countries and recognized as such. The dictionary defines a king within the context of England, giving it a parochial meaning.

The *Cambridge Dictionary*, which is another English dictionary, defines a king as "a male ruler of a country who holds this position because of his royal birth: King Charles II, the kings and queens of England. Prince Juan Carlos of Spain became King in 1975."[6] The office of a king is made coterminous with a country, which is common in some of the European countries such as England and Spain that were not colonized. All the kings in Africa and Asia had their independent states until they were colonized and merged with other independent states to form a country. Per the definition above, they would be disqualified from being called kings. The *Collins English Dictionary* also defines a king as a person with control over a country. It provides thus: "A king is a man who is the most important member of the royal family of his country and is considered the Head of State".[7] *Collins* followed the definition of a king, which equated a kingdom to a country. The combined effect of the above dictionary definition of a king amply states that where a person's kingdom is not coterminous with a country, that person is not a king but something else.

[5] Oxford Learner's Dictionaries: English.

[6] Cambridge Dictionary: English.

[7] Collins Online Dictionary: English.

There was a conscious effort to reduce the kings in Africa and Asia during the Victorian era, thus the 63-year reign of Queen Victoria between 1837 and 1901 aimed to have one monarch in England and make all the other kings in the colonies chiefs to subordinate them to the British Crown. The above statement has been well articulated as follows:

> During the Victoria era, paramount chief was a formal title created by the British colonial administrators in the British Empire and applied in Britain's colonies in Asia and Africa. They used it as a substitute for the word "king" to ensure that only the British Monarch held the title King.[8]

In the Victorian era, therefore, kings in the colonies were referred to as paramount chiefs. The paramount chief title purportedly conferred on the kings in the colonies is defeated by the fact that there are 70 paramount chiefs under Asantehene, and he cannot share the same title with them. The British introduced the term chiefs to royals who were the heads of their people and, having noticed that some chiefs had many people and sub-chiefs under them, they distinguished the superior chiefs into the category of paramount chiefs, meaning the chief who is above, upwards of, or superior to the other chiefs. The Asantehene, who is superior to 70 paramount chiefs in the Asante nation and presides over them at the Asanteman Council, cannot be a paramount chief unless he sits as the chief of the Kumasi traditional area. There is no superior argument to defeat the position that he is a king when he sits as the Asantehene in the Asanteman Council. Those who do the nomination, election and selection of qualified persons for enstoolment or enskinment and installation remain kingmakers, which applies to the Asantehene, the paramount chief, and other chiefs in the country (*In Re Kwabeng Stool: Karikari and Others v Ababio and Others* (2001-2002); Rattray 1929: 1443-1444).

The Asantehene is the automatic president of the Ashanti Regional House of Chiefs because all 36 paramount chiefs in the Ashanti region are subordinate to him. Furthermore, the definition of chiefs in Ghana separates Asantehene from all other chiefs. Section 58 of the Chieftaincy Act 2008 (Act 759) separates Asantehene from other paramount chiefs. It provides thus: "The following are the categories of chiefs: (a) the Asantehene and other Paramount Chiefs." The Act takes Asantehene to another chief category, recognizing his kingship. The undiluted fact is that the only two chiefly positions above paramount chiefs are king and emperor. A king

8 "Paramount Chief: Great Britain's Foreign Office Correspondence with Foreign Courts Regarding the Execution of Treaties Contracted, London, 1821 (110pp)".

reigns over a specific individual kingdom, such as Asantehene, while an emperor controls multiple kingdoms.[9]

The first edition of *Black's Law Dictionary*, which was published in 1891, and is one of the acclaimed law dictionaries, defines a king as:

> The sovereign ruler, or chief executive magistrate of a state or nation whose constitution is of the kind called "monarchical," is thus named if it is a man; if it is a woman, she is called "queen." The word expresses the idea of one who rules singly over a whole people or has the highest executive power, but the office may be either hereditary or elective, and the sovereignty of the king may or may not be absolute, according to the constitution of the country (Black 1891: 678).

The first edition of *Black's Law Dictionary* quoted above gives a more precise definition of a king to include a sovereign ruler of a state or a nation to distinguish it from the other definitions, which equate the area occupied by a king with a country. The Asantehene is a monarchy of the Asante Kingdom. The Asante Kingdom is a nation ruled by the Asantehene, whose office is hereditary. By the Constitution of the Republic of Ghana and the laws thereof, he is the traditional ruler over the Asante nation. There is no dispute that the Asantehene was the King of the Asante Kingdom before the Asantes were colonized. The Asanteman Council is analogous to the Asante nation, and the Asantehene's kingship cannot be questioned in any forum.

A modern definition of a king is as follows: "A male ruler of a nation or a state usually called a kingdom; a male sovereign, limited, or absolute monarch".[10] The above definition no doubt affirms the kingship of Asantehene. He is the head of the Asante nation, state or kingdom, which is presently made up of 70 paramount chiefs, including all 36 paramount chiefs in the Ashanti Region, all the paramount chiefs in Ahafo Region, a reasonable number of paramount chiefs in Bono and Bono East Regions, and a stool each in Oti and Eastern Regions. The *Merriam-Webster Dictionary*, one of the best legal dictionaries, defines a chief as: "A king is a male ruler of a nation or state, usually called a kingdom".[11]

The traditional definition of a nation is "a tightly knit group of people with the same culture and language". The definition above clearly describes Asantehene as a king who is the head of a tightly knit group of people in five different political regions of Ghana who share a common culture and a common language. William Tordoff, in his article entitled "The Ashanti

9 "What Is the Difference between a King and an Emperor?"

10 See "King Definition", YourDictionary.

11 Merriam-Webster Dictionary.

Confederacy", quoted from Ramseyer and Kuhne, Basel Missionaries, and their experience of the Government of Asantehene Kofi Karikari from 1867–1874, stated thus:

> The reins of the Ashantee government are not exclusively in the hands of the King, nor does he possess unlimited power, but he shares them with a council that decides his majesty, his mother, the three first chiefs of the kingdom [Juabenhene, Bekwaihene, and Mamponghene], and a few nobles of Kumasi (Coomassie). This council is called "Asante Kotoko" or Ashantee porcupine, which means that, like the animal of that name, nobody dares touch them.

The Asantehene's kingship was acknowledged during the Asante Empire and after the Asante Confederacy, where the members of the Asante Kingdom reunited and formed the Asanteman Council. The Asante Kingdom currently exists as a constitutionally protected sub-national state headed by its occupant, the king, in union with the Republic of Ghana (Philip 2007: 281). Section 7(1)(a)(b) and (2)(a) and (b) of the Chieftaincy Act 2008 (Act 759) acknowledges the unique positions of Asantehene and Mamponghene as follows:

> 7(1)(a) Each Regional House shall have a President who shall. (a) be the head of that House; (b) in the case of the Ashanti Regional House, be the Asantehene. (2) Each Regional House shall have a Vice President who shall, (a) in the case of the Ashanti Regional House, be the Mamponghene.

[Q] THE FLAG OF THE ASANTE EMPIRE

In Ghana, every paramount chief flies the flag of his paramountcy to show that he is the traditional leader of an area and, for that matter, occupies a traditional location. The Asantes have their flag to demonstrate their autonomy. The flag has three horizontal stripes. The upper stripe is gold, representing its mineral wealth. The middle stripe is black, representing the Asantes as black people. The lower stripe is green, representing its forest. The black stripe has a symbol in its centre, representing Asante unity and royal authority from the 18th century. The Asantehene fly the flag of Asanteman, while the paramount chiefs fly the flags of their respective paramountcies. The Asantehene stands out as a king by virtue of the Asanteman flags he flies (Brendon 2010: 523).

The author of this article does not mean to suggest that there cannot be other kings in Ghana, as traditionally, some of the chiefs had kingship status before the colonial government deliberately reduced them to paramount chiefs.

In conclusion, the Asantehene is a king by all standards; the kingmakers of the Asante Kingdom always consider his nomination, election or selection for enstoolment and installation, and it is fallacious to associate kingship with a country, as most of the kingdoms in the region, by all standards, would have attained country status if they had not been colonized. There are countries on the globe whose land size and population do not match that of the Asanteman Council but have the requirements to be called a country, and there are several of them in the European Council who maintained their statehood by the fact that they were not colonized.

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Equity in Tax—All Change after 1873?

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Abstract

Until the late 19th century, equity and common law courts were separate. Tax courts emerged from equity, and today equitable principles and maxims govern the tax legislation, as well as His Majesty's Revenue & Customs guidance and the tribunals. Even though the equity and common law courts "fused" in 1873, there has only ever been one law: common law tempered by equity. Only the courts, remedies and procedures were different prior to 1873 (though a unified Court of Exchequer with equity and common law jurisdiction existed before 1841). The law was already a single entity by the late 19th century. There was no fusion of actual laws in 1873, only of courts and procedure. Equity already moderated tax law, with beneficial ownership being all that mattered for tax purposes then and today.

Keywords: equity; common law; fusion; tax; beneficial ownership; Supreme Court of Judicature Act 1873.

[A] INTRODUCTION

Of equity courts and equitable principles, one may think of dimly-lit Dickensian courts, *Bleak House* and prolonged will disputes—all consigned to history. However, even though such courts might seem to be Dickensian, the tax laws embedded in statute[1] are not. These same principles, now administered through modern tax tribunals, stem from those medieval courts of equity. Indeed, just beneath the surface—lightly bedecked by modern legislation, titles and practices—the equitable principles are still there today. The Supreme Court of Judicature Act 1873 (the 1873 Act) swept away the courts and replaced them with one Supreme Court of Judicature, consisting of the High Court and civil Court of Appeal. However, the laws themselves were not merged—equity and common law were always one. Equity has always been the conscience of common law; it was just the courts and procedures that were unified. This

[1] At more than 10 million words, the UK has the world's longest tax code (Hammond & Collins 2021).

poses the question: did the 1873 Act make any difference to substantive tax law? Did it actually fuse equity and common law whence modern tax laws stem?

This article suggests not; the 1873 Act made no difference with respect to merging law and equity. They were always one—with equity acting as a moderator over the law. The modern tax courts are, and always have been, courts of equity. The equitable principles of good conscience and tools (such as constructive trusts) are recognized and enforced by the tax courts; the best and most common example is that the courts (as well as much of the legislation and His Majesty's Revenue & Customs (HMRC)) recognize beneficial ownership as being that of the taxable person—not necessarily that of the legal owner. Beneficial ownership is a creation of equity and is at the cornerstone of tax law. After the 1873 Act, the procedures and courts simply caught up.

[B] COURTS OF CONSCIENCE

Prior to 1873, the equity courts consisted of the High Court of Chancery (or Chancery Court) and, until it lost its equitable jurisdiction following the Administration of Justice Act 1841, the Exchequer of Pleas (or Court of Exchequer). Both courts arose, and eventually split, from the medieval Curia Regis[2] and were based upon the premise of good conscience. Yntema quotes a description of equity as being the "conscience of the law" (1966-1967: 69). The common law has *rules*, whereas equity has *maxims and principles*. Prior to the Reformation, the Lord Chancellors were priests rather than lawyers, applying the principles of canon law and conscience where the common law would not reach (Neuberger 2012).

The common law courts consisted of the Court of Common Pleas and the King's/Queen's Bench, with their Serjeants-at-Law. The precedence and ridged procedure from those courts, observing the strict wording of the law, along with the Acts of Parliament, applied *in rem*, that is, to everyone. Equity, on the other hand, was to provide a just remedy to the case before (primarily) the Chancery Court when the inflexible common law provided no remedy. It was presided over by the Lord Chancellor (also known as the "Keeper of the King's Conscience", per Haydn 's 'dictionary of dates' (1871) because "the office of the Chancellor is to correct men's consciences" (*Earl of Oxford's case* (1615: 486)); it was essentially the Lord Chancellor's personal court. The rules of equity are applied *in personam*, that is, with a tailored obligation imposed as a specific solution to a specific

[2] The King's Council – the effective governors of the Kingdom who evolved into the modern Executive and Parliament.

problem onto the conscience of specific parties, for "the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party" (*Earl of Oxford's case*: 487). Critically though, in the event of any confliction, section 11 of the 1873 Act placed equity above common law. Even though the equity courts disappeared, the spirit did not.

[C] COMMON LAW AND EQUITY AS ONE?

Throughout the centuries, the common law and equity courts ran in parallel, as "two streams running side by side and do not mingle their waters" (Ashburne 1902: 22-23). As Taylor put it:

> Equity follows the law, so it is said, but the way it follows it is to prevent its being put into operation. This is illustrated in the case of equitable estoppel which does not convey the title but prevents the legal title from being used as such (1917: 24).

After the 1873 Act, the two different streams were arguably "fused", with equity and common law becoming one and being administered together in one court with one set of laws. Lord Diplock put forward that argument succinctly in the case of *United Scientific Holdings Ltd v Burnley Borough Council* (1978: 925) when he said:

> by 1977, this metaphor of two streams running side by side has, in my view, become both mischievous and deceptive. The innate conservatism of English lawyers made them slow to recognise that by the Supreme Court of Judicature Act 1873, the two systems of substantive and adjective law – formerly administered by the Courts of Law and the Courts of Chancery – were fused.

This view was also favoured by Wilkinson LJ in *Tinsley v Milligan* (1993: 28): "the equitable principle has become elided into the common law rule" and "the reality of the matter is that English Law has one single law of property made up of *legal and equitable principles*" (1993: 22, emphasis added).

Another argument is that common law and equity law remained distinct—they just happened to be administered in the same courts after 1873—a procedural/administrative fusion only with no mixing of the rules of equity and law themselves (Babafemi 1971). If, as the law now states (in section 49 of the Senior Courts Act 1981, being the modern version of section 11 of the 1873 Act), equity prevails over common law, that is surely proof that equity is still distinct from common law. Otherwise, why state that one prevails over another if they are now a single entity? (Neuberger 2010). However, despite being separate, the two laws/principles were not

in competition; indeed, the rules of equity worked with the common law, refined and shaped it—medieval common law lawyers would have been influenced by the rules of equity. As Bryson puts it:

> Thus, did equity supplement and complement the common law? Equity does not compete with the common law but tunes it more finely. The common law is, in theory, a complete system; equity is not a system within itself but rather relates to the common law and aids the common law. English justice came to consist of both common law and equity and would be defective without both. This was recognised as early as the fifteenth century (2001: 41)

This quote introduces a third possibility, which is that even before the 1873 Act, the two laws were *already* one, and had become greater than the sum of their parts. Common law is *the* law, with equity acting merely as a moderator, a means of interpretation and an overriding corrective principle that ensured that those laws were applied according to good conscience in spirit as well as in word. This is essentially what courts do today—they take a "purposive" rather than "literal" approach to the legislation, seeking what was the intention behind the legislation when it was formed, rather than simply what it says. In ancient times, Aristotle had written in his *Ethica Nichomachea* (cited by Baker 2018: 114) :

> "Aequitas" as a means of correcting general laws, which in their nature could not provide for every eventuality and to him it meant interpreting written laws according to the intention rather than the letter.

This concept of *aequitas* (or *epieikeia* in the original Greek) was simply "denoting what is fair and reasonable"; equity "which previously was contrasted with strict law, is a necessary adjustment, an epiphenomenon, of legal justice" (Yntema 1966-1967: 5). This followed through to ancient Rome, where the phrase "*summum ius summa iniuria*"[3] (penned by Von Stroux 1926) encapsulated the principles of equity from which the legal rules are interpreted.

This was essentially the foundation of the modern purposive approach (Thorpe 2021) and was cemented into United Kingdom (UK) law following the House of Lords case *Pepper v Hart* (1992, 1993) which allowed the admission of Hansard into court to help determine the intention of lawmakers (this was a tax case!). However, even as far back as the *Earl of Oxford's case*, the verdict by the Lord Chancellor Thomas Egerton was that equity guides common law—the two are rooted in separate courts with different procedures, but are essentially one:

[3] "The greatest right is the greatest injury."

> law and equity are distinct, both in their courts, their judges, and the rules of justice; and yet they both aim at one and the same end, which is to do right; as justice and mercy differ in their effects and operations, yet both join in the manifestation of God's glory (*Earl of Oxford's case*: 486).

Holdsworth (1915) reminds us that even the development of the common law was influenced by canon law in its development of the doctrine of consideration.

We could take what Lord Diplock said in *United Scientific Holdings Ltd* (ie "by the Supreme Court of Judicature Act 1873, the two systems … were fused") to mean "by [*the time of*] the Supreme Court of Judicature Act 1873 the two systems were fused". By 1873, the laws were already fused, the Act did nothing to change that. Until 1841, the Court of Exchequer held both common law and equitable jurisdiction, so the concept of a single body of law within a single court was nothing new (something the Master of Rolls, Sir John Romilly, had pointed out during the debates concerning the 1873 Act—as pointed out by Patrick Polden (2002)). All the 1873 Act did was unify the courts, allow procedures to be administered concurrently and allow suits for equitable remedies to be heard in courts of law and *vice versa*. There has only ever been one system of law, written as common law but tempered by the principles and maxims of equity and good conscience in the vein of *aequitas* of Aristotle's day. Taylor makes a similar analogy saying that suits should be neither in law nor equity, "but merely actions where the rights of the parties are to be determined by the law of the land" (1917: 11). The rules and principles are, and always have been, distinct, but they act as one body of law pulling in one direction for the greater good. Even whilst the 1873 Act was being considered, the Lord Chief Justice Sir Alexander Cockburn had no issue with equity prevailing over common law but wanted to ensure that once defects in the law had been identified and corrected, even the name "equity" should disappear, leaving only common law visible (essentially as it is now). His concern was simply over the transfer of power from the common law courts to a new High Court of Justice, which he regarded as simply being the Chancery Court "under the new and high-sounding name" (Polden 2002: 5). This too would suggest that there was no argument over the dominance of one principle over another, no denial even that there was one body of law; it was the merging of courts and consequential loss of power and patronage which was in the minds of many.

The application of the *in personam* jurisdiction of equity applying to specific individuals only could therefore also be brought into question. If equity and law are essentially one and the same whereby the law is

tainted, coloured and influenced by equity, then arguably equity now acts *in rem* (Hohfeld 1913; Durfee 1916) in the same way that rights and rules are respected and observed by everyone according to the manner in which they affect the common law. The application of equitable rules being applied *in personam* (Cook 1915) is just as valid for tax law. When a "wrong" is committed by an individual trying to divert income to someone else to avoid paying the necessary tax, equity will right that wrong by placing the beneficial (and taxable) ownership back onto that individual. A dishonest individual with ill-gotten financial gains is left with only *in personam* trusteeship obligations. The tax rules are applicable to everyone as much as any branch of common law so are applied *in rem*, but so too are the benefits and powers of restitution within equity. Equitable obligations are imposed *in personam* against a named individual, but they can equally be aimed at anyone who chooses to engage in dishonest activity—so the laws of equity are also arguably applied *in rem* as much as under the common law.

How does this all fit with modern tax rules?

The Exchequer Court began life as the first tax court by virtue of collecting revenue with only the King being able to bring cases; the defendants were debtors to the Crown, namely, taxpayers. The formal head of the Court was the Lord High Treasurer who worked alongside the Chancellor of the Exchequer, whence the modern post derived. Tax was therefore part and parcel of the Exchequer Court from its very beginning and it evolved into becoming another equity court. As Bryson puts it:

> The revenue function of the Exchequer remained its primary characteristic, and from this humble origin as a tax collector, it answered the call to administer equity. Like St Matthew, the Exchequer rose and went on to bigger and better things (1975: 33)

Equity expresses itself through the tax laws by its recognition of beneficial ownership's taking priority over legal ownership. The beneficial owner is the "real" owner, namely, the person who can benefit from the asset; the legal owner is merely the person whose name is on the title/deed. Beneficial ownership is a product of equity, the laws of conscience recognizing intent rather than the form. In most instances, the legal and beneficial owners are one and the same, but the separation of legal and beneficial ownership defines and creates a trust—another creation of equity. The common law courts would only ever recognize legal ownership: the strict letter of the law. Equity looks through this to recognize the existence and rights of a beneficial owner, and the equity courts would be the resolution to those injustices meted out by the inflexibility of the common law

courts. Today, it is the Senior Courts Act 1981 which places equity above common law. HMRC acknowledges this and its internal manual points out that: "Taxation of income is based on beneficial ownership, not legal ownership"[4] and:

> Capital Gains Tax is charged under TCGA92[5]/S1(1) on the disposal of assets, but it is important to bear in mind that the legal owner of an asset is not necessarily its beneficial owner and that it is beneficial ownership (not legal ownership) which the tax principally follows.[6]

The beneficial owner of an asset is also the person who provides the funds to purchase the asset—the legal owner will be the person in whose name the asset is purchased (and recognized as such by the common law), but the "real" owner is the person who provided the means to buy it—thus creating a resulting trust. Eyre CB, in the case of *Dyer v Dyer* (1788: 42) reminded us of who the beneficial owner is:

> the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in the one name or several; whether jointly or successive – results to the man who advances the purchase-money.

Elsewhere in the tax statutes, the importance and primacy of beneficial ownership can be found with inheritance tax as per section 5 of the Inheritance Tax Act 1984: "For the purposes of this Act a person's estate is the aggregate of all the property to which he is *beneficially entitled*" (emphasis added).

1930s anti-avoidance

The settlements legislation and Transfer of Assets Abroad (TOAA) rules are contained within sections 624-648 Income Tax (Trading and Other Income) Act 2005 (ITTOIA) and sections 714-751 Income Tax Act 2007 respectively. These rules essentially impose the beneficial ownership of an asset back on its original owner when that person attempts to transfer it to someone else—with the income tax following suit. The two sets of legislation trace their existing forms back to 1936 and, whilst they are different, with different mechanisms and aimed at different scenarios, they essentially do the same thing—reassign beneficial ownership back to the donor and impose a settlor-interested implied trust for income tax to follow (Thorpe 2021).

4 HMRC Manual TSEM9305.

5 Taxation of Chargeable Gains Act 1992.

6 HMRC Manual CG11700P.

The settlements legislation concerned gifts of income to a settlor's spouse or minor unmarried child—theoretically a simple way for an individual to reduce their taxable income yet keeping it within the family. As far as spouses are concerned, the settlements legislation made little practical impact before 1990 as a wife's income was taxed as part of her husband's income anyway. After 1990, when "aggregation" ceased and the UK adopted independent taxation, the availability of a spouse to receive income and utilize their personal allowance and/or basic rate band made the settlements legislation more relevant. The rules essentially impose a settlor-interested trust on the person who now legally owns the income only as a trustee, as the beneficial ownership has been returned to the settlor. Gifts can be made to spouses without being caught by these rules if they include the underlying capital behind the income. In the *Arctic Systems case* (the colloquial name for *Jones v Garnett* (2007), this spousal "get out" saved Mr Jones from being taxed on his wife's share of their company's dividends from her equal shareholding following the artificial inflation of the distributable reserves (by his taking a small salary) due to his being creator/settlor of the company's income.

The TOAA rules likewise effectively impose a settlor-interested trust on the original settlor of the income (Thorpe 2021). When an asset is transferred to a non-UK-resident or domiciled person such that the UK resident still has the power to enjoy the resulting income, that resident is subject to income tax. The imposition of trusteeship onto a new legal owner, with beneficial ownership remaining with the original/real owner, is done through the mechanism of implied (resulting) trusts. In a similar vein, constructive trusts are also used by the equity courts to ensure that those who unjustly enrich themselves hold the legal title of their dishonest gains for the victims who are the beneficiaries. Unlike the settlements legislation, however, the TOAA rules are subject to an express "motive" exemption to ensure genuine commercial transactions are not caught. Only someone attempting to "commit" tax avoidance would be subject to the TOAA rules—a clear conscience will not invoke the intervention of equity.

As well as equity's recognizing the beneficial owner over the legal owner, it will also recognize what is right and just; the tax courts, with equity running through them like rock, will overturn the letter of the law if good conscience demands it.

[D] EQUITABLE PRINCIPLES IN THE TAX COURTS

Not only does the tax legislation put equitable principles at the forefront, beneficial ownership is cited in and enforced by Acts of Parliament, but the tax courts are also courts of conscience. Although the courts will obviously interpret the legislation and recognize the beneficial ownership bestowed therein, there are instances of the tax courts' applying the rules of equity with an inherent jurisdiction to correct a moral wrong, even though the case at common law seems "clear cut".

One example is the case of *Rebecca Vowles v HMRC* (2017). Miss Vowles was subject to a COP9 investigation by HMRC for dividends and benefits-in-kind (a company car) received by her but not declared. She was shareholder and director of the company in question (which was subsequently liquidated and investigated for fraud); so, on the face of it, she was liable for the income tax. However, it transpired that she was subject to physical abuse from her partner to whom in reality this business actually belonged; her legal ownership of the shares and directorship was a façade (as her partner was also disqualified from being a director). He was behind all correspondence and actions within the company and all of her finances; she was purely a figurehead acting upon his command. She did not, in reality, receive any dividends nor have any use of the company car. This argument was made in an appeal against the assessment which found favour with the First Tier Tribunal who said:

> Our finding is that while in law she was the shareholder, in equity it is clear that she held that share on trust for Mr Walker, even though neither party, not being lawyers, would have thought about the matter using such terminology. But the situation Ms Vowles described was clearly one where her name was used, but she had no beneficial interest in the company … We do not consider her the beneficial owner of the share in her name …
>
> In short, we find that Ms Vowles was not the person liable for the tax on the dividends. While we think s.385 (of ITTOIA 2005)[7] must be read as giving liability to a single person, in any event our finding is that whichever test in s.385 is applied, Ms Vowles was not the person liable to the tax. The dividend was not paid to her, it was not received by her and she was not in equity entitled to it (*Rebecca Vowles v HMRC* 2017: paragraphs 84-86)

[7] Sub-section 1 reads: "The person liable for any tax charged under this Chapter is— (a) the person to whom the distribution is made or is treated as made or (b) the person receiving or entitled to the distribution."

These paragraphs lay bare that the judiciary will call upon equitable principles which will take priority over any legal titles and procedures if good conscience demands it. The tribunal recognized that Ms Vowles's ownership of the share capital was as a trustee and that the beneficial (and thus taxable) ownership was elsewhere with the partner. Thus, the tribunal imposed a form of implied (constructive) trust—"*it is clear that she held that share on trust*" and that she was not "*in equity entitled*" (2017: paragraph 86, emphasis added) to the dividend. In addition, the tribunal effectively overlooked the fact that, for income tax purposes, Ms Vowles was a director—a *de jure* officer of the company and registered as such at Companies House. Whilst directors would normally be subject to income tax by having private use of a company car, and whilst Ms Vowles was a director, the tribunal held that this did not reflect reality and so she should be relieved from this legal obligation. The spirit of the medieval chancery courts is alive in an administrative tribunal of first instance.

Another example of the courts' role as a judge of conscience is the case of *David Patmore v HMRC* (2010) whereby the First Tier Tribunal imposed a constructive trust despite no invitation by either party to do so. HMRC sought to invoke the settlements legislation with respect to the transfer of a small number of "B" shares in the family company from Patmore to his wife and from which dividends were subsequently paid. HMRC argued that this was a settlement with the dividends on those "B" shares being taxed upon the "settlor", namely Mr Patmore. However, the First Tier Tribunal refused to agree—it held that there was an insufficient level of bounty by virtue of the fact that Mrs Patmore was still jointly liable for the debts which were incurred to buy the shares in the first place. Instead of finding that the beneficial taxable ownership of the "B" shares was on Mr Patmore, the tribunal found that Mrs Patmore was somehow the victim of an injustice by holding so few shares yet jointly responsible for the total debts behind the entire shareholding. The tribunal found that Mr Patmore held half of the "A" shares on constructive trust for his wife. The judge stated: "Mrs Patmore was entitled to half of the 85 "A" shares but in fact received only two "A" shares and the promise of almost valueless "B" shares" (2010: paragraph 59).

The judge also stated that:

> Either she (Mrs Patmore) intended to give up her entitlement in favour of her husband or she did not. I have found as a matter of fact that she did not intend a gift. This led me to conclude that Mr Patmore held some of the shares on constructive trust for her and that her receipt of the B shares and dividends up to 42.5% of the dividend paid did not therefore involve an element of bounty on his part (*David Patmore v HMRC*: paragraph 85).

What makes this case interesting from a perspective of examining the role of equity is that the imposition of a constructive trust occurred where neither party made any submissions regarding equitable remedies. The constructive trust is an equitable tool of restitution, traditionally imposing trusteeship upon the commissioner of a crime of dishonesty. However, the "new model" constructive trust[8] does the same with equitable wrongs—placing beneficial ownership in the hands of the wronged person; the person who committed an equitable, but not legal, wrong retains only their legal ownership of the asset. The tribunal judge, Barbara Mosedale, invoked this entirely on her own initiative based upon the inherent equitable jurisdiction of the courts. The tribunal, in rejecting HMRC's submissions of beneficial ownership remaining with Mr Patmore via the settlements legislation, could simply have respected the legal title of the shares. However, the judge didn't like the situation with the wife having so few shares yet half the liabilities, so she imposed the constructive trust to reassign Mrs Patmore greater degrees of beneficial ownership. This case demonstrates the inherent jurisdiction of the courts and shows that even without any prompting or argument, and without needing legislation to empower them, equitable principles are a ready weapon for the tax courts to combat any unconscionable behaviour.

[E] CONCLUSION

Whilst the 1873 Act seemingly placed equity ahead of common law, equity had already been prevalent in the tax courts long beforehand. The first tax court was an equity court; the principles of conscience and canon law guided and supervised the common law. The 1873 Act simply confirmed what had always been the case. Centuries on, equity still prevails within the tax courts by virtue of beneficial ownership—that "progeny of equity" (to quote Lord Denning)[9] which is the basis of taxation whereby any attempt to avoid tax by transferring the legal title of an asset is met by long-standing legislation which keeps the beneficial ownership with the real owner. By following the beneficial ownership, the tax courts are showing that equitable principles are all-important and that they are courts of equity which will overturn the letter of the law if good conscience demands it. The tax courts are, and always have been, courts of equity. The 1873 Act did nothing to change that; it only brought the courts and procedures together, or rather back together, thus resembling the pre-1841 Court of Exchequer as much as any new modern High Court.

[8] A phrase he used to describe "new model" constructive trusts when saying that "equity is not past the age of childbearing" in *Eves v Eves* [1975] EWCA Civ 3, [1975] 1 WLR 1338, 7.

[9] Ibid.

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Legislation, Regulations and Rules

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Special Section:
Scientia Iuris by Luca Siliquini-Cinelli,
pages 90-124

Can Historical Jurisprudence Inform the Artificial Intelligence and Law Debate?

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Abstract

The publication of a monograph by Dr Luca Siliquini-Cinelli on the history of *scientia iuris* in which he argues that law is a constructed form of knowledge that differs from experience is not just an important and very learned contribution to historical jurisprudence. The book's thesis is also making an important contribution to the debate about the impact, and probable future impact, of artificial intelligence (AI) on law, legal thought and legal reasoning. In critically reviewing the book, this essay will briefly indicate how and why Dr Siliquini-Cinelli's book is establishing a fundamental relationship between historical jurisprudence (understood as the history of legal thought) and AI.

Keywords: artificial intelligence (AI); epistemology; legal singularity; map; model; philosophy; rule-theorist; territory.

Would it be idle to think that, in a few decades time, law and legal decision-making will not be dispensed by a robot judge? And, if, or when, this phenomenon arrives, what will be the impact, in particular, on legal education and on law as a body of knowledge? Given the recent advances in artificial intelligence (AI), no doubt such robotic judgments will be elegantly written and supported by convincing legal reasoning. Is such a future development to be feared or welcomed? One pressing question is whether law teachers might disappear (Chaumet & Puigelier 2024). Another pressing question is the ontological and epistemological basis upon which such AI is founded. What will inform this ontology and epistemology? A new book by an Italian-trained comparative lawyer, legal philosopher and legal historian impliedly, if not directly, addresses these AI questions through an extremely learned contribution to historical jurisprudence and comparative legal history (Siliquini-Cinelli 2024).

Dr Luca Siliquini-Cinelli's *Scientia Iuris: Knowledge and Experience in Legal Education and Practice from the Late Roman Republic to Artificial Intelligence* (2024) proposes the following thesis. Legal education and legal practice are in crisis and the reason for this crisis is to be found in the distinction between experience and knowledge. The distinction is not recent, says the author; it goes right back to the Roman jurists of the Republican era who began to establish law (*ius*) as a body of constructed knowledge (*scientia iuris*) that could be seen as existing independently from the human experience. The result is "that law is and will increasingly be capable of performing its regulatory function without recurring to the *experiential* medium of legal experts" (2024: 1). And this is because legal education and practice pursue knowledge by employing analytical techniques of reasoning and argumentation that void experience and render it obsolete. The author links all of this to "Prometheus [who] is the god that knows everything in advance ('*pro-mētheús*', '*pro-mathḗs*') and whose thinking moves on a rectilinear plane on which all that exists is effectually commeasured ('*pánt' epistathmṓmenos*', '*pro-ex-epístasthai*') for epistemic purposes" (2024: 124). The book claims "that rather than just being a prerogative of scientific treatments of law, *scientia iuris* lies at the core of, and still defines and directs, the whole of legal education and practice in Civil and Common law jurisdictions" (2024: 126). The author, in the chapters that follow, goes on to trace and to justify the thesis through an extensive and very detailed examination both of the philosophy of knowledge and of the history of legal thought and reasoning.

The author insists that his "take on knowledge and experience is *philosophical*", that is to say "the book argues on philosophical grounds that while experience defines who we are as individuals because it is bound to our own facticity (i.e. experience is and cannot but be factical and finite), knowledge is impersonal and ethereal." And so "while one's experiences are immanent, subjective, and unique, knowledge is *information*—i.e. a metaphysical and sharable end-result of intellectual processes of ontological abstraction that transcend experience's facticity and finiteness" (2024: 2, original emphasis). Dr Siliquini-Cinelli justifies his arguments in the chapters that follow the introduction through a detailed examination of the work of philosophers such as Plato, Aristotle, Husserl, Heidegger, Popper, Siegal, Russell, Agamben and others. There is equally a detailed diachronic analysis and discussion of *scientia iuris* that in terms of the *Prometheus Bound* myth "reveals that law's nature is artifactual because it is a specific social *technique* whose purpose is the *creation* of regulatory (i.e. meaning-assigning and chaos-avoiding)

frameworks *knowable in advance* through which life can be decoded and systematised legally" (2024: 123, original emphasis).

One might say (with some trepidation) that in summary what this work on epistemology is arguing is this. Legal knowledge (*scientia iuris*) is a constructed model of the kind discussed recently by Erica Thompson in *Escape from Model Land* (2022) (although Dr Siliquini-Cinelli refers neither to models nor to Thompson) and that this legal model is highly problematic and will eventually be able to function without the intervention of jurists and lawyers. As the author says: "the teaching, learning, and practice of law have always been dependent upon a form of thinking and language that is both *structured* and *structuring* along rational and cognitivist lines, of which logical and analogical forms of validation as well as conceptual representationalism are the protagonists" (2024: 149-150, original emphasis). This suggests an epistemic "model", although the author would no doubt prefer the term "philosophy". It is a model that nevertheless raises an epistemic problem: what is it modelling? Is it modelling something independent of the model—something "out there" (*res*)—or is it modelling a psychological model that is inherent in the mind (*intellectus*)? Or is it modelling another model: is it a model of a model?

This question can be put another way. Is a civil code (for example the *Code civil* or the *Bürgerliches Gesetzbuch*) a model that is attempting to model social reality (the code is the scientific model while social reality is the object) or is the reality completely absorbed by the model? This is the old map and territory argument (on which see Mathieu 2014). Is a code a "map" that is actually mapping an objective "territory" or is the map actually the territory itself? If a jurist goes on to assert that ontologically law consists of a set of rules (see, for example, Eisenberg 2022), then even in a non-codified legal system the set of rules is nothing but a model. That is to say, social reality is being fashioned by the text of the rule rather than by some other model—one thinks of the recent legislation declaring Rwanda as a safe country irrespective of the reality on the ground so to speak (Safety of Rwanda (Asylum and Immigration) Act 2024, section 2(1)).

This is an issue that lies at the heart of the AI debate. One assumption in this debate is the notion of "legal singularity" which is described as "a version of a complete legal system, overseen by a superhuman intelligence" whereby such "a system is premised on the possibility of the perfect enforcement of legal rights" (Deakin & Markou 2020: 27). In other words one feeds into the AI machine a "singularity" code of rules which will then act as the programme for deciding legal cases, an idea that

reaches back to the *mos mathematicus* jurists and was the dream of the original European codifiers. But such a code will map not just the rules but equally the social facts; it will model the whole of these social facts via the rules "as if" they are reality, thus giving a renewed life arguably to the fiction theory of law (Jones 1940: 164-186).

It is this kind of problem that motivates Dr Siliquini-Cinelli's project and gives it a relevance that cannot be ignored. It is not just computer scientists that are the problem; historical jurisprudence is just as much to blame in that the ever more rationalising tendencies from republican Roman law to the Pandectists have helped create the myth of a "legal singularity", often under the guise of legal positivism. The challenge, of course, is to offer an alternative model to the one proposed by convinced rule theorists such as Eisenberg (2022) and by the legal singularity school. How is legal reasoning to be modelled? Dr Siliquini-Cinelli proposes "experience". The problem, he says, is that "knowledge phenomenologically equalises the targets of its reach for regulative and structuralising purposes, thus emptying both their factical immanency and unpredictability of their interaction" (2024: 130). Perhaps this is true, but it still leaves open the question of how one models experience for reasoning purposes. One is reminded of Felix Cohen's well-known 1935 article attacking the (in effect) Pandectic notion of *scientia iuris* as nothing but transcendental nonsense (Cohen 1935). This Cohen article is more than convincing in its "deconstruction" (as one would say today) of conceptualism in law but, when it comes to the alternative functional approach, there is a feeling that such an approach is not completely thought through. Functionalism is a much more complex scheme of intelligibility than it might seem.

One might also reflect on how judges are supposed to reason. Are we, for example, supposed to applaud Lawton LJ's approach to interpretation in the case of *Young v Sun Alliance Insurance* (1977) when he declares that an elephant is difficult to define (science?) but easy to recognize (experience?)? The problem here with any subjective experience thesis is that if care is not taken, it gets dangerously close to the judicial "intuition" theory derided (rightfully) by Ronald Dworkin (1986: 10-11). Given the number of rather odd decisions made on occasions by United Kingdom senior judges, some might argue that an approach based on knowledge rather than on (so-called) experience might not be a bad thing. As for law teachers, how might they go about discussing, on the basis of experience, the Roman law situations set out in, say, *Digest* 9.2.52.2, D.19.2.31 and/or D.41.1.55? It may be, then, that the author might wish to give some further guidance on how the experience theory translates into practical

reasoning (although, in fairness, the author's discussion of Twining in chapter 6 is helpful in this respect).

Dr Siliquini-Cinelli's thesis is a challenging one. The author recognizes that his thesis may attract criticism and he attempts to counter several of the objections in the introduction (2024: 58-62). Some, however, may not be entirely comfortable with this critique of legal knowledge in favour of some kind of epistemology founded on "experience" for other reasons. There is a possibility of opening the door to conspiracy-theory ideas about the dangers of European rationalism. Of course, one can be sure that this is far from the mind of the author who is rightly concerned about the state of legal education and the encroachment of AI into the field of legal decision-making. Yet the thesis is open to an interpretation that is suggesting an "irrational" view of the world. (The position is not helped by Heidegger's links to fascism.) "Experiences," says the author, "by contrast, are inherently subjective and unique" and so "cannot be replicated from one subject to another" (2024: 3). Moreover, says Dr Siliquini-Cinelli, "knowledge is independent of truth" (2024: 380). This, of course, begs a question of what amounts to "truth", a notion for some that might best be avoided. Or, failing that, others might say that there is such a thing as "truth"; it is just that we cannot access it directly, only through sophisticated "knowledge" models. The author would no doubt counter that this is a misreading of what he is trying to do. The point, however, is that there are statements—perhaps inevitable given the complexity of what the author is trying to do—that are open to a misreading which has been encouraged by what some might regard as an "anti-science" stance.

One final point must be mentioned: the book has no index. This is obviously an inconvenience, but, arguably, it is more than that. "The ideal index", writes Dennis Duncan, "anticipates how a book will be read, how it will be *used*, and quietly, expertly provides a map for these purposes" (2021: 17). As has been argued elsewhere, an index is an epistemological model in itself that operates quite differently from the kind of rationalized knowledge models that Dr Siliquini-Cinelli attacks in his book (see Samuel 2011). If ever there was a model that brought "knowledge" face to face with empiricism (experience?) it is surely the alphabetically arranged detailed index. It is an "X-ray" of the book's content where "duty" can find itself juxtaposed with "duck" and "right" with "road", not to mention "Thatcher, Margaret" with "theft" (see further Duncan 2021: 203). Indeed, rethinking a number of "contract" and "tort" cases seen from the viewpoint of, say, "family" may actually offer some "experience" insights into the outcome of several cases that are normally analysed only through the positive rules of private law as coherently arranged by the *scientia iuris* mind. An

index is always an antidote to "antifactuality", and so its absence is a real cause for regret. As Dennis Duncan reminds us, *Qui scit ubi sit scientia habendi est proximus*, but of course the search for knowledge (*scientia*) may not be to Dr Siliquini-Cinelli's liking. What about, then, *Qui scit ubi sit experientia habendi est proximus*?

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Legislation, Regulations and Rules

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Cases

Young v Sun Alliance and London Insurance Ltd [1977] 1 WLR 104

The (In)efficiency and (Un)certainty of Non-propositional Structures of Reality … or, Adventures in Philosophy of Understanding

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Abstract

This article critically discusses understanding, certainty and efficiency in relation to juridical and jurisprudential contexts. Understanding is an undertheorized topic in law and jurisprudence, despite philosophy and epistemology addressing it at some length in recent years. The focus, therefore, is on understanding-in-law (or understanding as a cognitive function of the law) rather than understanding-of-law, which is an exceedingly well-trodden path in doctrinal, critical and philosophical legal work. The article acknowledges that this branch of epistemology is perhaps new ground for legal academics, and thanks to Luca Siliquini-Cinelli's landmark book, *Scientia Iuris*, the article is a response to his thesis that law's regulatory function has grown in recent decades to embrace and embody knowledge while voiding experience. And while this leads Siliquini-Cinelli to the conclusion that law is a matter only of knowledge, not of experience, the article raises questions about what dwells cognitively between poles of knowledge and experience, and how we can take from or define a place for understanding between poles of knowledge and experience. It also explores the role of certainty and efficiency in shaping understanding in law and beyond, with understanding ultimately defined as a grasping of the structures of the objects of law, different from and in contrast to legal knowledge.

Keywords: understanding; certainty; knowledge; efficiency; law.

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[A] INTRODUCTION

> "We would surely rather understand than merely know" (Pritchard 2010: 74).

This article critically discusses understanding, certainty and efficiency and shows important links between the three that are relevant to juridical and jurisprudential contexts.[1] However, and notwithstanding my intention to identify links between understanding, certainty and efficiency, the primary focus of the article is *understanding* because it is an undertheorized, even neglected, topic in law and jurisprudence. This, despite philosophy or, specifically, epistemology, addressing understanding at some length in recent years, albeit still far less so than knowledge (Zagzebski 2001; Pritchard 2010; Grimm 2017 and 2019; Kelp 2021).[2] To be clear, my interest here is *understanding-in-law* (or understanding as a cognitive function of the law) not *understanding-of-law*, with the latter being an exceedingly well-trodden path in doctrinal, critical and philosophical legal work. Moreover, the focus here is understanding distinguished from and held in contrast to knowledge. So, rather than considering understanding as always already adhering to knowledge or interchangeable with it—both of which describe the normative status of understanding in law and elsewhere—the following discussion will coax understanding out from knowledge's shadow so we may see and consider it more clearly and on its own terms and merits.

"Adventures in the philosophy of understanding", as I refer to them, acknowledges that this branch of epistemology is (largely) new ground for me as a legal academic. I embarked on the adventures in response and thanks to Luca Siliquini-Cinelli's landmark book, *Scientia Iuris* (2024). Central to Siliquini-Cinelli's thesis is that law's regulatory function has grown in recent decades to embrace and embody knowledge whilst voiding experience, which leads to the conclusion that law is a matter only of knowledge, not of experience. This position, which is worthy of merit, entirely coherent, and in numerous respects provocative, will not be challenged here as such. But Siliquini-Cinelli's thesis raises a series of questions about what (if anything) dwells cognitively between poles of knowledge and experience. These questions provide a backdrop, if

[1] "Juridical and jurisprudential contexts" should be read (and understood) here as being far from self-contained or internally logical but shaped constantly by externalities, especially, although not exclusively, by technology, eg autonomic computing, politics and, perhaps above all, financial and market economics.

[2] It has been argued that Plato and Aristotle's notion of *episteme* aligns better with conceptions of understanding than with knowledge (Grimm 2021). Further, Zagzebski offers a strong case for the concept of *techne* being fundamental to ancient formulations of understanding, the residue of which prevails in the ways we decipher different modes of understanding today (2001: 240).

not precisely a framework, for this article. So, for example, if experience amounts to so little in legal education and practice, is knowledge the only game left in town—what about understanding? What can we take from or how might we use Siliquini-Cinelli's provocation to carve out, better recognize and define a place for understanding between poles of knowledge and experience? Or, and perhaps more importantly, how might we come to understanding as something concrete and self-defining, a vital cognitive force in and for the law? And to reintroduce my other keywords, if we come to understanding as such, what role do certainty and efficiency have in shaping understanding in law and beyond? But let us begin with understanding.

[B] WHAT ABOUT UNDERSTANDING?

Siliquini-Cinelli contends that, "through the making sense relation, we produce information out of experiential data, and regulate our existence accordingly so that chaos and uncertainty are averted", adding that, "the primary role exerted by the principle of 'legal certainty' in Western legal consciousness is but a consequence of the normative, ordering ethos underpinning the intellect's making-sense efforts." (2024: 4) In the above quotes, Siliquini-Cinelli arguably comes closest in *Scientia Iuris* to acknowledging understanding and doing so as a factor in the pursuit of (legal) certainty. But there is an intricate relationship between understanding and certainty that needs a better definition than this, one that begins with a better definition of understanding that can advance the cause of legal certainty just as much as it can certainty writ large. Law is concerned with, even defined by, considerations, articulations and judgements of certainty and the ways and means to substantiate and action it in the world. For jurisprudence (as well as doctrine), therefore, it is necessary to connect, and understand the connection between, understanding and certainty better. Before delving into that connection, however, what about understanding?

We may take understanding to mean a quest for meaning that allows us to transform our experiences into knowledge and acquire a deeper comprehension of the world. Zagzebski proposes two structure-based definitions of understanding that align with this quest for meaning, both of which I consider important, and, above all, salient for an analysis of understanding that usefully fits a juridical or jurisprudential context. First, that "understanding is the state of comprehension of nonpropositional structures of reality" (2001: 242), a nuanced definition of understanding that we shall unpack further later. Second, "that understanding is the grasp of structure", and Zagzebski continues:

> When we grasp an object's structure, we understand the object. The object of understanding can be anything that has structure: a living organism, an event, a narrative, a piece of music, a work of art, a metaphysical system, a philosophical argument, a causal relation, the stock market, human intentional action, a moral theory (2019: 124).

The need for or situatedness of comprehension of a structure in understanding is clear in structuring modalities of the law (rules, principles, doctrines etc). But mere comprehension of a structure also shows us that exactness can and often is played down in favour of a *feeling for* with the hope of a *grasping of* world(s). Comprehension over exactness is not fatal to law's authority nor, as is more relevant here, to legal certainty, if that is something we consider to be predicated on propositions alone. And this is why, as a response to Siliquini-Cinelli, I suggest understanding almost certainly offers another (third) dimension to his thesis. Lying somewhere between knowledge and experience, understanding, in deference to Siliquini-Cinelli's terms, is not voided like experience, but neither is it a mere echo of the function or place Siliquini-Cinelli claims for knowledge. Understanding differs from and performs differently in discourse to knowledge. Understanding is not merely knowledge, but a distinct cognitive state rooted in grasping propositional and non-propositional structures alike (Zagzebski 2019: 128).

Knowledge, so often king, relegates understanding to an adjunct. In legal education, for example, we normatively draft marking rubrics in terms of "knowledge *and* understanding", meaning the measure of a student's overall grasp of a subject, whether demonstrated in an exam or by coursework, is spelt out only in and by a conjunction of the two—"well done, this is a good essay that shows solid knowledge *and* understanding of …". Perhaps this is because knowledge is a more easily measurable criterion than understanding. The marker of a legal essay, for instance, can point to a student's inclusion of relevant (or, inversely, non-relevant) subject-matter (dates, case names, legislation etc) as an indication of knowledge. In that sense, knowledge is concrete. But for understanding, a student needs to be subtle in their synthesis of subject-matter to achieve a meaningful, final analysis. Put another way, when it comes to showing understanding the student must tarry with the nebulous.

To be cynical for a moment, this is most common with the student who brain dumps subject-matter onto a page with little or no evidence that they understand why they have said what they have said or why they have said it in that order. It should also be noted, given another focus of Siliquini-Cinelli's book, that this is a feature and indicator more recently

of a student's use of large language model artificial intelligence, like Chat GPT. As Zagzebski puts it, "a person can know the individual propositions that make up some body of knowledge without understanding them" (2001: 244), to which we can surely add today: a student can ask Chat GPT to formulate a response to a series of subject-matter prompts without understanding the response.

Understanding is, therefore, naturally or perhaps even too easily overshadowed by knowledge. Not so much forgotten as lightly appraised as the lesser partner. Consequently, understanding and its depths are rarely plumbed. But that could also be because understanding is hard to adumbrate and pin down (Pritchard 2010). As an object of philosophical or jurisprudential enquiry, the aim of understanding "understanding" quickly takes on a veneer of circularity. But understanding obviously has importance to the discourse and practice of everyday life, not least because it enables an individual to discriminate amongst sense-data, facts and information—a form of cognitive discrimination that undoubtedly contributes to the efficiency of personal economy (eg overcoming cognitive limitations). But equally, I argue, financial and market economies because it enables, for better or worse, a more effective species of *homo economicus* operating within, what Enzensberger referred to as, "the mind industry" (1982: 5). Hence, understanding involves the process of simplification, assigning intelligible meaning to the things we encounter in life and organizing them accordingly (Zagzebski 2001: 244). Further, the act of understanding combines elements of rationalism and empiricism, as it not only seeks to grasp how things are but also how they must be or might be (Grimm 2017: 4). This unique blend of rationalist and empiricist traditions sets understanding apart from ordinary instances of knowledge, which primarily focus on perceptual knowledge of an environment (Grimm 2017: 4).

While knowledge is often propositional in nature, understanding goes beyond individual propositions. It deepens our cognitive grasp of known information and allows us to comprehend the relationships and dependencies between various elements of the world. As mentioned above, Zagzebski proposes that understanding is the state of comprehension of non-propositional structures of reality. She distinguishes understanding from knowledge, emphasizing that understanding involves seeing how the parts of knowledge fit together, which is not propositional in form (2001: 244). Understanding is characterized by internally accessible criteria and a conscious transparency that distinguishes it from knowledge, meaning, "It may be possible to know without knowing that one knows, but it is

impossible to understand without understanding that one understands" (Zagzebski 2001: 246).

Understanding is not limited to propositional knowledge, therefore, but extends to non-propositional structures of reality, which add complexity to its nature. Opening understanding on a front of non-propositional structures regarding law is, I suggest, an interesting line of inquiry. One that invites further even fresh analysis of vital and longstanding juridical characteristics (at least within common law traditions) and virtues that are, if not wholly, then in large part non-propositional. Those parts of the law that serve as adhesive, such as the "spirit of the law", equity, judicial instinct (for example, determinations of reasonableness) and, possibly most importantly, legal certainty. To understand these parts of the law, to echo Zagzebski, involves seeing how the parts of that body of legal knowledge fit together, but where the fitting together is not itself propositional in form (2001: 244).

But, and this is important for a general educational imperative attached to understanding and to the more specific imperative Siliquini-Cinelli attaches to legal education, understanding, like knowledge, can be taught. Understanding arises from unanalysed virtues, which can be taught through education. As Zagzebski claims:

> There is a difference between the kind of understanding a person has who acquires it from a teacher and the kind that a person has who has figured it out for herself. Good teachers learn how to give their students understanding of difficult subject matter by the use of diagrams, vivid examples, and explanations of the way the new subject matter connects to things the students already understand. Understanding can be taught, like knowledge; and like knowledge, there is probably a qualitative difference between the state one gets from another and the state one gets on one's own. (2001: 248-249).

[C] (IN)EFFICIENCY AND (UN)CERTAINTY

Efficiency, certainty and the inverse or perhaps negation of each (the [in] and [un]) are central to the cognitive function of understanding. We can reflect again on understanding as something achieved partly, as Zagzebski argues, "by simplifying what is understood, highlighting certain features and ignoring others" (2001: 244), a process that foregrounds the probity of human cognitive inflexions. In other words, daily we walk a fine line between efficiency and inefficiency, certainty and uncertainty, switching back and forth in the regulation of personal and social economies. There is much to be said about how we elide these positions daily, both in discourse and practice, but that discussion will have to occur elsewhere.

Certainty relates to the making-sense relation, which enables us to extract information from experiential data and regulate our existence. We do so, as Siliquini-Cinelli proposes, "so that chaos and uncertainty are averted, our existential fears and anxieties managed, and 'the rot of entropy' resisted (to the extent that it is possible)" (2024: 4). The doctrine of legal certainty concerns a normative, ordering ethos that underlies the intellect's efforts to make sense of the world. There is not space here to rehearse the doctrine of legal certainty at length. But as a central pillar of Western (common and civil) law norms, legal certainty is neatly summarized by Lord Mance, when he states that: "The law must be certain at the time when the subject has to act by reference to it" (2011: 2). Law that is intrinsically beyond understanding cannot be certain. As the physicist Herbert Dingle usefully put it, albeit as part of a (misguided?) personal attack on Albert Einstein and the newly emerging scientific field of relativity: "When the witnesses speak in unknown tongues and the judge seems mad, what is the poor jury to do?" (1937: 118).

Legal certainty, as a subset of humanities' wider desire and need for certainty, may serve as a reassuring and calming force, dispelling existential anxiety caused by uncertainty and risk (Siliquini-Cinelli 2024: 22). But there are inevitably questions about the nature of certainty and the challenges it poses, not least if the calming effects are unobtainable without understanding. Further, there is potential uncertainty that arises when there is a lack of knowledge, for example, about a particular risk. In such cases, prudence becomes a matter of waiting, as Winner suggests, for better research findings rather than taking effective action to address the suspected source of injury (2020: 144), which may be read in contrast to or even as a rebuke of Siliquini-Cinelli's insistence on meaning-seeking and world ordering as necessary and therefore good scientific and intellectual goals. As an objective of paramount importance linked to the progress of science, the growth of industry, the rise of professionalism, and the conservation of natural resources, efficiency has become instrumental in defining what effective certainty looks like (Winner 2020: 46). In contrast, therefore, inefficiency is (and must be) a clear path to breakdown in certainty. But whilst this equation seems to satisfy an obvious and irredeemable logic, the problem is, I suggest, that it also dehumanizes. Accusations of inefficiency and uncertainty—we should not be naïve in thinking that either can escape "accusation" in

a pejorative sense—leave little room for doubt that there is or can be any resistance or alternative to them.[3]

Perhaps the best indicator of the haunting, imperative presence of scientifically informed yet economically motivated calculation in most if not all modes of modern social discourse (including law), efficiency is a constant backdrop to the interplay of understanding and certainty, and, ultimately, the measure of them. "In every field men seek to find the most efficient method", Ellul says, and "it is really a question of finding the best means in the absolute sense, on the basis of numerical calculation" (1964: 21). Efficiency thus calls (or demands) understanding and certainty to account. Each must show value as well as responsiveness to risk, primarily, as economic data, and only subsequently as social goods. As Winner maintains, "demonstrating the efficiency of a course of action conveys an aura of scientific truth, social consensus, and compelling moral urgency" (2020: 46-47). Accordingly, in a final analysis, we might say that understanding is deemed good only if it can be shown to or materially improve (economic) efficiency. Undoubtedly, the same equation and analysis applies to knowledge and efficiency, although the relationship between the two must be different, as the characteristics of understanding, knowledge, and certainty differ in conjunction with efficiency. Each is shaped in different ways by efficiency.

[D] CONCLUSION

The focus of this article has been a critical analysis of understanding distinguished from knowledge. The aim being to raise curiosity about and develop a better sense of understanding, especially for juridical and jurisprudential contexts. I have little hesitation in saying that law (or perhaps I should say the common law, as the type I am most familiar with) has hitherto neglected to take understanding seriously. Understanding that, after Zagzebski, I define as a grasping of the structures of the objects of law. That is, primarily, understanding as something different from and in contrast to (legal) knowledge. Nor has law sought to consider, in any meaningful way, what is at stake from understanding in anything but its most cursory form (understanding-of-law). Whether as a standalone cognitive function or in conjunction with the likes of certainty and efficiency,

[3] Echoing my comment on "juridical and jurisprudential contexts" (note 1 above), the suggestion here is that efficiency and inefficiency, certainty and uncertainty, notwithstanding the philosophical definition of each, are products of society. The social role and place of understanding (and knowledge) in conjunction with efficiency and inefficiency, certainty and uncertainty, therefore, can be traced to what Hans Magus Enzensberger, following Marx, calls the "industrialization of the mind", an ongoing (post-enlightenment, post-industrial) process involving material and immaterial expropriation and exploitation of the many by the few (1982: 3-14).

understanding-in-law needs far more attention. Siliquini-Cinelli's book and the thesis it advances on the triumph of knowledge and resultant voiding of experience helped identify a gap in which I see understanding emerge, and it helped prompt the questions that this article has raised and sought to tackle. I do not doubt there is more to be said.

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Law without Lawyers, Lawyers without Law

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Abstract

Luca Siliquini-Cinelli thinks that there can be law without lawyers. American legal realism thinks that there can be lawyers without law. The truth is perhaps somewhere in between. Law forces individuals to fit into categorical rules. Focusing on its Procrusteanism leads one to imagine the possibility of law without lawyers: law is a set of rules, albeit a complex set, that can be applied consistently to a whole array of situations. But law can also take on shifting shapes and forms to suit the circumstances. Focusing on its Proteanism leads one to imagine the possibility of lawyers without law: law is just whatever lawyers make it out to be. Perhaps law is somewhere between Procrustean and Protean. Therefore, Siliquini-Cinelli and American legal realism may, each, be half-right.

Keywords: legal realism; law; lawyers; logic; knowledge; experience; Holmes.

[A] INTRODUCTION

Lawyers are experts in the law. They work the legal system and make the legal system work. With due credit to Frank Sinatra, one might say that law and lawyers go together like a horse and carriage, you can't have one without the other. "Try, try, try to separate them, it's an illusion. Try, try, try, and you will only come, to this conclusion."[1] Separating them is exactly what Luca Siliquini-Cinelli tries to do in *Scientia Iuris*, and he comes to the opposite conclusion. Siliquini-Cinelli argues that lawyers are not essential to law: there can be law without lawyers.

Siliquini-Cinelli's position is the inverse of the position held by some American legal realists, who argue that law is not essential to the work of lawyers: there can be lawyers without law. Although they overlap in their goal of severing the connection between law and lawyers, one does so by dispensing with lawyers, the other with law. Comparing Siliquini-

[1] Frank Sinatra was talking, or rather singing, about "Love and Marriage" (1955).

Cinelli's position with American legal realism will clarify and amplify the distinctness of Siliquini-Cinelli's argument. A good place to start is with the oft-quoted remark by Oliver Wendell Holmes that the life of the law "has not been logic, but experience" (1963: 5). In a footnote, Siliquini-Cinelli describes this remark, not only as a cliché, but as a deceptive one at that (2024: 141). Cliché or not, Holmes's remark must surely be deceptive from Siliquini-Cinelli's perspective because Holmes's position is the direct inversion of Siliquini-Cinelli's. The reason that law does not need lawyers, on Siliquini-Cinelli's view, is that law is based on logic, not experience. If Luca Siliquini-Cinelli is right, then Holmes is wrong. Either law is based on logic (in which case Siliquini-Cinelli is right), or it is based on experience (in which case Holmes is right).

Holmes has frequently been credited as the progenitor of American legal realism based on his famous definition of law: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (1897: 460ff). Holmes and the American legal realists emphasize the lived experience of lawyers, while Siliquini-Cinelli emphasizes the independent logic of the law. On Holmes's view, it requires the lived experience of lawyers to predict accurately what a particular judge in a particular court will do in a particular case. No amount of learning the rules and working out the internal logic of the law will help you do that. The only way to learn the law is through lawyering. Some may attribute this difference in approach to the difference between civil and common law. Civil law is based on a code, whereas the common law is based on the reiterative practice and interaction between judges and lawyers in resolving concrete disputes. However, this explanation is not one that Siliquini-Cinelli is prepared to accept. Siliquini-Cinelli wants to expand his thesis to include both civil and common law. It is the application of his thesis to the common law that this review essay will put under the spotlight. This review will proceed in two parts: it will first outline Siliquini-Cinelli's argument ("Law without lawyers") before presenting the American legal realist counterargument ("Lawyers without law").

[B] LAW WITHOUT LAWYERS

Siliquini-Cinelli begins with a puzzle that immediately sets up a contrast between law and lawyers. Law is thriving, while lawyers are in crisis. That law is thriving can be seen from the ever-expanding domain and dominion of law. Ronald Dworkin says at the start of his book, *Law's Empire*, that "we are subjects of law's empire, liegemen to its methods and ideals" (1986: vii). Towards the end of the book, Dworkin writes that "the

courts are the capitals of law's empire, and judges are its princes" (1986: 407). To convey Siliquini-Cinelli's point using Dworkin's metaphor, it seems that law's empire is expanding at the same time as its capitals are crumbling and its princes are on life-support. This anomaly proves that the intuitive picture that law and lawyers rise and fall together is false, and the explanation for this anomaly must lie elsewhere. The answer lies, so Siliquini-Cinelli argues, in law's artifactuality: "as a product of the intellect, law is a matter of knowledge, not experience", which "explains why it possible for law to be flourishing as a regulatory phenomenon while the very places where it is taught, studied, and practised undergo a crisis" (2024: 1).

Once experience has been abstracted and transformed into knowledge, the substratum of experience is voided and can be discarded. While knowledge needs a repository (which Siliquini-Cinelli variously calls an "ontic entity" and "factical medium") to contain it, that repository of knowledge need not be human. It could just as well be a machine or an artificial intelligence. The knowledge floats free from the experience and becomes its own thing, an artifact. As law is knowledge, any person (or thing), even one with no prior experience of the law, can acquire knowledge of the law. Once transformed into knowledge, it can be acquired and transmitted independently of experience. Siliquini-Cinelli separates knowledge from experience, just as he separates law from lawyers. Knowledge is impersonal, ethereal, informational, metaphysical and abstract, whereas experience is bound to one's own facticity, finite, immanent, subjective and individualized. Knowledge can be replicated from one subject to another, just as a computer file can be copied and pasted from one folder to another, but experience cannot. Experience makes each individual unique, whereas knowledge makes each individual irrelevant.

Law takes individual experiences, in all their random messiness, and subjects them to the rationalization of a rule. Law thus combines reason and rule, by subjecting human conduct to the rule of reason. What results then is the transformation of subjective experience into "rational behaviour as a captivated and standardised form of conduct" (Siliquini-Cinelli 2024: 3). That is how law performs its essential function of social ordering. Siliquini-Cinelli argues that law's social ordering can be achieved without lawyering: "to appreciate this, it would suffice to think of how most of the time law shapes our daily existence without the direct intermediation of (some of) its officials" (2024: 47). While it is indisputably true that, in most run-of-the-mill cases, law works perfectly well without the involvement of lawyers, that truism should not be taken

to be synonymous with the much stronger claim that law can function without any lawyers working somewhere within the system. It is true that most disputes do not end up in court, but that does not mean that the legal system does not need courts with lawyers, even if only as a forum of last resort. Lawyers may very well only come in at the tail end of the legal process, but as American legal realists assert, this is the tail that wags the dog. It is to this tail that we will now turn.

[C] LAWYERS WITHOUT LAW

In an inversion of Siliquini-Cinelli's position, American legal realism claims, in its strongest formulation, that there is no law; there are only lawyers. By lawyers, I include judges, as they too are supposed to be human "legal experts". On Siliquini-Cinelli's view, law's operation depends on "logical and analogical forms of analysis", of which "judicial reasoning is a perfect case study" (2024: 170). Legal realists would agree that judicial reasoning is a perfect case study, but for a completely different reason: it shows, not law's dependence on logic, but its dependence on the choices of lawyers, including judges. To predict accurately how a particular judge would decide a particular case thus requires, not logic, but experience. "The common law is not a brooding omnipresence in the sky" (*Southern Pacific Company v Jensen* (1917: 222)) To an American legal realist, if one wants to understand law, one needs to look at what lawyers do.

Felix Cohen calls all the references to the logic of the law "transcendental nonsense", which he lampoons with a stinging satire of a German jurist, who dreamt of being transported to "a special heaven reserved for the theoreticians of the law", where he would meet "face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life" (1935: 809). Cohen's "transcendental nonsense" is Siliquini-Cinelli's "*scientia iuris*". Where Siliquini-Cinelli transforms experience into knowledge, legal realists want to transform it back into experience. In place of *scientia iuris*, Cohen advocates a "functional approach", which turns the attention from law to lawyers. Law is simply what lawyers make of it, or make up. On this legal realist perspective, law recedes from view, to be replaced with the activities of lawyers. "A judicial decision is a social event" (Cohen 1935: 843). As a social event, it is the outcome of various social factors and forces pulling in different directions. These social dynamics are the hard facts of law. To abstract from them and transform them into legal knowledge is to run away from the hard facts. There is nothing but these hard facts. Anything more, or anything else, is just "transcendental nonsense". A successful lawyer is one who is able to use these hard facts to predict the behaviour of judges.

It is no accident that American legal realism developed out of a common law system. Siliquini-Cinelli refers to Costantini's "excarnation *vs* incarnation" antithesis, which posits that the civil law tradition "excarnated" its rules in legal codes, whereas the common law "incarnated" its rules in the activities of lawyers (2007: 22, 79). This antithesis would carve up the Western legal tradition into two halves: *scientia iuris* in the civil law tradition and practical lawyering in the common law tradition. However, Siliquini-Cinelli refuses to rest content with this easy binary explanation. Drawing on the work of Postema on the common law tradition, Siliquini-Cinelli argues that *scientia iuris* is equally present in the common law tradition through the construction of "artificial reason" (1989: 30). Artificial reason proceeds through reasoning by analogy from case to case in a gradual and incremental fashion. Common law, as much as civil law, cannot do without *scientia iuris*, with its own internal logic, independent of what lawyers do. On Siliquini-Cinelli's view, the common law's artificial reason is akin to Prometheus' gift to humankind. It is a technique that allows us to create legal order out of social chaos. To recur to social forces, as the legal realists are wont to do, would be to return to the social chaos that legal order is meant to rescue us from.

[D] CONCLUSION

It is often said that law is Procrustean: it forces individuals to fit into categorical rules. However, the lesson to be taken from American legal realism is that law may, in fact, be Protean: it can take on shifting shapes and forms to suit the circumstances. The truth is perhaps somewhere in between: law is somewhere between Procrustean and Protean. Focusing on its Procrusteanism leads one to imagine the possibility of law without lawyers: law is a set of rules, albeit a complex set, that can be applied consistently to a whole array of situations. Conversely, focusing on its Proteanism leads one to imagine the possibility of lawyers without law: law is just whatever lawyers make it out to be. Law may be a multifaceted thing. It can be looked at it from different angles. Thus, law may be Promethean, Procrustean and Protean, all at the same time, and therefore, Siliquini-Cinelli and Holmes may, each, be half-right.

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Symposium on *Scientia Iuris*: A Reply

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Abstract

In this reply, I express my gratitude to *Amicus Curiae* for hosting a symposium on my new book—*Scientia Iuris: Knowledge and Experience in Legal Education and Practice from the Late Roman Republic to Artificial Intelligence* (Springer, 2024)—as well as to the symposium's guest authors for their insightful contributions. In so doing, I also engage with their comments on my analysis and argument.

Keywords: *scientia iuris*; knowledge; experience; legal education; legal practice.

> [*P*]*iù si impone l'automatismo, più siamo obbligati a non essere noi automatici e a sviluppare la coscienza accanto alla conoscenza*[1]

[A] INTRODUCTION

I sincerely thank *Amicus Curiae* for hosting this book symposium on my new monograph and all the guest authors—Geoffrey Samuel, Robert Herian and Joshua Neoh—for taking the time to read it and for writing such compelling essays on it. Their contributions have grasped, each in its own way, the main thrust and nuances of my analysis and argument perfectly. I have learned a lot from their insightful appraisal of and critical engagement with my findings and claims. What I have found particularly helpful is that each essay has prompted me to reflect anew on several substantive and methodological aspects of my book in a manner that will greatly enrich my future research on the philosophy of legal education and practice in comparative perspective—for this, I am grateful to them all.

Writing this book has proven to be a rather strenuous endeavour both professionally and personally. Thus, in putting together this reply, I find

[1] Bodei (2023: 329). In English: "The more automation takes hold, the more we are required to not be automated beings ourselves and to nourish our consciousness alongside our knowledge." My translation.

myself sharing for all the contributors to this symposium the feelings of appreciation that Goethe voiced in a key passage of his *Italienische Reise* when, looking backward to the journey he had made up that point, forward to what might await him, and inward to how his experience had affected his spirit, he paid tribute "to all [those] who, directly or indirectly, help, encourage and sustain me" (Goethe 1970: 389).

I opened the book with a few quotes from ancient to more recent times that well encapsulate the phenomenon I have attempted to uncover and contextualize. If I was to add one more here for the purposes of this reply, it would be Honorius of Autun's that "*De hoc exilio ad patriam via est scientia*" (*De Animae Exilio*, PL172: 1243B, cited in *Le Goff* 2008: 59). Honorius' remark points to one of the Western tradition's existential canons—namely, that intellectual and spiritual flourishing requires and is inseparable from the pursuit and attainment of knowledge. In *Scientia Iuris*, I drew from Emanuele Severino, the greatest Italian philosopher of the 20th and early 21st centuries, to show that the philosophical spark of this existential sentiment can be traced back to the Promethean myth as narrated by Aeschylus. In so doing, I also argued that inspiring and proper though it is, this "*discendi cupiditas*", as Cicero labelled it in pages that proved crucial for the history of the Western tradition's fascination with epistemic quests,[2] hides a peril of the first order that ought to be uncovered and confronted. For, to say it with Petrarch and Boethius, while the epistemic "striving for truth"[3] against "the dark cloud of error"[4] is certainly a most noble endeavour, it is experience, not knowledge, that defines who we are as individuals, namely what makes "each individual in his unique distinctness" (Arendt 2008: 207) who they are as opposed to someone else. Experience exerts an individualizing function because experiences are immanent, subjective and unique. This is so despite experience being somehow affected by "abstract [ie universal] ideas, such as that of cause and effect", as Karl Popper reminds us (2002: 258). "[M]y experience", writes Iris Murdoch in her masterpiece, *Metaphysics as a Guide to Morals*, "*is private to me* and cannot be experienced by another … in the sense that there is (it seems) nothing which we would call me having your perceptions" (1992: 349, emphasis added). It is this *principium individuationis*, I argued in the book on philosophical grounds, that makes experience always given and primary, that is, ontologically

[2] *de Finibus Bonorum et Malorum*, V 50. On the legacy of Cicero's words, see Bonazzi (2023: 14ff).

[3] Petrarch (1956: 34). Titled in English as "Self-portrait", Petrarch's letter to Francesco Bruni is the number VI of the *Seniles Collection*. The original passage reads: "[N]*on sono seguace di nessuna setta, ma della verità avidissimo*."

[4] *De consolatione philosophiae*, III.XI.7 ("*texit erroris nubes*"). My translation.

irreducible to anything else (cf Tagliapietra 2017: 16). Moreover, and relatedly, in experience's individualizing properties there lies its existentially *traumatic*[5] value.

Conversely, knowledge is but information—that is, a metaphysical, truth-independent[6] and sharable (ie non-rivalrous) end-result of intellectual processes of ontological abstraction that transcend experience's facticity and finiteness. Pursuing knowledge alone at the expense of experience makes the individual that every one of us is redundant and replaceable.[7] Appreciating why that is the case is of the essence if we are to understand why, *qua* a regulatory phenomenon, law is thriving, whilst legal education and practice are undergoing a crisis. For, if all that law needs to perform its regulatory tasks is knowledge alone, then the experiential contribution of legal professionals becomes obsolete. Nor is there any need for (legal) education's individualizing (ie other-regarding) ethos. All that is needed is a form of education that focuses on bare, constructivist learning—and, say, either let do the job by one-right answer problem-solving assessments, or computational, algorithm-based modes of legal reasoning and argument (as is gradually being done).

Unfortunately, since their inception in the late Roman republic, the study, teaching and practice of law have always been a matter of knowledge rather than experience. As I explain in the book, this epistemic fascination has to do with law's nature and operations as an intellectual artifact to be used for ordering purposes. As such, it may simply be inevitable. However, be that as it may, I believe that we are still required to understand why that is so and what the repercussions might be for the future of legal education, practice and societal interaction more generally. Taking up this challenge, the conclusion I have come to is that, as paradoxical as it may sound, it is precisely the favouring of knowledge over experience which has been characterizing Western legal consciousness since its origins that enables law to exert its regulatory function without the aid of legal

5 A term I employ in its etymological sense to point to experience's ontological sublimity and marvellous (*thaumastón*) potency. Cf *Metaphysics*, 982^{b}14, 983^{a}14. In secondary literature, see Severino (1989: 349ff).

6 I am not affirming that truth does not exist. I am saying that it differs from knowledge, the two occupying two different analytical planes entirely. I elaborate on this point at length in the book.

7 And, I would also dare to note, perhaps not even replaceable and merely *disposable* in a not too distant future, for current technological advancements suggest that humans in their experiential specificity might one day become, in the words of Marx, "unsaleable, like paper money thrown out of currency by legal enactment" (2004: 557). For a recent example in education, see Carroll (2024).

The most profound and eye-opening critical appraisal of the anthropological, ethical, and socio-political repercussions of current and future technological developments I know of is that of Bodei, who also draws from and contextualizes philosophically Marx's statement (2023: 284ff). I return to this theme below.

experts. To draw from Plato and put it somewhat more philosophically, the knowledge-oriented categorization of legal education and practice I have set forth in *Scientia Iuris* is the very cause ("*tên tou pantos arkhên*")[8] of the existential crisis which they both are undergoing.

[B] SAMUEL

The essay opening the symposium, by Geoffrey Samuel, is titled "Can Historical Jurisprudence Inform the Artificial Intelligence and Law Debate?" It is for me a great honour that Samuel has read the book and decided to engage with it. I was first introduced to Samuel's work while I was an undergraduate student at Turin, and it has played a crucial role in my intellectual development since. Samuel is a leading legal comparatist and epistemologist whose decades-long scholarship has made fundamental contributions to the nature and dynamics of legal reasoning in both common and civil law jurisdictions. Students, scholars and practitioners alike have significantly benefited (and will no doubt continue to benefit) from Samuel's deep acquaintance with the subtleties of both traditions and their respective legal languages and mentalities. His insightful discussion of *Scientia Iuris* is no exception. It has given me the invaluable opportunity to critically reflect on my claims and on how I have tried to support them from new perspectives of inquiry that I will explore in my future research on the book's topics.

Starting from the very end of Samuel's essay, I agree with him that the lack of an index is to be regretted. Especially in a book as long and complex as *Scientia Iuris*, an index would not only have proved a helpful navigational tool for readers; it would, *qua* "an antidote to 'antifactuality'", as Samuel defines it, have helped to sensibilize law teachers and professionals to experience's existential value. As with any other oversight that might affect the book's readability, I take responsibility for it and will do my best to convince the publisher to include an index should the opportunity to do a new/revised edition present itself in the future.

As to Samuel's take on the book's argument and methodology of enquiry, I am delighted by his generally positive assessment. In addition, and relatedly, the interrogatives he raises regarding the implications of some of my claims are very much on point. For as I mentioned to him when he spoke at the book launch in Cardiff earlier in the year, Samuel is no doubt right to ask where my criticism of law's fixation with knowledge and reason might eventually lead to. When thinking about this question, the only answer I have to offer, at least for now, is that I see no alternative

[8] As to why Plato's phrase fits my argument, see Berti's analysis of it (2008: 52).

to the epistemic universe I describe in the book. For law is a product of the intellect. As such, its experience cannot but take place within its very "epistemological foundation" (Kelley 1990: 9; cited in *Scientia Iuris*, Siliquini-Cinelli 2024a: 60; see also Siliquini-Cinelli 2024b).

In this sense, I share Samuel's perceptive concern about a law-world geared too much—if not solely—towards experience.[9] Accordingly, my main aim in *Scientia Iuris* is neither to place existence over thought, *à la* Feuerbach; nor to advocate an existentially passive (ie merely naturalistic and biological) mode of living in line with or comparable to, say, the unrealistic Pulcinella-like form-of-life advocated by Giorgio Agamben; nor, finally, is my aim to envisage a sort of Heideggerian poetic dwelling, which as Adorno (2016) showed perhaps better than others, is utopic to say the least, and whose inaccurate premises I tried to expose in the book. Rather, my main aims are, first, to alert readers to what distinguishes experience from knowledge—two terms which are employed superficially and interchangeably not only in legal literature but also, in the classroom and courtroom; secondly, to elucidate why and how we have got to the unfortunate point we find ourselves trapped into—a point in which law schools and the legal professions are undergoing a severe crisis despite law having significantly expanded and intensified its regulatory reach; thirdly, to suggest that, if in all its declensions (ie legislative, judicial, executive) law were to become sensitive to experience's existential value, that would enrich both its pedagogical and professional dimensions (as Samuel acutely notes, my critique of the common law tradition's mind-set and self-legitimating narrative ought to be read in this light). My future work on legal education and practice will continue to pursue these aims, and I thank Samuel for sharing his precious insights and suggestions—they have widened my scholarly horizon and will greatly benefit my research on *scientia iuris*.

[C] HERIAN

In his essay, "The (In)efficiency and (Un)certainty of Non-propositional Structures of Reality … or, Adventures in Philosophy of Understanding", Robert Herian takes the first steps towards a philosophy of "understanding" in legal education. Herian is kind enough to say that reading *Scientia Iuris* helped him identify the scholarly gap he aims to tackle. I am deeply grateful to Herian for this very generous remark as I profoundly admire his thought and work. Herian is no doubt right to say that "understanding" is a much-

[9] Samuel refers to Felix S Cohen in this passage of his essay. As Cohen is also mentioned by Neoh in his contribution, I share some brief remarks on American legal realism below.

neglected topic in legal education scholarship. That is unfortunate to say the least, for law teachers are, ultimately, educators. In *Scientia Iuris* I argue that law teachers have overlooked what distinguishes knowledge from experience. The fact that, as Herian notes, it is also generally overlooked that what it means for students *to understand* what they are being taught is indicative of how serious and profound the malaise affecting legal education is. As I mentioned to Herian when he spoke at the launch of my book in Cardiff, his timely call for more pedagogical awareness in legal education made me think of a statement which had been added to the module descriptors at an institution I worked at. The purpose of the statement was to alert students to the consideration that there was nothing that the teaching team could do to *make* them learn their subjects—that is, the statement would set the students' expectations right as to what could be pedagogically provided to them and why.

Now, being clear about what students may expect from a teaching team (as well from the module they are taking more generally) is of the essence, for it helps to establish a healthy professional relationship between the two. In so doing, it also ensures that students are provided with a high-quality teaching and learning experience. However, as regard to statements such as the one above, one may reasonably wonder whether their inclusion and implementation have, instead, the opposite effect and negatively affect the students' learning experience. For, effectively, they turn law into something akin to Aristotle's first principles—that is to say, into something which the learner ought to be intellectually able to grasp on her own, for nothing can be done to make her understand it. Yet, learning is never a merely subjective phenomenon. It always includes, and is defined by, a relational dynamic between teacher and learner. Accordingly, our pedagogical duty as educators goes beyond the bare teaching of notions, principles, rules, and the like. It involves trying to make our students appreciate the relevance of what they are required to know and get them excited about it while also helping them to develop critical thought as well as self- and social awareness (critical pedagogy). Stripped of this pedagogical (ie experiential, individualizing, empowering and responsibilizing) function, teaching would be best left to self-study (as, regrettably, already is the case in some key jurisdictions). The value of Herian's perceptive contribution is, therefore, that it reminds us that, to be truly meaningful, the teaching and learning experience *must* include a critical and self-reflective appraisal of what understanding is and entails. This is particularly the case, I suggest, if we conceive of the attainment of knowledge as a dynamic and multifaced "problem space" (Lury 2020), to

use Celia Lury's terminology, that is influenced by the very methodology we employ to (try to) make sense of it and solve it.

The latter remark leads me to what I would like to be one of the main takeaways of *Scientia Iuris*—namely, that the challenge which law teachers face could not be more urgent and serious. For we live in an age in which human flourishing, progress, self-dignity and self-responsibility are increasingly being inhibited and put at risk by reductionist (ie causal, materialist etc) mind-sets and practices, declining moral and ethical standards, and dystopian technological developments. Among the latter, there stands the ability of artificial intelligence (AI) to decouple agency from intelligence (Floridi 2023) which, according to some, will inevitably lead to a flattening of intellectual capabilities (see eg Baker 2015; cf Wooldridge 2020: 274ff), if not "personalities" (Kissinger 2015: 353), and thus, of the complexity and ingenuity informing and shaping societal interaction and advancement.[10] Should that be the case, one might say that the "soot" Seneca warned the human mind against might in fact take hold in a not too distant future.[11] As with much else, the history of philosophical thought reveals that philosophers have been sensitive to this peril for longer and better than others. Consider, for instance, that, while being generally critical of humans' thoughtlessness, Heraclitus believed the human spirit (ie soul, *lógos*, *psūkhḗ*) to be capable, eventually, of discovering the truth (see eg DK 22B116, B114, B1, B2, B49, B50). Yet, fast-forward two-and-a-half millennia, and this enlightening aspiration has been replaced by much grimmer portrayals of the human nature. "The [human] spirit", Karl Jaspers famously wrote in *The Origin and Goal of History* commenting on modern technology's hold on human life, "is [now] being reduced to the learning of facts and training for utilitarian

[10] The main philosophical references here are to Aristotle's view that, deprived of their intelligence, humans are but beasts (*Protrepticus*, fr 28), and to such Averroesian, Spinozaean and Marxian notions as the general intellect and knowledge. For the key point of AI technology is that it makes any AI user just as competent and capable as any other: see Massimo Cacciari's remarks on the late Remo Bodei's last work on the subject, cited above. Cf the remarks Severino made in an interview he gave to il *Corriere della Sera*, on 4 October 1992, reprinted in Severino (2022: 212ff). On Spinoza, see Lenoir (2023: 57).

[11] *De brevitate vitae*, 3.1: "*humanarum mentium caliginem*". My translation.

functions" (2021: 111).[12] Jaspers' lament ought to be taken seriously for the simple reason that, as philosophical thinking has made it clear since its dawn on Ionian shores, epistemology (ie what we know, why and how) is, ultimately, a matter of ethics (see *Scientia Iuris*, Siliquini-Cinelli 2024a: 3–4, 53–54, for some references; see also Severino 2010: 21ff; for a present-day declension of this view, see Popper 2012: 47, 58–60, 71–72, 121). Taking what I have argued in the book regarding the incursion of technology into the legal education and services fields one step farther, here I should like to add that the day will soon come, I fear, in which there will not even be the need for such basic tasks.

[D] NEOH

In his thought-provoking contribution, "Law without Lawyers, Lawyers without Law", Joshua Neoh sets my analysis and argument against those of the American legal realists—particularly, Felix S Cohen's. Neoh's approach is all the more appropriate, for in the book I also argue that despite what is commonly and too easily claimed by those who lament the death of law at the hands of new technological forms of regulation and management, what is currently taking place is not the crisis of law as a regulatory phenomenon;[13] it is, rather, the crisis of law's juridical component and its teaching and learning. The reason for this, as already mentioned, is that *qua* a product of the intellect, law is a matter of knowledge (ie information), not experience. This, in turn, makes the experiential contribution of legal experts redundant. Accordingly, there is no doubt that ultimately, as Neoh puts it, if I am wrong in saying that legal education and practice are a matter of knowledge rather than experience, then Oliver Wendell Holmes Jr must be right (and *vice versa*).

[12] Assuming that the high-speed tempo of our lives still allows for it, supporters of the technological revolution the world is witnessing would do well in taking a moment and read Eugen Diesel's *Das Phänomen der Technik*, first published in 1939, where it is explained why and how machines can replace not just the operations of the human body, but those of the human mind, too (1944: 62ff, 85ff). To this, one should add the reading of Albert Speer's concluding statement of his account of Nazi Germany and of the pivotal role he played in the atrocities it perpetrated. Speer, who described himself as "the top representative of a technocracy which had without compunction used all its knowhow in an assault of humanity", labelled "nightmare" his realization "that some day the nations of the world may be dominated by technology". He then affirmed that "the more technological the world becomes, the more essential will be the demand for individual freedom and the self-awareness of the individual being as a counterpoise to technology". His conclusions could not be clearer and more worrying: "The danger of the automatism of progress will depersonalize man further and withdraw more and more of his self-responsibility" (2003: 692, 694, 698). See also this essay's opening quote, by Bodei.

[13] Ours is, and will continue to be, a *societas iuris*—ie to say it with Solon and Hobbes, law will continue to exert its "force" undisturbed ("*kratei nomou*", fr 24), and we will continue to walk on the path delimited by its "hedges" (*Leviathan*, ch XXX).

To be sure, in the book I acknowledge that as in any human endeavour, experience does play an important role in the teaching, study and practising of law (see eg Siliquini-Cinelli 2024a: the beginning of chapter 2). Yet, as Neoh correctly notes, I am also of the view that law being an intellectual artifact, at some point experience is replaced by knowledge. This is the reason why, as I tried to show in *Scientia Iuris*, similarly to what occurs in metaphysical thinking,[14] in law the epistemological and the ontological systematically overlap and mutually inform each other.

Neoh's perceptive discussion and use of Felix S Cohen's work has prompted me to think of some remarks made by Cohen's father, the legal philosopher Morris R Cohen. In a fundamental work first published in 1933, which has regrettably not received the attention it deserves, *Law and the Social Order,* Morris R Cohen made a powerful plea to not abandon the world of law—nor, indeed, ourselves *qua* intellectual beings—to the realm of experience alone. As he puts it, "personal experience is obviously not an adequate basis on which to decide the policies of the law" (Cohen 1967: 194–195). For, he continues, "law, like other institutions and civilizations, is organized to advance the good of life, and what distinguishes that is not to be attained by abandoning our intelligence" (ibid 195).

Morris R Cohen's argument for what may be safely called a jurisprudential form of "empirical rationalism" (see eg ibid part 3) seems to apply well to Neoh's views about what law is and how it operates as they transpire from his comments on my book—especially when he notes that both Holmes and I might, in the end, be "half right" (so that law would neither be a matter of knowledge, nor of experience, alone, but of both). I therefore wish to thank Neoh for contextualizing my thought through the prism of American legal realism—a fundamental intellectual movement which, due to space constraints, I could not discuss in the book. In this sense, Neoh's accurate analysis of and critical engagement with my findings and views provide a valuable perspective of inquiry from which I can continue my research on the multiple declensions of *scientia iuris*. The scholarly venues Neoh explores in his account confirm that, rather than being a conclusive appraisal of the themes it discusses, my book is just the beginning of what appears to be a very long and difficult journey into the twists and turns that make up the philosophy of legal education and practice in comparative perspective.

[14] *Metaphysics*, 1028[a]32-33.

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Special Section:
Children's Rights: Contemporary Issues in Law and Society (Part 3), edited by Maria Federica Moscati, pages 125-141 & 203-223

Children's Rights in the Early Childhood Education Curriculum and Activity Book in Türkiye

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Abstract

This research evaluates the representation of children's rights in the Early Childhood Education curriculum and Activity Book in Türkiye. Content analysis was used to assess the scope, depth, and frequency of children's rights-related learning achievements in both the curriculum and the Activity Book, revealing that these achievements do not explicitly emphasize children's rights in areas such as cognitive, language, and motor development. However, 11 out of 17 social-emotional development objectives and 116 activities indirectly addressed children's rights. The research suggests a need for the explicit inclusion of fundamental rights in the curriculum and the Activity Book, tailored to children's age, enhancing skills in conflict resolution, safety awareness, empathy, and opposition to rights violations.

Keywords: early childhood education; children's rights; human rights; content analysis.

[A] INTRODUCTION

The potential of early childhood education (ECE)[1] as a transformative agent in shaping future generations underlines the critical importance of exploring ECE's incorporation with children's rights, fostering a foundation for empathy, inclusion, and social responsibility. This article focuses on ECE, evaluating the representation of children's rights-related concepts in Türkiye's ECE curriculum and Activity Book (Ministry of National Education (MoNE) 2013a; 2013b).

The significance of early childhood as a formative period for cognitive, emotional, and social development has been acknowledged by distinguished theorists in psychology and education (Freud 1905; Erikson 1963; Piaget 1965; Bloom 1976; Vygotsky 1976; Bruner 1977; Bandura 1986; Piaget 2013). ECE, thus, can play an important role as a strategic juncture for the cultivation of foundational virtues such as tolerance and appreciation for diversity and fundamental human rights (Hawkins 2014; Quennerstedt 2016; Correia & Ors 2019). In this context, ECE is a crucial part of equipping young minds with a profound understanding of human rights values, while contributing to the holistic development of individuals within a broader societal framework (OHCHR 2004; OHCHR & UNESCO 2006; Council of Europe 2015).

The United Nations Convention on the Rights of the Child 1989 (UNCRC) recognizes children's rights, including the right to good quality education that nurtures their personality, talents, and mental abilities to the fullest potential (Articles 28 and 29). Introducing rights education in early childhood can contribute to creating a more just and harmonious society in which children are empowered to be active participants in shaping a world where the principles of equality, freedom, and dignity are at the centre (OHCHR & UNESCO 2006; Council of Europe 2015).

Despite the growing acknowledgment of the significance of children's rights education in ECE, there is a lack of research exploring its implementation and impact (UNICEF 2021). Existing efforts in the field of rights education have primarily focused on primary school-aged children, overlooking the crucial preschool years (Topsakal & Sadıkoğlu 2017). Therefore, this research focuses on examining the ECE curriculum and Activity Book in Türkiye through the perspective of children's rights to obtain a deeper understanding of how children's rights come into play in the ECE curriculum and Activity Book. The pivotal role of the

[1] ECE in Türkiye covers children aged from 0 to 5 and is not compulsory. However, ECE in Türkiye is compulsory for 3-5-year-olds with disabilities.

curriculum in rights education lies in its capacity to allocate dedicated "class time" within the structured and guided teaching and learning practice, ensuring that children have sufficient space to learn about rights (UNICEF 2014). Moreover, the curriculum serves as a guiding document for teachers, providing them with direction and flexibility in classroom activities. Additionally, in the context of Türkiye, the curriculum plays an influential role in the development of textbooks and activity books to be used in schools. Thus, it has the status of an educational tool with clear implications for many aspects of teaching practice.

The following research questions serve as a guide for the study. First, to what extent do the learning objectives in the ECE curriculum in Türkiye relate to children's rights? And, second, to what extent does the ECE Activity Book in Türkiye represent the learning objectives connected to children's rights?

To answer these questions, the study employed a qualitative research design. By assessing the existing ECE curricula of the Turkish education system, we aimed to gain a comprehensive understanding of the curricular approaches and Activity Book content related to children's rights based on the UNCRC in the ECE context.

In the subsequent sections of this article, we will present the literature on the role of children's rights in ECE in the international and national context, the present study's methodology, results, and discussion, bringing together the various aspects of the complex structure of rights education in early childhood. By doing so, we hope to enrich the ongoing discourse on promoting children's rights awareness and fostering a culture of respect and dignity right from the beginning of a child's educational journey.

[B] LITERATURE REVIEW

Children's rights education aims to foster a collective commitment to realizing and recognizing rights in communities and society, playing a crucial role in preventing rights abuses, promoting equality and sustainable development, and empowering people to participate in democratic decision-making (OHCHR & UNESCO 2006). Integration of children's rights in education encompasses a multifaceted approach involving educational practice, training, and various activities (Council of Europe 2015; UNICEF 2014), which may extend to shaping the curriculum content. Thus, the ECE curriculum can be viewed as one of the essential elements that can offer a framework for teaching people and communities about their rights at a very young age.

Within the context of rights education and curriculum design, a crucial aspect lies in understanding how children at a young age perceive their rights. Unfortunately, curriculum development often stems from an adult-centric perspective. However, to successfully integrate rights education into the curriculum, it becomes essential to prioritize the perspective of children. Understanding children's viewpoints is key to crafting an inclusive curriculum that resonates with their experiences. In this context, several studies have explored the comprehension of rights amongst young children (Ersoy 2011; Quennerstedt 2016; Uysal Bayrak & Ors 2020; Tunc & Pamuk 2023).

Building on the need to understand children's viewpoints, Ersoy (2011) aimed to explore children's (elementary school students) perceptions of rights and how these perceptions are potentially shaped by their socio-cultural environment within the context of Türkiye. Ersoy's findings (2011) revealed that students of lower and middle socio-economic status (SES) focused more on protection rights, while those from higher socio-economic backgrounds emphasized participation rights. Most of the participants in this study stated that they learn about their rights at school, with higher SES students also citing parental influence in learning about their rights. Ersoy's study underscores the role and importance of the curriculum and school in promoting equal access to rights education, while clearly highlighting disparities between SES groups in learning about rights.

In addition to Ersoy's (2011) insights, Quennerstedt (2016) conducted an observational study within a preschool setting, providing a perspective on how young children, aged from 1 to 3 years, engage with and embody human rights principles in their everyday activities. Within the children's actions, they found three distinct domains of rights, wherein children frequently engage with human rights principles and assume various roles as rights-holders: namely, the right to own something (such as a toy, a book, etc); the right to be respected and heard; and the right to equal treatment. Moreover, Tunc and Pamuk's (2023) research focused on children's perceptions of their rights. Their research was conducted with third-grade students in Türkiye. This research showed that some students emphasized that it was their right to participate in games as well as in education. Tunc and Pamuk's (2023) results highlighted the need for an extensive programme of rights education, and they suggested that it should be designed and implemented in accordance with children's particular needs within their own contexts.

Further emphasizing the importance of understanding children's perspectives, Uysal Bayrak and colleagues' (2020) research focused

on assessing the awareness of children's rights among preschool-aged children, specifically targeting those between the ages of 4 and 6. The study revealed that many children who participated expressed their awareness of the right to play. Additionally, the study's findings shed light on the absence of any child mentioning the right to participate.

The studies looking at children's perspectives on their rights show the significance of the right to play (Uysal Bayrak & Ors 2020; Tunc & Pamuk 2023) and the limited emphasis on participation rights among children (Ersoy 2011; Uysal Bayrak & Ors 2020). However, in Tunc and Pamuk's (2023) study, some children were able to merge the right to participate with the right to play as playing is a type of participation. Considering the findings that highlight the right to play and the limited emphasis on the right to participation amongst children studied, the curriculum can potentially integrate both aspects. While the right to play is evidently fundamental and resonates strongly with children, there may be an opportunity to enhance awareness and understanding of participation rights.

Moreover, Ersoy's (2011) study indicated that only children from higher socio-economic backgrounds demonstrated an explicit understanding of the importance of participation rights. The disparity between children from low and higher socio-economic backgrounds in awareness of participation rights can show the crucial role of incorporating participation rights explicitly within the curriculum. Recognizing this disparity is important for achieving social justice in education, as it ensures that all children, regardless of their socio-economic background, are equally informed about and empowered to exercise their participation rights. While studies explored in this literature review involved certain rights that children are aware of, such as the rights to play and participation, the absence of children's knowledge of other fundamental rights, including the rights to protection, healthcare, shelter, adequate nutrition and many others (UNCRC: ie Articles 16, 20, 22, 23, 24, 25, 27, 31, 32, 38, and 39) highlight the necessity to comprehensively integrate all these rights within the curriculum.

Recognizing how important it is for young people to know about their fundamental rights, an exploration of diverse teaching methods becomes key to understanding how the foundational principles of children's rights can be conveyed and cultivated. According to UNICEF (2021), some early child development experts suggest that children aged 3 to 6 may encounter challenges comprehending abstract concepts tied to rights, like "rights-holder", while others argue that, even at this age, it is feasible

to begin establishing the groundwork for comprehending concepts related to child rights with age-appropriate teaching methods. In this sense, it may be important to start from the concrete and move to the abstract. For instance, teachers can "start with concrete examples relevant to young children's everyday lives (e.g. names, birthdays, family situation, food, safety, privacy – such as going to the toilet)" (UNICEF 2021: 12). Moreover, "education must be provided in a way that is consistent with human rights, including equal respect for every child, opportunities for meaningful participation, freedom from all forms of violence and respect for language, culture and religion" (UNICEF & UNESCO 2007: 4). By using appropriate teaching strategies, educators can help young children develop a meaningful and practical understanding of their rights from an early age.

In terms of the teaching strategies, Dere (2022) explored the experiences of preschool teachers in relation to teaching children's rights. Dere's study established that, regarding teaching methods, preschool teachers emphasized using visual aids (such as pictures, slides, and videos), games, theatre, and drama to teach young children their rights. Also, Brantefors and Thelander (2017) highlighted four concepts when teaching young children their rights: participation, empowerment, rights awareness, and rights respecting. Moreover, Tellgren's (2019) study, conducted in two preschools in Sweden, revealed that the teaching of children's rights adopted an approach with less direct instruction and greater emphasis on understanding, skills, and practical action. This indirect learning process aimed to prioritize human relations and interactions, particularly from the children's perspectives on their cultures. Additionally, Tellgren (2019) found that both preschools prioritized linguistic skill development, recognizing it as a crucial aspect of teaching children about their rights, with a focus on empowering every child to effectively express themselves.

In summary, the literature review has explored the intricate relationship between rights education, children's perspectives on their rights, and the methods for integrating children's rights into the learning environment. Building on these perspectives, the literature highlighted the need for a comprehensive integration of various fundamental rights within the curriculum and involving various activities in the learning environment. The following section will detail the analytical approach used to examine the Turkish ECE curriculum and Activity Book, aiming to contribute to the effective integration of children's rights education in ECE.

[C] METHODOLOGY

In Türkiye, the UNCRC was signed in 1990 and ratified in 1994. This pivotal international treaty sets forth the fundamental rights of and protection for every child, emphasizing their entitlement to live and learn in an environment that nurtures their development per their age and maturity. Articles 28 and 29 of the UNCRC specifically outline the obligation of state parties to establish an educational framework aligned with children's rights. The primary goal is to equip children with life skills, enhance their capacity to exercise their rights, foster a culture imbued with human rights values, and fortify the child's learning capacities, abilities, self-esteem, and self-confidence.

As qualitative research, our project was designed as a case study using the content analysis methodology. In qualitative research, the unit subject of analysis can be an individual, an institution, a programme, or a school (Yildirim & Simsek 2011), or decision and decision-making processes, certain implementation processes, or organizational change issues (Yin 2003). Considering that, our research was conducted as a case study since it aimed to examine in the context of the UNCRC the official ECE curriculum which is in effect in every school in Türkiye because of the centralized education approach employed in the country. For this reason, the most recent ECE curriculum[2] (MoNE 2013a) and the ECE Activity Book (MoNE 2013b), which have been in force during the period 2013-2024, were analysed using the content analysis method. Content analysis has an important place among the available methods of collecting information and has several positive aspects, such as the absence of reactivity, the ability to handle large samples and its low cost (Yildirim & Simsek 2011).

Our analysis extends beyond a mere quantitative assessment of the presence of children's rights-related content; rather, we delve into the qualitative aspects, scrutinizing the depth and context in which these principles are introduced. As outlined by Mayring (2004), this systematic and in-depth approach allows us to dissect the textual content of both the ECE programme and the Activity Book, examining every line with a focus on the representation of children's rights themes. Our goal was to generate meaningful codes that capture the essence of how children's rights concepts are presented within the ECE curriculum in Türkiye.

[2] Full Access to the MoNE ECE curriculum, in force between 2013-2024, is available from the official website.

To enhance the rigour of our analysis, we categorized the codes based on common themes and objectives derived from the UNCRC. This process enabled us to identify recurring patterns, thematic concentrations, and potential gaps in the representation of children's rights within the educational materials. The categorization of codes into overarching themes provided a structured framework for our interpretation and facilitated a comprehensive understanding of the nuanced ways in which rights education is integrated into early childhood curricula in Türkiye.

Selecting the most current curriculum is paramount in ensuring that the educational content remains relevant, reflective of evolving societal norms, and aligned with the latest educational paradigms. In this context, it is noteworthy that the MoNE plans to update its ECE curriculum in 2024. However, this study is confined to the examination of the 2013 curriculum, which has been actively used in schools ever since then, offering a snapshot of the educational landscape as it existed during that time. The decision to focus on this particular curriculum allows us to discern the progression and evolution of children's rights representation in ECE, thus providing a reference point for future comparative analyses. By understanding the nuances of the 2013 curriculum, we can pave the way for informed recommendations and adjustments in subsequent educational frameworks, contributing to the continual enhancement of ECE in Türkiye. In conclusion, through this comprehensive analysis, we aspire to contribute valuable insights that can inform future revisions of educational materials, ultimately fostering a more robust and effective integration of children's rights principles in ECE.

[D] RESULTS

The ECE curriculum in Türkiye and its association with children's rights derived from the UNCRC

In the ECE curriculum examined in this study, various components are highlighted, including the significance of the preschool period, developmental characteristics, learning objectives, planning, and the implementation and evaluation of preschool education. As outlined in the curriculum, its fundamental features are characterized by

> being child-centred, flexible, and having a spiral structure. It embraces an eclectic, balanced, and play-based approach, with an emphasis on discovery-based learning that prioritises the development of creativity. The curriculum encourages the use of daily life experiences and local resources for educational purposes, treating themes/topics as tools rather than ends. While learning centres are deemed crucial,

> family education and participation are considered vital elements. The curriculum takes into account both cultural and universal values. The evaluation process is multidimensional, and explicit attention is given to adaptations for children with special needs. Guidance services are also underscored (MoNE 2013b: 14).

All these statements reflect the assumptions of policymakers that these principles effectively guide the curriculum.

Concerning the content of the programme designed for children aged 36-72 months, specific developmental characteristics are thoroughly outlined, encompassing cognitive, language, social-emotional, and movement-oriented development, as well as self-care skills. These specifications are further detailed for age groups of 36-48 months, 48-60 months, and 60-72 months. Upon closer examination of the learning achievements, indicators, and explanations provided in the programme, the following findings emerged.

None of the 21 learning achievements[3] related to cognitive development, or the 12 learning achievements[4] related to language development, or the five learning achievements[5] related to movement-oriented development are directly associated with children's rights. Conversely, out of the total 17 learning achievements[6] in social and emotional development, nine

[3] (1) Pays attention to objects/situations/events; (2) makes predictions related to objects/situations/events; (3) remembers what is perceived; (4) counts objects; (5) observes objects or entities; (6) matches objects or entities based on their properties; (7) groups objects or entities based on their properties; (8) compares the properties of objects or entities; (9) arranges objects or entities based on their properties; (10) applies spatial instructions related to location; (11) measures objects; (12) recognizes geometric shapes; (13) recognizes symbols used in daily life; (14) creates patterns with objects; (15) understands the part–-whole relationship; (16) performs simple addition and subtraction operations using objects; (17) establishes cause-and-effect relationships; (18) explains concepts related to time; (19) generates solutions to problem situations; (20) prepares graphs with objects/symbols; (21) recognizes Atatürk and explains his importance to Turkish society.

[4] (1) Distinguishes between sounds; (2) uses voice appropriately; (3) constructs sentences according to syntax rules; (4) utilizes grammatical structures while speaking; (5) uses language for communicative purposes; (6) expands vocabulary; (7) understands the meaning of what is heard/seen; (8) expresses what is heard/seen in various ways; (9) demonstrates phonetic awareness; (10) reads visual materials; (11) demonstrates reading awareness; (12) demonstrates writing awareness.

[5] (1) Performs displacement movements; (2) executes balance movements; (3) performs movements requiring object control; (4) performs movements requiring fine motor skills; (5) moves in response to music and rhythm.

[6] (1) Introduces personal characteristics; (2) ıntroduces family-related characteristics; (3) expresses oneself in creative ways; (4) describes the feelings of others regarding an event or situation; (5) expresses positive/negative feelings about an event or situation in appropriate ways; (6) protects one's own rights and the rights of others; (7) motivates oneself to accomplish a task or duty; (8) shows respect for differences; (9) explains different cultural characteristics; (10) fulfils responsibilities; (11) takes responsibility in activities related to Atatürk; (12) adapts to rules in different environments; (13) preserves aesthetic values; (14) recognizes the value of artistic works; (15) has self-confidence; (16) explains the different roles and responsibilities of individuals in social life; (17) solves problems with others.

are directly linked to children's rights. When we examined the learning achievements associated with children's rights in social and emotional development, we discovered that they reflect the protection of individual rights related to the principles of children's rights (UNCRC 1989), particularly the right to non-discrimination (Article 2), the freedom to express one's thoughts (Article 13), the freedom to practice one's culture (Article 30), and the right to participation in cultural and creative activities as well as engagement in play (Article 31).

The above-mentioned nine learning achievements in the social and emotional development domain specifically refer to respecting differences, understanding and appreciating diverse cultural characteristics, fulfilling responsibilities, adapting to rules, building self-confidence, and understanding societal roles and responsibilities. Respecting differences is fundamental to the right to non-discrimination and promotes the principles of equality and diversity inherent in children's rights. Understanding and appreciating diverse cultural characteristics contributes to the right to participate in cultural life, as well as to protect adequate standards of living (Article 27). Fulfilling responsibilities is connected to the idea of civic duty, contributing to the development and exercise of rights within a community (Article 29). Adapting to rules reflects an understanding of the importance of the rule of law, a fundamental principle underpinning many children's rights. Building self-confidence is essential for the realization of one's potential, contributing to personal development and dignity (Articles 23, 28, 37, 39, and 40). And, finally, understanding societal roles and responsibilities is linked to the right to participate in the cultural, social, and political life of the community, but also aligns with the overarching goal of education (Articles 27, 28, and 29).

Similarly, all eight learning achievements[7] related to the development of self-care skills are associated with children's rights enshrined in the UNCRC.

Upon reviewing the development of self-care skills learning achievements associated with children's rights, we found that they coincide with promoting and protecting individual rights in accordance with children's rights principles. Specifically, respecting one's own body through cleanliness is a fundamental aspect of the right to health and wellbeing (Article 24). The ability to dress oneself is linked to the right to

[7] (1) Applies cleanliness rules related to the body; (2) manages tasks related to dressing; (3) makes necessary adjustments in living spaces; (4) eats sufficiently and maintains a balanced diet; (5) explains the importance of rest; (6) uses tools and materials necessary for daily life skills; (7) protects oneself from dangers and accidents; (8) takes precautions related to health.

personal autonomy and dignity. Ensuring appropriate living conditions, as well as access to sufficient and nutritious food, is a fundamental human right, contributing to the right to an adequate standard of living adequate for health and wellbeing (Article 27 UNCRC). Understanding and advocating for the importance of rest aligns with the right to rest and leisure (Article 31), while access to tools and materials for daily life skills is integral to the right to education (Articles 24, 28, and 29) and the right to participate in cultural life (Articles 29, 30, and 31). Taking precautions to prevent harm reflects the right to life and the right to security of a person (Article 6). Finally, taking precautions in respect of one's health is a proactive approach to safeguarding one's right to health and wellbeing (Articles 23, 24, and 25). Based on the outcomes of the content analysis of the 116 activities outlined in the Activity Book concerning their alignment with children's rights, the activities predominantly emphasize the child's capacity to articulate diverse cultural characteristics and fulfil their responsibilities (Articles 29, 30, and 31).

ECE Activity Book in Türkiye and its association with children's rights

Out of the 116 activities featured in the Activity Book, 43 activities were identified as being linked to the development of self-care skills. In these activities, particular emphasis was placed on the child's ability to take health-related precautions and make necessary arrangements in living spaces (Article 27 UNCRC).

One example is the "*Ebe Tura* 1, 2, 3" game[8] from the MoNE's official Activity Book. In this case, the "*Ebe Tura* 1, 2, 3" activity was analysed in the context of the ECE curriculum's social and emotional development goal to appreciate different cultural characteristics. Despite the curriculum's emphasis on cultural understanding (Articles 29 and 30 UNCRC), its

[8] The following text summarises the "*Ebe Tura* 1, 2, 3" game in the Activity Book. The learning process begins by informing the children that they will play a game called "Ebe Tura 1, 2, 3". It is highlighted that this game is played in various forms in many countries around the world and is also one of the traditional children's games in our country. A discussion follows about the names of the games they play and how they choose the "it" (*ebe*) in those games, noting that different counting rhymes are often used for this purpose, such as the Turkish rhyme: "*Çık çıkalım çayıra, Yem verelim ördeğe, Ördek yemini yemeden, Ciyak miyak demeden, Hakkudu hukkudu, Çıktım çıkardım, Ki-mi çı-kar-dım.*" The rules of the game are then explained. The child chosen as "it" (*ebe*) faces the wall, while the other children line up about 3-4 metres away. With their back to the others, the "it" says, "*Ebe Tura* 1-2-3". During this time, the other children step forward, trying to get closer to the "it". When the phrase ends, they must freeze like statues. If the "it" sees any child moving when they turn around, that child is out of the game and becomes a spectator. The "it" then repeats the phrase and the process continues. Each time, the children get closer to the "it". When one child touches the back of the "it", everyone runs away, and the "it" tries to catch someone. The person caught then becomes the next "it".

practical implementation raises efficacy concerns. Goal 9 of the Social and Emotional Development section stresses the need to explain diverse cultural characteristics. However, this traditional game serves only as an introduction to a specific cultural group, compromising the curriculum's objective of highlighting broader cultural diversity. The theoretical underpinning links the activity to the promotion of cultural rights as part of children's rights principles. While theoretically aligned, practical implementation falls short of fostering comprehensive appreciation for diverse cultures, undermining the broader human rights agenda. In conclusion, the "*Ebe Tura* 1, 2, 3" activity, while conceptually linked to the curriculum's goal, raises concerns about practical efficacy and may perpetuate cultural homogeneity. A reconsideration of the activity's design is warranted for a more inclusive and holistic approach within the ECE curriculum.

[E] DISCUSSION

The findings from the content analysis of the ECE curriculum and the associated Activity Book, which are mandatory in every school in Türkiye, have revealed both promising aspects and areas that require attention. In alignment with Tellgren's (2019) study, the Turkish ECE curriculum seems to highlight a child-centred approach, accentuating components like the significance of the preschool period, developmental characteristics, learning objectives, planning, and the implementation of preschool education. Despite this, further analysis is needed to determine whether the child-centred approach is predominantly theoretical or effectively implemented in practice.

In general, the analysis revealed that not all children's rights principles and concepts were included in the curriculum and the Activity Book. Those that were integrated were mostly presented in an implicit manner. As discussed in the results section, some included rights are non-discrimination (Article 2), freedom of expression (Article 13), freedom of cultural practice (Article 30), and the right to play (Article 31), with a particular emphasis on cultural practice. However, the curriculum and the Activity Book did not adequately cover all children's rights, particularly the rights to healthcare, shelter, adequate nutrition, and protection from violence (Article 19 and 24).

Also, the analysis revealed that there is a lack of integration of children's rights principles in the language, movement-oriented, and cognitive development domains of the ECE curriculum. None of the 12 learning achievements related to language development are directly

associated with children's rights within the curriculum. However, effective communication is central to children's rights principles and education (Tellgren 2019). By integrating these concepts into language development within the curriculum, children can begin to understand and articulate their rights and responsibilities (Articles 10, 13, 14, 15, and 40 UNCRC). In relation to this, literature suggests that it is feasible to establish a foundational understanding of children's rights concepts in early childhood (Quennerstedt 2016; Yoruk & Kaya 2019; UNICEF 2021). Therefore, the curriculum's emphasis on language development presents an opportunity for children to learn and effectively communicate the concepts tied to rights.

Similarly to language development, the Movement-Oriented Development section, despite its importance in fostering physical wellbeing (Articles 25, 27, and 29 UNCRC), did not explicitly connect with children's rights. Given the relevance of physical activity and wellbeing to children's rights, there is potential to enhance this aspect of the curriculum by incorporating movement-oriented activities that emphasize concepts such as the right to a healthy lifestyle and the right to play. The right to play is highlighted in the literature as a right that young children can comprehend (Uysal Bayrak & Ors 2020; Tunc & Pamuk 2023). Also, the literature shows a limited understanding of some fundamental human rights amongst young children, such as the right to participation (Ersoy 2011; Uysal Bayrak & Ors 2020; Tunc & Pamuk 2023), which could be implemented in the Movement-Oriented Development section. However, this study's findings suggest that none of the current five learning achievements related to movement-oriented development are directly associated with children's rights, and, therefore, it would seem opportune for the rights to play and participation to be implemented within the curriculum under this section.

The Social and Emotional Development section emerged as a significant domain where the curriculum aligns with children's rights. The learning achievements related to personal characteristics, family-related characteristics, and protection of rights demonstrate a connection to the principles of equality, dignity, and respect (Articles 23, 28, 37, 39, and 40 UNCRC). The curriculum integrates, although implicitly, children's rights by encouraging positive expression of feelings, respecting differences, and instilling a sense of responsibility towards one's own rights and the rights of others (Articles 10, 13, 14, 15, and 40). The implicit inclusion of children's rights and principles in this developmental section encompasses the right to non-discrimination, the freedom to share thoughts (Article 14), the freedoms to practise one's culture and to participate in cultural

and creative activities (Articles 29, 30, and 31). However, there is an absence of other UNCRC children's rights-related concepts such as the rights to healthcare, shelter, adequate nutrition, and many more. This underscores the necessity to integrate all these rights comprehensively and explicitly within the ECE curriculum in Türkiye.

The Activity Book (MoNE 2013a), which primarily focuses on fostering cultural understanding and self-confidence, could be improved by adopting a more comprehensive approach to teaching young children about their rights. Teachers could enhance the learning experience by utilizing alternative teaching methods, such as visual aids and age-appropriate games, rather than relying solely on traditional teaching approaches (Dere 2022). Therefore, it would be beneficial for the children's rights-related activities in the ECE activity book to include richer content enhanced by these alternative teaching methods.

The findings underscore the importance of a comprehensive approach to children's rights education in the ECE curriculum, ensuring that all aspects of a child's development are imbued with principles of equality, freedom, and dignity. The recommendations stemming from this research aim to contribute to the continual improvement of the ECE curriculum, fostering a generation of individuals who are not only academically proficient but also socially conscious and rights-oriented from their earliest educational experiences.

[F] CONCLUSION

From this study, we can conclude that children's rights are indirectly addressed in the ECE curriculum and Activity Book in Türkiye, particularly within the framework of developing the skills to recognize different cultures. This research proposes a clearer and more distinct approach to children's rights in the curriculum and Activity Book, tailored to the age of the children. It suggests emphasizing all the fundamental children's rights, such as the rights to life, protection, participation, and education, across all curricular development domains, with careful consideration of the child's best interests.

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AI and its Regulation (Part 3), pages 142-168

The Need to Update the Equality Act 2010: Artificial Intelligence Widens Existing Gaps in Protection from Discrimination

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Abstract

The use of artificial intelligence (AI) to produce decisions about individuals can result in discrimination. Despite the fact that the employment of AI as part of the decision-making process is growing in the United Kingdom, there is limited literature examining gaps in legal protection in the Equality Act 2010 that the employment of AI gives rise to. This article identifies what assumptions contained within a number of provisions of the Equality Act 2010 result in this legislation having gaps in legal protection in the context of the use of AI. It proposes a number of solutions.

Keywords: Equality Act 2010; discrimination; artificial intelligence; digital; algorithmic; decision-making.

[A] INTRODUCTION

Computer scientists Valentin Hofmann, Pratyusha Ria Kalluri, Dan Jurafsky and Sharese King demonstrated in 2024 that language models operating on artificial intelligence (AI) software exhibit prejudice against individuals who use dialect when speaking English (Hofmann & Ors 2024: 2). While the language models generated statements reflecting positive stereotypes about African Americans when producing a response to a specific user query, they exhibited archaic stereotypes dating to before the civil rights movement when matching individuals to opportunities (ibid 2-3). For instance, AI scored individuals who said, "she been pulling" (ibid 42) as having a lower intelligence quotient score (ibid 46) than individuals who said "she's been pulling" (ibid 42). The researchers found that the intervention of programmers during the

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programming stage exacerbated the problem by making it harder to detect prejudices in decision outcomes (ibid 393). It is imperative to address discrimination arising from the deployment of AI. The use of this technology is spreading in the United Kingdom (UK) (Stacey 2023). Yet, Jack Maxwell and Joe Tomlinson point out that it is challenging to apply the Equality Act 2010 in some circumstances to question unequal outcomes associated with the employment of AI (Maxwell & Tomlinson 2020: 353). The example they give is when the application of AI produces accurate predictions in one but not another geographical area (ibid). The Westminster Parliament plans to legislate in order to create obligations for developers of AI (Kyle 2024). One of these initiatives should involve updating the Equality Act 2010.

Currently, there is limited literature scrutinizing the gaps in legal protection from discrimination stemming from the use of AI that exist in the Equality Act 2010. There are few proposals regarding how these gaps can be remedied. Jeremias Adams-Prassl, Aislinn Kelly-Lyth and Reuben Binns are among a few scholars who have demonstrated how existing precedent can be applied to address some of the new ways in which AI brings about discrimination (Binns & Ors 2023: 1856-1857). It is crucial to establish what aspects of the Equality Act 2010 prevent it from achieving its aim to increase equality of opportunity in the context of AI use and to propose solutions. This is particularly the case because many scholars have written on the shortcomings of the Equality Act 2010 relating to protecting individuals from discrimination outside of the AI context (Butlin 2011: 434; Saunders 2020: 27; Connolly 2023: 663-664). For example, Hannah Saunders observes that the Equality Act 2010 protects people with some disfigurements from discrimination but does not capture the full spectrum of disfigurement (2020: 27). Karon Monagham described the Equality Bill that became the Equality Act 2010 as a “wasted opportunity” for many people (2009: 13).

The present article will demonstrate why several key provisions in the Equality Act 2010 do not capture some instances of discrimination when organizations employ AI to make decisions about applicants. It will explain why some of the assumptions underlying these provisions do not hold in the context of AI. These findings will serve as a basis for suggesting what considerations the Westminster Parliament could bear in mind when revising the Equality Act 2010. Due to the limitations of space, this article cannot consider all possible applications of AI and every provision of the Equality Act 2010. The limited scope of inquiry is not problematic. The purpose of this article is to pave the way for further discussion rather than to identify and to provide solutions to all problems.

For the purpose of this discussion, it is necessary to define AI. This stems from the fact that numerous definitions of this technology exist (Martínez-Plumed & Ors 2018: 5180). The UK Department for Science, Innovation and Technology defined AI in 2023 as products and services that are "adaptable" and "autonomous" (2023: 13). Autonomy refers to the fact that AI can produce decisions without ongoing human control; adaptivity denotes that AI can draw inferences from the data based on detecting patterns within the data (ibid 22). The UK Government Data Ethics Framework elaborates that AI entails the use of statistics to "find patterns in large amounts of data" (Central Digital and Data Office 2020). This article uses both documents as a basis for defining AI. This choice stems from the fact that, when used in conjunction, the two documents reveal that the use of statistical techniques and drawing inferences from large volumes of data (ibid; Department of Science, Innovation and Technology 2023: 22) are core characteristics of how AI operates.

The article has the following structure. Section B will define the provisions of the Equality Act 2010 that are the subject matter of discussion in this article. It will explain some of the assumptions that lie at the heart of how the drafters formulated these provisions. Section B also will introduce the central argument relating to why these assumptions create challenges for applying the provisions of the Equality Act 2010 in question to the context of AI use in some cases. Section C will further develop this argument by reference to how AI operates and by reference to specific AI programs. Section D will propose what considerations the legislators can bear in mind when revising the Equality Act 2010. It will put forward that there is a need to reconceptualize the concepts of the protected characteristic and group membership. The article will propose an alternative understanding of these two concepts. It will argue that it is necessary to rethink the relationship between the treatment, the affected individual, the protected characteristic and group membership. Judges need to be able to apply multiple tests, either in isolation or in conjunction, to establish whether the operation of the AI decision-making process gives rise to discrimination. The article outlines the overall framework of the solution without explaining all the details. Fleshing out the details is a subject of follow-up work. This is the case because it is necessary to consult the affected communities in order to draft a legal test that reflects the needs of individuals. Another reason for limiting the scope of inquiry stems from space limitations.

[B] THE NEED FOR CONCEPTS DEFINING DISCRIMINATION TO BETTER ACCOUNT FOR COMPLEXITY

Sandra Wachter states that when AI produces a decision, often, the decision is not causally linked to a particular characteristic or group membership of the subject of the decision-making (Wachter 2023: 199). This state of affairs is due to AI basing the decision on correlations, meaning on the relationships between the data (ibid). A corollary is that there is no causal relationship between the AI decision, the decision-making criteria the AI uses and an applicant's group membership (ibid). What is more, there is no causal relationship between the decision, the decision-making criteria AI employs and a particular characteristic of the applicant (ibid). Wachter concludes that: "The pursuit of mere correlation in AI renders causation disposable." (ibid 200) Although the Equality Act 2010 requires proof of causation for cases of direct discrimination (*Onu v Akwiwu; Taiwo v Olaigbe* 2016: paragraph 30) but not for cases of disability-based discrimination (Equality and Human Rights Commission 2011: paragraph 5.3) and cases of indirect discrimination (*Essop and Others v Home Office* 2017: paragraph 39), the manner in which AI produces decisions nevertheless poses a challenge to the practical application of the provisions of this legislation in some cases.

One reason why it is challenging to map onto the Equality Act 2010 some instances of discrimination occurring as a result of the use of the AI decision-making process is that this legislation defines the terms "protected characteristic" and "group membership" as having a one-dimensional character. Another reason is that the definitions of direct discrimination and indirect discrimination in the Equality Act 2010 do not conceptualize the relationship between the protected characteristic as a ground of legal protection, the individual experiencing discrimination and group membership in a complex manner. One possible approach to enable the Equality Act 2010 to protect individuals from AI-based discrimination in a more comprehensive manner is to include additional provisions defining prohibited treatment (Binns & Ors: 2023: 1857). Such provisions would need to have definitions of discrimination that capture the complex interrelations and interdependencies that exist between the affected individual, protected characteristic, group membership and harmful treatment/practice. Furthermore, the Equality Act 2010 needs to define the protected characteristic and group membership as having multiple dimensions. In order to lay the groundwork for developing this argument, this section will explain how a number of provisions in the

Equality Act 2010 treat the relationship between the prohibited conduct, the affected individual and the protected characteristic as a ground of legal protection and group membership.

The assumption that there is a direct unidirectional relationship between the protected characteristic as a ground of legal protection, the affected individual and the prohibited treatment can be seen in how the Equality Act 2010 defines a number of key provisions. Section 4 of the Equality Act 2010 defines the grounds for legal protection by reference to the possession of a protected characteristic. It assumes that the prohibited treatment can be directly linked to the possession of a protected characteristic. Section 4 of the Equality Act 2010 contains a closed list of the protected characteristics. These protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy, maternity, race, religion, belief, sex and sexual orientation.

The Equality Act 2010 contains numerous definitions of how discrimination can occur. According to section 13(1) of the Equality Act 2013, A engages in direct discrimination against person B if "A treats B less favourably than A treats or would treat others" "because of" B's protected characteristic. In *Higgs v Farmor's School No 3*, the court held that it would look at why the defendant acted in a particular way and whether this conduct was "because of or related to" the possession of a protected characteristic (2023: paragraph 82). The terms "because of" and "related to" (ibid) connote the presence of a direct and unidirectional relationship between the prohibited conduct, the affected person and the protected characteristic.

In the case of *EAD Solicitors LLP and Others v Abrams*, the court held that section 13 of the Equality Act 2010 covers cases of direct discrimination where a person suffers adverse treatment due to the protected characteristic of another person (*EAD Solicitors LLP v Abrams* 2015: paragraphs 14-15). An example is when a company suffers adverse treatment due to providing financial support for Islamic education (ibid paragraph 29). Such cases are known as direct discrimination by association (ibid paragraph 10). In this case, the court interpreted section 13 of the Equality Act 2010 as being applicable when there is such a direct relationship between the person suffering the adverse treatment and the person with a protected characteristic that one can substitute the person with a protected characteristic for a person without a protected characteristic. Although this case recognizes that there can be an intervening element between the adverse treatment and the protected characteristic, the relationship between the adverse treatment and the

protected characteristic nevertheless has to be direct and unidirectional. It must be possible to substitute the person with the protected characteristic for the person experiencing adverse treatment in order for the treatment to be due to the possession of a protected characteristic.

The Supreme Court, in the case of *Lee v Ashers Baking Company Ltd*, explained that the prohibition of direct discrimination by association extends to cases where the reason for the less favourable treatment was a proxy for a protected characteristic (2018: paragraph 25). There must be an "indissociable relationship" between the proxy for the protected characteristic and the treatment (ibid paragraph 48). An example is when a hotel rents rooms to married couples but not to civil partners in circumstances when only heterosexual couples can get married (ibid paragraph 25; *Preddy v Bull* 2013). The court said that the connection between the proxy for the protected characteristic and the treatment needs to be closer than having "something to do" with the protected characteristic (ibid paragraph 33). However, the court thought that it would be "unwise" to define what degree of closeness satisfies the requirement of there being an "indissociable relationship" between the protected characteristic and the treatment (ibid paragraph 34). This case confirms that the prohibition of discrimination requires a direct and unidirectional relationship between the person suffering the adverse treatment, the harmful conduct and the protected characteristic. This aspect stems from the requirement that there be an "indissociable" relationship (ibid) rather than a degree of connection (ibid paragraph 33) between the unfavourable treatment and the protected characteristic.

Similarly, the definition of disability-based discrimination in the Equality Act 2010 assumes that there is a direct unidirectional relationship between the affected individual, the protected characteristic and the adverse treatment. Section 15(1)(a) defines discrimination against a person with a disability as treating that person "unfavourably" "because of something arising in consequence" of that person's disability. An example is when an employer dismisses a person due to taking a leave from work that is related to having a disability (Equality and Human Rights Commission 2011: 72 paragraph 5.3). According to section 15(1)(b) of the Equality Act 2010, such treatment should not be a "proportionate means of achieving a legitimate aim". Since section 15(1) of the Equality Act 2010 uses the phrase "because of" to link the adverse treatment to an aspect that is connected to an individual's disability, this provision creates a direct unidirectional relationship between the negatively affected individual, protected characteristic and unfavourable treatment. It follows that, although the definitions of direct discrimination and disability-based

discrimination differ (ibid), the two definitions have the same assumptions and underlying structure. Since courts recognize direct discrimination by association (*Lee v Ashers Baking Company Ltd* 2018: paragraph 25), the difference between the definitions of direct discrimination and disability-based discrimination is not substantial. While the prohibition of disability-based discrimination covers cases of an employer dismissing an employee due to taking a disability-related leave from work (Equality and Human Rights Commission 2011: 72), the prohibition of direct discrimination covers cases of an organization refusing to do business with another organization due to that organization employing individuals with a disability (*EAD Solicitors LLP v Abrams* 2015: paragraph 29). Both the prohibition of direct discrimination and the prohibition of disability-based discrimination address unfavourable treatment that can be directly linked to an individual with a disability.

The definition of the prohibition of indirect discrimination in section 19 of the Equality Act 2010 further consolidates the assumption that there is a direct unidirectional relationship between the negatively affected individual, the protected characteristic and unfavourable treatment. Additionally, section 19 adds group membership to this sequence. The definition of indirect discrimination contains the term group membership because it focuses on preventing harmful effects (Connolly 2018: 127) and on achieving "equality of results" (*Essop and Others v Home Office* 2017: paragraph 25). This approach to defining what constitutes discrimination contrasts with the definition of the prohibition of direct discrimination (Binns & Ors 2023: 1853). The prohibition of direct discrimination focuses on formal equality between two individuals and on the reason for the treatment (ibid).

Section 19(1) of the Equality Act 2010 defines indirect discrimination in terms of a person A applying a provision, criterion, or practice to a person B that is "discriminatory" to person B "in relation" to B's protected characteristic. Section 19(2) clarifies that the provision, criterion or practice "is discriminatory in relation to" B's protected characteristic if it 1) applies to all persons, 2) either "puts, or would put, persons with whom B shares the characteristic at a particular disadvantage" compared to persons who do not share B's protected characteristic, 3) either "puts, or would put, B at a disadvantage" and 4) A cannot show that the provision, criterion or practice is a "proportionate means of achieving a legitimate aim". Section 23(1) of the Equality Act 2010 elaborates that when comparing cases of treatment of A and individuals sharing B's protected characteristic for the purpose of applying section 19, "there must be no material difference between the circumstances relating to each case".

Sections 19 and 23 of the Equality Act 2010 conceive of the relationship between the negatively affected person, the protected characteristic, group membership and disadvantageous treatment as being direct and unidirectional. In the case of *Grundy v British Airways plc*, the judges explained that they identified a pool for comparison that "suitably tests the particular discrimination complained of" (2007: paragraph 27). The pool should enable a comparison of "like with like" (ibid paragraph 28) so that the circumstances of individuals in the pool are "not materially different" (ibid paragraph 33). By way of illustration, in the case of *Natasha Allen v Primark Stores Ltd* the court found that the pool in question related to all individuals whom the employer required to work a late shift on a compulsory basis and excluded individuals who could decline such a request (2022: paragraph 37).

By requiring the court to construct a pool consisting of persons whose circumstances are "not materially different" (*Grundy v British Airways plc* 2007: paragraph 33), section 19 of the Equality Act 2010 conceives of the protected characteristic and group membership as being in a direct unidirectional relationship. In addition to being an attribute of a person, the protected characteristic becomes overlapping with group membership. Moreover, the fact that the Supreme Court held in *Essop v Home Office* that identifying a criterion, provision, or practice "will also identify the pool for comparison" (2017: paragraph 41) points to the fact that the court constructs a direct relationship between the possession of the protected characteristic, group membership and disadvantageous treatment when choosing a pool. This discussion demonstrates that sections 19 and 23 of the Equality Act 2010 conceive of the negatively affected individual, the protected characteristic, group membership and the disadvantageous treatment as being in a direct unidirectional relationship. What is more, the prohibition of direct discrimination, disability-based discrimination and indirect discrimination share the same underlying assumptions and structure. This is despite the fact that the drafters formulated each definition of discrimination in a different way. The next section will demonstrate why this assumption creates challenges in some circumstances for applying the provisions of the Equality Act 2010 to the context of AI use.

[C] THE EQUALITY ACT 2010: AI USE AND GAPS IN PROTECTION

The assumption that there is a direct unidirectional relationship between the affected individual, conduct or practice, the protected characteristic and group membership creates difficulties for applying a number of provisions in the Equality Act 2010 to the context of the employment of AI as part of the decision-making process. Hilde Weerts and colleagues argue that it can be difficult to show a link between the possession of a protected characteristic and treatment in the context of AI use (Weerts & Ors 2024: 2). They maintain that the solution is to measure the extent to which one can derive a protected characteristic from another variable that has a relationship to a person's data and that AI uses to produce a decision (ibid 3-4). One can then measure the extent to which the AI uses a variable from which one can derive an applicant's protected characteristic in order to generate a prediction (ibid). For example, there is discrimination when the AI produces a decision based on inferring a person's race from the postcode (ibid 3). These scholars conclude that the prohibition of direct discrimination can be used to capture the specific way in which AI subjects individuals to unfavourable treatment in such cases (ibid 10). Their work is based on the work of Anya Prince and Daniel Schwarcz (ibid 4). Prince and Schwarcz coined the concept of "proxy discrimination" to denote instances when AI uses data that is predictive of having a protected characteristic to reach a decision about an applicant (2020: 1261).

While Weerts and collaborators explain that it can be difficult to determine what influence some proxies have on the decision outcome (Weerts & Ors 2024: 9), they do not discuss how the Equality Act 2010 can respond to the fact that there are cases when an AI decision-making process penalizes individuals for attributes that are akin to the recognized protected characteristics, but that cannot be linked to protected characteristics. In another article, Binns and colleagues put forward that there is a need to develop an additional category of direct discrimination (Binns & Ors 2023: 1857) that captures cases where the employment of AI disadvantages an applicant even though the developer had no intent to discriminate, there was no individual proxy corresponding to a protected characteristic, and there were no combinations of features that acted as a proxy for the protected characteristic (ibid 1856). They do not clarify how legislators could formulate such a concept.

The following example illustrates that AI can detect correlations in the data (Mittelstadt & Ors 2016: 5) that operate akin to a protected

characteristic but that do not map onto a protected characteristic in section 4 of the Equality Act 2010. Bart Custers explains that the patterns that AI detects in the data can result in AI penalizing someone for having physical attributes, such as shoe size (2023: 2). There is little difference between subjecting someone to unfavourable treatment based on that person's sex and shoe size because both are physical attributes of a person. Yet, in many cases, it will be impossible to link the shoe size to the protected characteristics that the Equality Act 2010 recognizes.

Consider the protected characteristic of sex in section 4 of the Equality Act 2010. In many cases, the shoe size is not a proxy for one's sex. This is the case because individuals of different sexes have both overlapping and different ranges of shoe sizes (Jurca & Ors 2019: 4). Male individuals have feet lengths in the range of 220-300 millimetres on average while female individuals have feet lengths in the range of 210-280 millimetres on average (ibid). There is a large overlap between the feet sizes of individuals of male and female sex. If someone's foot is 240 millimetres in length, one cannot conclude, based on this information, whether this person is of the male or female sex. Additionally, the fact that there are non-binary, multigender and transgender individuals means that it is not meaningful to talk about the shoe size as corresponding to a particular sex. As a result, shoe size is not a proxy for the protected characteristic of sex in many cases. In many cases, there will be no direct unidirectional relationship between the unfavourable treatment, the affected individual and the possession of a protected characteristic when the AI uses shoe size as a basis for generating a prediction, a score, or a decision relating to an applicant.

The lack of a direct unidirectional relationship between shoe size, the affected person and a negative AI decision renders it hard to invoke the prohibition of direct discrimination in the Equality Act 2010 to challenge the decision. The prohibition of direct discrimination in section 13(1) of the Equality Act 2010 requires that the less favourable treatment be "because of" the possession of a protected characteristic. Shoe size is neither a protected characteristic nor can it be associated with having a protected characteristic in many cases. Besides, it can be hard to demonstrate that the AI deployer treated an individual less favourably on the ground of shoe size in cases where the operation of the AI decision-making process disadvantaged individuals with a number of different shoe sizes to different degrees. The prohibition of indirect discrimination in section 19(2)(b) of the Equality Act 2010 is difficult to apply to these types of cases for a similar reason. This provision requires one to demonstrate that the use of AI puts individuals who share the protected

characteristic at a disadvantage in comparison to individuals who do not. However, it is not possible to link shoe size to having a protected characteristic in many cases. The difficulty of applying the prohibition of indirect discrimination is exacerbated by the fact that the use of AI as part of the decision-making process could disadvantage individuals with different shoe sizes to varying degrees. Such cases could present a challenge in identifying the correct pool of candidates in order to undertake a comparison of the treatment of different individuals. Additionally, the fact that the AI could issue a decision based on the shoe size and based on other attributes of multiple applicants (Fawcett & Provost 2013: 107; Broussard 2020) further complicates tracing the decision to belonging to a pool of candidates who have a particular shoe size.

This example illustrates a broader issue. Sandra Wachter notes that the operation of AI decision-making processes can generate many new types of disadvantaged groups (Wachter 2023: 153) due to detecting correlations in the data (ibid 158). Examples include playing video games and being a single parent (ibid 153-154). One cannot map these new groups onto existing protected characteristics (ibid 166). Wachter believes that the legislation should protect these new groups (ibid 203) because they suffer the same type of harm as individuals who currently enjoy protection from discrimination (ibid 195).

The fact that the Equality Act 2010 construes the relationship between the individual, unfavourable treatment, protected characteristic and group membership as being direct and unidirectional gives rise to another problem in the context of AI. Section 4 of the Equality Act 2010 can be difficult to apply even when the operation of AI disadvantages a person based on having a particular protected characteristic. This is the case because individuals with the same protected characteristic or attribute can be affected by the use of the same AI decision-making criterion differently. Consider the case study of bank lending. The Lenddo algorithm uses financial transactions and behavioural data to produce the applicant's creditworthiness score (Bary 2018). This software scores individuals who avoid using one-word subject lines in communication higher on creditworthiness than individuals who do not on the assumption that this behaviour corresponds to caring about details (ibid). The decision-making criterion of using one-word subject lines (ibid) is more likely to negatively affect single parents, individuals with caring responsibilities, individuals who work very long hours, individuals with a disability and individuals who have many children. Such individuals could use a one-word subject line in their communication more frequently due to experiencing greater time pressures.

This discussion corroborates Wachter's claim that the groups that AI generates can combine multiple combinations of protected characteristics (2023: 160-161). Contrary to Wachter, it is not the case that the AI decision-making criterion affects one group more than another group in a particular situation. When formulating this argument, Wachter uses the example of men and women as two groups (ibid). The use of Lenddo could disadvantage women with many children to a greater degree than women who have no children. Similarly, the employment of this software could disadvantage heterosexual women who work long hours to a greater degree than bisexual women who do not work overtime. The use of AI could disadvantage some single parents of different sex to a similar degree. A man with four children could be disadvantaged to a similar degree as a transgender woman with a disability who has two children. It follows that the operation of AI affects numerous individuals with various protected characteristics (ibid), with each individual being affected to a different degree.

Since using the same AI decision-making criterion can disadvantage individuals to different degrees, it could be challenging to identify that the AI decision-making process disadvantages an individual in a particular way based on having a particular protected characteristic. Suppose a woman with four children receives a negative decision and a woman with one child receives a positive decision. In this case, it is difficult to attribute the decision to a woman's sex. Moreover, since individuals with the same protected characteristic are affected differently and individuals with different protected characteristics can be affected similarly, it becomes hard to establish that an AI decision-making criterion affects an individual in a particular way because of having a particular protected characteristic.

The difficulty of capturing how the use of AI affects a diversity of individuals with a particular protected characteristic, such as sex, goes to the heart of how AI operates. AI generates predictions about an individual using data about a group of people (Fawcett & Provost 2013: 107) that AI treats as similar to the individual's data (ibid 24). AI makes sense of each applicant's data based on the correlations it detects between the applicant's data and the data of other individuals (Newell & Marabelli 2015: 5; Mittelstadt 2016: 8). As a result, AI produces a decision based on group characteristics rather than based on those of the applicant (Van Wel & Royakkers 2004: 133; Mittelstadt 2016: 10). Since AI could, for example, allocate individuals who work long hours, some single parents, and individuals with many children to the same group when generating predictions about each person whose data is in that data cluster, it can

be hard for a woman to show that the AI score is based on her sex. It is difficult to argue that the decision is based on a proxy for sex because AI could group male single parents, individuals with a disability and women with no children who work long hours in one group. This discussion shows that it is not always meaningful to talk of having a particular sexual orientation or sex as demarcating group membership in the context of AI. Additionally, the assumption in sections 4, 13 and 19 of the Equality Act 2010 that the treatment can be attached to a protected characteristic of a specific person does not hold in the context of AI, even when the AI decision penalizes the individual for having a protected characteristic.

The inaccurate assumption in the Equality Act 2010 that the negatively affected individual, unfavourable treatment, protected characteristic and group membership have a direct unidirectional relationship interacts with the flawed assumption that the ground of protection can be defined by reference to a discrete protected characteristic and group membership. The interplay between these two assumptions exacerbates the gap in legal protection in the Equality Act 2010 in the context of the use of AI as part of the decision-making process. Consider this example. The website of the company Datrics states that because its AI credit-scoring software detects correlations between thousands of data points, the software "can uncover subtle relationships between seemingly unrelated factors and a person's financial reliability" (Datrics 2024). The website elaborates that: "This score is based on a complex analysis of various factors, including those that may not be immediately obvious, even to financial experts" (ibid). The Datrics software uses credit history, income, transaction analysis, work experience, user behaviour analytics of the applicant and other criteria as a basis for decision-making (ibid).

Since AI can use thousands of data points to generate a decision (ibid), since AI attaches different weights to different data points (Mittelstadt & Ors 2016: 3-4), since one cannot always link the decision-making criterion to a protected characteristic (Binns & Ors 2023: 1856) and since the attributes that the AI uses to generate predictions correspond to the data of different individuals (Fawcett & Provost 2013: 107; Broussard 2020), in some cases the unfavourable treatment will not be based on a discrete attribute, interest or group membership (Wachter 2023: 199). Instead, the decision will be a result of the relationships that the AI detects between the data of different individuals (Fawcett & Provost 2013: 107; Mittelstadt & Ors 2016: 5) in circumstances when such data reflects different aspects of personal identity and circumstances of diverse persons. Zhisheng Chen argues that "statistical discrimination" occurs when AI operates because AI uses historical data about specific

populations to make decisions about particular applicants (Chen 2023: 2). The term "statistical discrimination" refers to individuals using group membership as a proxy to infer missing information, such as someone's work productivity (Tilcsik 2021: 98). Such individuals use their beliefs about a group in order to make predictions about an individual whom they perceive to be a member of that group (ibid).

Furthermore, the barriers that individuals face to accessing opportunities due to their protected characteristics and due to the manner in which social institutions produce social inequality (Torres 2003: 68; Guinier & Torres: 2002) can influence the prediction that the AI generates for an applicant even though the applicant shares either in part or not at all either the protected characteristics or life circumstances of other persons whom the AI treats as being similar (Broussard 2020). Meredith Broussard commented that, most likely, an AI, in part, predicted that a student whose native language was Spanish would fail her International Baccalaureate Spanish examination because it used the historical record of grades from her school as an input (ibid). This student reported that the AI downgraded everyone she knew (ibid). Most of the students who attended this school were racialized and belonged to low-income families (ibid). Broussard's comments point to the fact that, in this case, the AI transferred the social barriers to accessing opportunities that the students of colour from a poor socio-economic background faced onto the applicant who had the advantage of being born to Spanish-speaking parents (ibid).

Since section 4 of the Equality Act 2010 contains a limited list of protected characteristics, it is put forward that this provision does not make it possible to capture the full range of ways in which the attributes (Van Wel & Royakkers 2004: 133) and life circumstances of other individuals that are encoded in the data (Binns & Ors 2023: 1851) can become transferred onto the applicant. For example, section 4 of the Equality Act 2010 does not include socio-economic background. The incident Broussard commented on involved an AI decision-making process penalizing a student for attending a school that had predominantly students from low-income families (Broussard 2020).

The application of direct discrimination in section 13(1) of the Equality Act 2010 to the context of the AI decision-making process poses a challenge because this provision assumes that the applicant is treated negatively solely based on having a protected characteristic. When the adverse treatment is based on the transfer of the attributes and life circumstances of other people onto the applicant (Broussard 2020), the

relationship between the protected characteristic of the applicant and treatment stops being direct and unidirectional. Instead, particular isolated characteristics of the applicant and the characteristics of other individuals may be linked to one another indirectly or not at all. There could be different degrees of relationships between the characteristics of different individuals and the applicant. Such characteristics could include protected characteristics, non-protected characteristics and a mixture of both types of characteristics. Since AI attaches different weights to different correlations between the data (Mittelstadt & Ors 2016: 10), there is arguably a very complex web of relationships between the data of individuals in the same data cluster whom the AI treats as being similar (Fawcett & Provost 2013: 24). Section 13(1) of the Equality Act 2010 arguably renders it challenging to map this social complexity onto the prohibition of direct discrimination in cases where one cannot assign the attributes and life circumstances that are being transferred onto the applicant (Broussard 2020) to a particular protected characteristic.

Another challenge is that the prohibition of direct discrimination by association requires a very high degree of association between the person with a protected characteristic and the person experiencing adverse treatment. Thus, the problem is not confined to that which Weerts and colleagues identify. These scholars posit that the application of the "but for" test gives rise to a challenge in the context of the employment of the AI decision-making process because the relationship between the decision-making criterion and the applicant's protected characteristic can be "elusive" (Weerts & Ors 2024: 5-6). At the heart of the difficulty of applying the prohibition of direct discrimination to the operation of the AI decision-making process is that section 13(1) of the Equality Act 2010 uses the term "because of a protected characteristic" (ibid). Since AI generates predictions about an applicant based on processing the data of a group of individuals (Fawcett & Provost 2013: 107) whom it treats as being similar to the applicant (ibid 24), it is maintained that the prediction will be an outcome of the transfer (Broussard 2020) of an amalgamation of different encodings of life circumstances in the data (Binns & Ors 2023: 1851) belonging to many individuals onto the applicant. It is arguably challenging to trace the relationship between the AI's prediction and the impact of the transfer of the protected characteristics and life circumstances of other individuals onto the applicant (Broussard 2020). According to Binns (2024), the current state of knowledge in computer science makes it impossible to determine how sources of social inequality influenced a particular applicant's ability to obtain a favourable AI decision. The lack of techniques in computer science to map how the life

circumstances of other candidates interact with the sources of societal inequality and AI to lower the applicant's score creates challenges for applying the prohibition of direct discrimination by association.

Multiple decision-making criteria that the AI uses can interact to inhibit access to an opportunity for an applicant (Weerts & Ors 2024: 6). Since there are thousands of data points that the AI uses (Datrics 2024), there are many ways in which the decision-making criteria can interact with the applicant's data and the data of all other applicants to lower the applicant's score. It is suggested that the assumption that there is a unidirectional correspondence between the treatment and a person's protected characteristic in the Equality Act 2010 gives rise to challenges for applying the prohibition of direct discrimination by proxy (Prince & Schwarcz 2020: 1261) to the following cases. In such cases, the treatment is arguably due to the existence of numerous different degrees of association between the applicant's data and the data of other individuals (Wachter 2023: 200) who either possess protected characteristics, belong to new AI-generated disadvantaged groups (ibid 153) or who experience disadvantage due to societal inequality.

Section 14(3)(b) of the Equality Act 2010 exacerbates this difficulty. This provision requires the plaintiff to establish that there was direct discrimination on the basis of each protected characteristic in isolation if the applicant wishes to demonstrate direct discrimination on the basis of a combination of protected characteristics. The focus on the relationship between a single protected characteristic and the unfavourable treatment does not allow one to establish the manner in which unfavourable treatment occurred in the context of the employment of AI as part of the decision-making process. The AI uses decision-making criteria that have a complex relationship with thousands of data points (Datrics 2024) relating to both the applicant and to other individuals (Fawcett & Provost 2013: 107) whom the AI treats as being similar to the applicant (ibid 24). The prohibition of direct discrimination in section 13(1) of the Equality Act 2010 assumes that the less favourable treatment is "because of" the applicant's protected characteristic. Yet, the decision can be due to a complex interaction between the decision-making criteria (Weerts & Ors 2024, 6), the applicant's data and the transfer of attributes of other applicants onto the applicant (Broussard 2020) in circumstances when the decision cannot be traced directly either to the applicant's or to another person's protected characteristic. As Gianna Seglias explains, AI may use a criterion to produce a decision that is related to the protected characteristic without mapping onto that protected characteristic in an exact manner (2021: 66-67). Furthermore, Weerts and colleagues point

to the fact that it is not always possible to establish whether an input acted as a proxy for a protected characteristic (Weerts & Ors 2024: 9).

The fact that the definition of indirect discrimination in section 19 of the Equality Act 2010 requires an applicant to identify a pool of persons with whom that applicant shares the protected characteristic and whose situation is alike (*Grundy v British Airways plc* 2007: paragraph 28) leads to a gap in protection. This occurs arguably in cases where the attributes and life circumstances that the AI transfers onto the applicant (Broussard 2020) either do not correspond to the applicant's protected characteristic or are not very similar to the situation of the applicant. As was shown above, there could be instances when AI groups data of individuals into the same group even though the individuals have different life circumstances (ibid). In such cases, it is suggested that it will be difficult for an applicant to demonstrate that the applicant was in the same situation as another person whose data the AI uses to generate predictions about the applicant (Fawcett & Provost 2013: 107).

[D] POSSIBLE SOLUTIONS

Given the fact that there are multiple complex interrelationships between the correlations in the data, the affected individual and the disadvantageous outcome, it is desirable to have multiple tests defining what constitutes discrimination in the context of AI. Each of these tests can aim to capture different aspects of the way in which the employment of the AI decision-making process disadvantages individuals. The courts should be able to apply these tests either separately or cumulatively, depending on the situation, in order to address the harm of discrimination. What matters is whether applying each test separately or cumulatively allows the court to better capture the fact that the employment of AI as part of the decision-making process disadvantaged an applicant.

The first test should focus on the process entailed in developing an AI and in AI producing a decision. The second test should focus on the effect of the decision on the applicant or on the type of harm that the prohibition of discrimination is designed to capture. It is put forward that the first test needs to reflect the fact that the subjective decisions that the developer makes when constructing the AI (Mittelstadt & Ors 2016: 2), the target variable that AI is aiming to predict (Barocas & Selbst 2016: 679-680), the process of optimization underpinning the AI (Badar & Ors 2014: 39), the data of the individual (Fawcett & Provost 2013: 24), the data of individuals whom the AI treats as being similar (ibid 107) as well as all the data as a whole (Mittelstadt & Ors 2016: 6) shapes the decision

outcome. The second test needs to focus on the harmful outcome. One should be able to determine whether the harm in question occurred either by reference to a particular person, by reference to a group of persons, or by reference to both.

In addition to embedding these two tests into the Equality Act 2010, it is necessary to rethink and to revise a number of current provisions in the Equality Act 2010. The scholarship of Weerts and colleagues and Wachter points to the fact that one needs to revise how section 4 of the Equality Act 2010 defines a protected characteristic. Weerts and colleagues showed that multiple variables can constitute a complex proxy for a protected characteristic when the AI uses these variables together to produce a prediction (2024: 5). One cannot always know what combination of variables will act as a complex proxy (ibid 8). Moreover, it can be difficult to disentangle the impact of a complex proxy on the decision from the effect arising from the AI using other attributes that are associated with having protected characteristics to generate a decision (ibid 9). Wachter demonstrated that AI can generate new categories of disadvantaged groups (2023: 153) that are not meaningful to a human being (ibid 159).

Custers objects to expanding the list of protected characteristics as a solution to these types of problems (2023: 12). His scepticism is premature. It is necessary to reconceptualize the concept of a protected characteristic and to revise section 4 of the Equality Act 2010 so that it encompasses the possession of any attribute or group of attributes. One can draw inspiration from Article 26 of the International Covenant on Civil and Political Rights 1976. This provision contains a non-exhaustive list of protected characteristics. However, unlike Article 26 of the International Covenant on Civil and Political Rights 1976, the Equality Act 2010 should not have the phrase “on any ground such as” followed by a list of protected characteristics. Rather, it is suggested that it should be sufficient that either an attribute that has predictive value or a group of attributes that have predictive value (Weerts & Ors 2024: 5) reduce an applicant’s access to an opportunity by contributing to structural inequality. The concept of structural inequality recognizes that institutions play a role in creating social hierarchies and in producing inequality (Torres 2003: 68; Guinier & Torres: 2002). All such attributes and variables that AI uses to produce a decision should constitute protected characteristics. As a corollary, these attributes and variables, either on their own or in combination, will constitute grounds for legal protection. This discussion points to the fact that it is necessary to reconceptualize the term “protected characteristic”

as having multiple dimensions and as being embedded in a broader social context.

This argument is based on the work of Lily Hu and Shreya Atrey. Hu calls for a recognition that the use of AI can "reinscribe" existing patterns of inequality (Hu 2023: 7). She argues that AI's use of features that are correlated with race should constitute discrimination if these features result in entrenching the subordinate social position of racialized individuals by subjecting them to a "matrix of privileging and subordinating social relations" (ibid 16-17). Hu's proposition should be arguably extended beyond race to encompass any attribute or a group of attributes (Weerts & Ors 2024: 5) that have a role in creating subordinating social relations or in contributing to enacting structural inequality. It is important to include structural inequality in the analysis because Atrey explains that race discrimination "has a clear link with racism" (2021: 2). According to Gerard Torres, the same is the case for gender-based and other types of discrimination (2003: 68). On this approach, the AI's use of particular variable or group of variables (Weerts & Ors 2024: 5) to generate a decision involves the use of a protected characteristic in the following circumstances. The variable or group of variables (ibid) should play a role in the process of creating social hierarchies between individuals who belong to diverse groups (Atrey 2021: 4-5) or in giving rise to "subordinating social relations" (Hu 2023: 17) that disadvantage individuals (Atrey 2021: 9) or in contributing to how social institutions create inequality (Torres 2003: 68) or in giving rise to a new social institution (Krupiy 2020: 2) that gives rise to inequality.

It is crucial to rethink the relationship between the protected characteristic and group membership. The term group membership in the Equality Act 2010 needs to be rethought as having three dimensions. First, it should be possible to define group membership by reference to having either single, multiple, or both single and multiple diverse attributes in common. Second, individuals belonging to the same group can share each attribute to a different degree. It should be sufficient for an association between the attribute that an individual has and the attribute that group members share to have a degree of impact on the decision that is tangible. For example, an association of 30% can suffice. Third, it should be irrelevant that individuals who belong to a group cannot be ordered or partitioned in a coherent and logical manner. What should be relevant is whether an attribute or a group of attributes has a role in sustaining or in creating structural inequality. As was already explained, Hu's scholarship (2023: 16-17) provides some insights into

the circumstances when the use of a particular attribute contributes to structural inequality.

Fourth, there can be shifting and changing intra-group variations within the group that do not deprive the group of its unifying character. The group membership criterion will be satisfied even when the disadvantageous treatment attaches to characteristics of a group that are shifting and do not fall into a sequential or coherent pattern. For example, the core and stable dimension could be the membership of individuals who have natural or prosthetic feet. The shifting and flexible dimension of this group membership could be either having a particular shoe size or falling within a range of shoe sizes that correspond to a greater likelihood of AI generating a negative decision. It should be irrelevant that the pattern of shoe sizes of individuals who are disadvantaged by the AI decision-making process does not fall into a coherent or logical pattern. The judges should be able to draw artificial boundaries between individuals with different shoe sizes and partition them into sub-groups for every different AI application in order to identify individuals with a particular shoe size or variety of non-sequential shoe sizes who are more likely to receive a negative decision in the context of an AI decision-making process on the basis of their shoe size. This is the case because different AI applications could disadvantage individuals with different shoe sizes or combinations of shoe sizes. If the employment of AI disadvantages an individual based on shoe size and another attribute, such as a preference for buying decaffeinated coffee, then these two attributes can count as belonging to a group that has multiple dimensions.

In order to implement this proposition, one could modify the existing position that judges identify a pool for comparison that "suitably tests the particular discrimination complained of" (*Grundy v British Airways plc* 2007: paragraph 27). It is put forward that judges need to be able to define protected characteristics and corresponding group membership by reference to whether such protected characteristics have a role in disadvantaging an individual by giving rise to or contributing to structural inequality. The requirement that individuals should be in a position that is not "materially different" in order to constitute a group (ibid para 33) should be revised for the context of the AI decision-making process. In addition to focusing on the attributes of the applicants, the judges need to focus on evaluating the process entailed in the AI decision-making process, how the AI decision-making process interacts with the social context and the outcome. This is particularly the case because the operation of the AI decision-making process will give rise to biases due to

being in feedback loops with the dynamic cultural and social environment (Friedman & Nissenbaum 1996: 336; Whittaker & Ors 2018: 27-28).

Furthermore, the Equality Act 2010 needs to be amended to recognize that varying degrees of relationships between the negative AI decision disadvantaging the candidate and the protected characteristic suffice. The same is the case for group membership. Contrary to Weerts and colleagues, the threshold that there be a "significant influence" on the decision (2024: 6) is too high. It should be sufficient for the influence to be material, meaningful and not spurious. The judges will need to be able to hear from experts from different fields in order to aid them in carrying out this analysis. The computer science community will need to create tools that facilitate the conduct of this type of inquiry.

The proposed approach differs from the current assumptions underlying the provisions of the Equality Act 2010. This legislation assumes that a protected characteristic corresponds to group membership that can be neatly subdivided into subgroups using ordering criteria, such as a sequential pattern. By way of example, section 9 of the Equality Act 2010 arguably assumes that one can define group membership, such as race, by partitioning the group into sections or subgroups sequentially by reference to the shade of skin colour (UK Government 2024: paragraph 50). Section 9(1) of the Equality Act 2010 states that the term race includes skin colour. Section 9(2)(a) of the Equality Act 2010 states that "a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group". These two provisions make it clear that race corresponds to belonging to a group and that this group can be subdivided into subgroups. The key phrase denoting this meaning in section 9(2)(a) of the Equality Act 2010 is "a person of a particular racial group".

The validity of this interpretation can be gleaned from the explanatory notes to the Equality Act 2010. The explanatory notes state that, "Colour includes being black or white" (UK Government 2024: para 50). The explanatory notes confirm that the Equality Act 2010 recognizes that all individuals are on a spectrum of having varying skin colours and that the term race applies to individuals of all skin colours (ibid). However, section 9(2)(a) of the Equality Act 2010 artificially draws boundaries between different shades of skin colour. It positions different skin colours as existing on a spectrum and as belonging to particular sub-groups. In order to demonstrate disadvantage, the individual needs to show to which subgroup that individual belongs under section 9(2)(a) of the Equality Act 2010 based on that person's shade of skin colour.

The assumption that groups are stable and can be understood using logic in relation to one another in the Equality Act 2010 makes it difficult to account for groups that have both a dimension of stability and a dimension of being shifting. Consider an AI decision-making process that disadvantages individuals with multiple different shoe sizes. Individuals with shoe size 37 could get a 5% lower performance prediction for a job role. The AI could predict that individuals with a shoe size 40 are 10% less likely to be successful employees, that individuals with a shoe size 38 are 12% less likely to be suitable for the role and that individuals with a shoe size 44 are 10% less likely to perform well. The current logic in the Equality Act 2010 that sub-groups can be ordered sequentially on a spectrum poses challenges in this case. Defining everyone with shoe size 40 as a distinct stable sub-group does not account for the fact that individuals with shoe size 44 experience the same degree of disadvantage. Defining individuals with shoe sizes 40 and 44 as the same sub-group can lead to a situation where one allocates individuals with shoe sizes 37 and 38 to the same group even though these individuals experience different degrees of disadvantage. This discussion points to the need to examine the assumptions underlying the provisions of the Equality Act 2010 that have a relationship with how these provisions conceive of the protected characteristic and group membership. All provisions that either define, elaborate on, or incorporate the concepts of the protected characteristic and group membership need to be revised in order to enable the Equality Act 2010 to capture the manner in which the operation of the AI decision-making process gives rise to disadvantage.

Finally, the new definitions of discrimination that policymakers formulate would need to build on aspects of the prohibition of direct discrimination and the prohibition of indirect discrimination. The relationship between the decision, the affected individual, the attribute that is an input into the AI decision-making process and the data of other individuals that AI uses to generate a prediction (Fawcett & Provost 2013: 107) can be complex and non-unidirectional. As a result, it is arguably necessary to evaluate how individual correlations between any two data points, the correlations between data points of individuals whom AI allocates to the same group (ibid) and correlations between all data points in the model as a whole impacted on the ability of the applicant to access an opportunity (Mittelstadt & Ors 2016: 6). This approach would result in individuals being protected from discrimination based on the attributes and group membership of all individuals whose data the AI uses to generate a prediction.

This argument builds on the work of Linnet Taylor. Taylor proposes that the right to privacy needs to be extended from the individual to all individuals wherever they may be located in the context of the use of digital technology (2018: 105). In the context of the prohibition of discrimination, one arguably needs to think about how the processing of all the data of individuals whom the AI treats as being similar (Fawcett & Provost 2013: 107) disadvantages an individual, contributes to sustaining structural inequality (Hu 2023: 7) or creates new forms of disadvantage (Binns & Ors 2023: 1856; Wachter 2023: 153). Additionally, one needs to evaluate how the correlations between all data within the AI model interact to disadvantage an individual, contribute to sustaining structural inequality (Hu 2023: 7), or create new forms of disadvantage (Binns & Ors 2023: 1856; Wachter 2023: 153).

About the author

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The Advocate Lecture: "Justice, and Access to It"

Sir Robin Knowles CBE

Given on 14 March 2024 at Lincoln's Inn

Lord Chancellor, Friends and Colleagues.

Thank you to each person in this room for being here. Thank you to Advocate* for the invitation to us all. Justice is fairness, delivered.

At the centre of any discussion of access to justice is the public. A system of justice is there to protect the public through the rule of law. To defend rights and enforce responsibilities that our Government has proposed, and our Parliament has made. Or that the system of justice has found in our common law and law of equity.

There is also a global dimension to our system of justice. It is respected in most parts of the world for careful results, delivered with integrity. It has become a system of choice for many. It offers stability. It supports business confidence, attracts investment, earns overseas revenue, and supports other sectors of UK plc to do the same. There is no national asset like it. Ask other nations.

And there is a future dimension to our system of justice. With the enormous change the world faces, we are going to need this system of justice, and we are going to need it to be at its best. For example, it is going to have to answer questions about the rights and responsibilities of corporations in a world confronted with climate change. As another example, we will need it to help artificial intelligence (AI) take a place in the world that is successful rather than not.

For all these dimensions, and for all the differences and complexities within it, we have only one justice system. It supports what is one, single, rule of law. That is fundamental to this discussion. Where our system of justice is weakened at one point, it is weakened across its length—for the public, and in its global dimension and its future dimension.

* Advocate is a charity that finds free legal assistance from volunteer barristers. See website for details.

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It's a while ago now but I remember being at a local community centre and finding myself in conversation with someone who recalled that she had previously had a legal problem that was quite serious but she had felt she could not do anything about it. So she had not, despite consequences that she and her family could ill afford. I asked why she had felt that and got the answer: "That system of justice, it's not for people like me." These words, ringing with inequality, have stayed with me. I have heard the same many times, but never quite so eloquently in the moment.

The words warn that our system of justice is not where it needs to be. I suggest we know it. But I also suggest that in 2024 we are well placed to look, together, at where the problem is—at access to the system of justice. Access has been tested by crises, of banking, pandemic, and cost of living, and affected by the age of technology. Through its organized delivery of *pro bono*—free of charge—legal advice and representation, our legal profession now has three decades of front-line experience of what the public faces. That sits alongside the deep expertise and understanding of our advice sector, and the benefit of much academic study. It is also a dozen years since legal aid—publicly funded legal advice and representation—was reduced through legislation.

As we look, it is obvious that in England & Wales we have allowed ourselves to reach the point where the system of justice is simply not available to most people. This puts that system at risk.

You can go to court without legal advice or representation. But that is not access to justice. That is like saying that electronic filing of a claim is case management, rather than just the start. What matters is what happens before and throughout and afterwards.

If you are not a lawyer, you will not know the answer to the question whether you have a good legal case or defence. You are unlikely to know how to use legislation or past legal decisions to make or defend a case. You will struggle with legal procedures and to present and challenge evidence. Yet these are things that our system will require from you. If our law was something that could be found on a few pages that everyone knew, that would be one thing; but it is not and many thousands of pages are added to it by government and Parliament each year.

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What about paying for legal advice and representation?

In guideline rates recently published, the lowest figure for a solicitor or legal executive of over four years' experience is £233 for each hour of their time. In a matter of any complexity, advice and representation requires many days of time and often from a number of lawyers. It is easy to reach five-figure sums, sometimes six-figure sums, very quickly.

In many areas, if you lose you will be paying for the cost of the lawyers on the other side, and at that sort of rate, even though you could not afford your own.

So where are we on help from the state; from civil and family legal aid?

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It's complicated. There are hundreds of pages of legislation, regulation and direction. Let me focus on some essentials, although there is always more detail. I also appreciate that work has gone into improving things through some of that detail, including on means testing.

First, legal aid is not available at all if you have a legal issue or find yourself in court in any of a multitude of subject areas. There are exceptions, but most consumer, debt, education, employment, immigration, family and welfare benefits cases are "out of scope".

Second, if you live in certain parts of the country, you will find few providers of legal advice and representation have in fact taken contracts to provide legal aid in one or more subject areas, and those who have are at capacity. The theory persists that there is a "legal aid market" but things are so diminished that can be debated. So, for that reason you may in practice not get legal aid even if your dispute qualifies on subject area. Examples are family law in the south west and housing law in the north east and immigration law in Wales.

So, in many cases there will be no legal aid, however little you earn, if you earn.

But what about in subject areas that do qualify and where there is a provider with capacity? There are exceptions but broadly speaking anyone earning more than £32,000 gross (or with more than £8,000 capital) is ineligible. Now, please do not fall into the trap of asking yourself: does that sound a reasonable income? The question is instead: if I earn that figure, can I afford to pay for professional legal advice and representation at £233 per hour? The answer is no. You would have to earn many times

that sum. You could pay for 2.5 hours of legal time a week if you spent all your income after tax and NI for that week.

The National Audit Office has recently looked at legal aid. Its report of last month is one of quality. But it looked only at subject areas within legal aid (I have already summarized some of those that are not) and for those who were eligible. It did not ask whether someone earning £32,000 would be able to afford to pay for legal services. It did not ask what was to happen with a subject area not within the scope of legal aid at all. It limited itself to the question of whether those whose legal problem is within a legal aid subject area and who earn less than £32,000 are in fact getting legal aid. And even the answer to that was sometimes no.

Thus, practical access to the system of justice is now available only to those who can afford to buy legal expertise, and most cannot. Or to those to whom the state will provide legal expertise, and to most it will not.

I realize as I speak that I have been referring to "you", trying to access the system of justice without legal expertise. I do mean most of you in this room—me too for that matter—so wide is this problem. Not you now, today, but you if something happens in life so that you do need to bring or defend a claim. But I mean even more the vulnerable individual, or the person who is not confident in language, or someone already at the limit of coping and with no one to turn to, or those who have been damaged by the dispute or its subject. These are among the people on the phone to the *pro bono* charities as their last resort.

I add that there is no legal aid for a small business. We have more than five million of these.

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Let me say something here about legal information, the advice sector, and *pro bono* legal provision. These are major parts of the system, and they exist for access to justice.

Online and other legal information plays an important part. Some, like Advicenow, is seriously impressive. Without it, the position would worsen still—just think about going direct to the legal handbook on employment law (largely no legal aid available) or immigration law; or the 1134-page handbook on defending possession proceedings or the 661-page handbook on debt advice, let alone the 3,000 pages of the first volume of our "white book" on civil procedure. But online and other information can only ever be a contribution. It cannot give advice and it does not deal with

representation. It is no substitute for the expertise the system demands from those who attempt to reach it.

The advice sector (law centres, Citizens Advice Bureaux (CABx) and independent advice centres, supported by *pro bono* and university clinics) is rightly admired, and frankly there are examples that inspire. But it has been asked to do so much for so long with such little resource, it is exhausted. And only some of the advice sector extends its work to legal assistance, some does not. There are not law centres or CABx or advice centres with legal capability in every town. The individual advice worker will still, on the whole, do all they can in as many cases as they can, but the strain shows, and that strain on the workforce takes us further on the road to unsustainability.

Pro bono legal advice and representation has undertaken tens of thousands of cases over the 35 years of organized *pro bono*, and millions of pieces of advice at *pro bono* clinics in partnership with the advice sector or universities.

The profession—barristers, solicitors, legal executives, paralegals and those in education or training; in practice and in house—deserves utter respect for the commitment that is behind this *pro bono* contribution. It demonstrates a legal profession worthy of the name, and one with compassion. In its own quiet way, the contribution is something that has kept the profession a profession. Advocate's panel of barristers is 4,450 strong. I am just as proud of the *pro bono* work of many solicitors, including through LawWorks.

A few years ago we reached the point of being able to talk of *pro bono* as part of being a lawyer, not an additional extra but integral to the role, for all in or aspiring to join the profession. It is worth letting that phrase sink in for a moment. The contribution is rightly celebrated at *pro bono* weeks and on walks and through awards, but those also show that every encouragement is already being availed and therefore opportunities to expand the *pro bono* system in response to the absences of and gaps in legal aid provision are limited. Some of the boundaries of specialisms could be pushed further to increase the supply of *pro bono* assistance to where it is needed most, but there are limits.

In sum, legal information, the advice sector, and *pro bono* legal provision have a crucial part to play. But we should be clear with one another. They cannot, even together, approach the sheer scale of the shortfall in access to the system of justice.

Every day on the ground people are being signposted from A to B in our system of justice not because A knows there is capacity at B but because A cannot help or has done all A can.

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Few of the public know about any of the barriers to access until the day comes when they need to reach the system of justice. Take the lady at the local advice centre who told me that the justice system was not for people like her.

Across the road from my home on the Isle of Dogs the local primary school has put up a sign: "We value the Rule of Law. Laws are important to ensure that everyone's rights are respected." So let's not think the public is not interested in the system of justice and in access to it. It is very interested. Bring a justice discussion to a classroom and see.

When someone already on low pay does not get paid but then cannot get a remedy that is not what the public expects, and locally that will be voiced. The same where a vulnerable person is left waiting for an appeal process to address a decision on their entitlement to state support by way of benefits. Waiting matters here, for reasons I do not need to spell out because the public would not need them to be spelled out. And look at the reaction of the public when they get a glimpse of what may be injustice, whether from infected blood or polluted water or in the Post Office. The public asks why people could not take these to court or tribunal long ago, and get the thing put right.

And what view does the individual or the public take where the other side chose to field a full legal team against an unrepresented individual, and it becomes clear that there is a limit to the help the judge can give?

A system of justice that is not available to material parts of the public when it is needed has a problem that goes to the core of what a system of justice is. It's like a crack in the fuselage of the rule of law. In equality before the law, in the protection and stability that the law gives us, and in the strength of the law in every area.

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For the legislative and executive arms of government, the law is at the heart of their work. They deal in the very making of rights and responsibilities. But my impression is that most Members of Parliament (MPs) then feel uncertain of their role in the realization of those rights and responsibilities after the legislation is made.

This is remarkable, and I mean no disrespect when I say that. Some MPs make the point they are not lawyers; yet as lawmakers their business is very much the law.

In their surgeries every MP sees examples of their constituents needing but not getting true access to the justice system because they do not have legal advice or representation. Caseworkers supporting MPs with their constituency work kindly responded to an online survey by law firms, working in partnership with LawWorks and the All Party Parliamentary Group on Access to Justice. A majority said that the organizations providing legal advice within their constituencies did not have sufficient capacity to deal with their constituents' legal problems.

When there is a meeting in Parliament of an All Party Parliamentary Group, on legal aid or *pro bono* or access to justice, you would imagine every MP thinking that was of mainstream relevance to all that they did. But in practice it is left to those who are lawyers or who have or shadow the justice portfolio. This is not the way it should be.

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The answer we all reach for when access to justice is discussed is "more money, from government".

Worldwide we are not alone with the enormous challenge of how to ensure access to the justice system. I have had the privilege of discussing legal aid and *pro bono* from Australia to Brazil to China to the United States, and across Europe and Africa, and the Middle East, and more. But here in the UK, given the importance of the justice system to our economy, we are very exposed indeed.

It is possible to find many countries who spend less public money on access to justice than we do, but what kind of measurement is that? And in every other aspect of our system of justice, we want other countries to look to us and all the advantages that come with that. No country has more to lose here than we do.

It does not help that the larger part of the debate over public money currently plays out between government on the one hand and the profession and advice sector on the other; that is, between contractor and contracted, payer and paid. The profession is advocate in its own cause. I fear all sides have become desensitized.

It is the public, not the profession or the advice sector, which is the true counterpart in this. The proposition is investment of public money in the rule of law to protect the public. The public interest case as well as

the business case for that could not be clearer. It goes to families, jobs, health, to the functioning of society, to successful government, to the economy and more. Without rights and responsibilities that have meaning because they can be confirmed and enforced, nothing else works.

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So what do we do? There is not, of course, a single answer or a single plan. This is too complicated for that, and things have gone too far for that. But what we can do is to agree an approach, from where we are and with what we have learned, and start to put it to work.

Yet I am nervous. The approach I am going to suggest is so readily open to a challenge. I know that. I also know we cannot continue as we are. And this is why we are here (you were beginning to wonder!).

To ask for your consideration and reaction to ideas on how we might do better in providing access to our justice system, realistically. And where the approach is unrealistic, to suggest what would be realistic. It is an approach, and it can be shaped and changed and corrected and improved.

On that understanding let me step forward.

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For me, the starting point is with the public, before disputes, and away from the court or tribunal. It is time to take on the discipline of not resting on the public trust we have, but sustaining public trust through building public understanding of the system of justice.

This involves actively increasing public understanding of what is at stake; what legal aid really is; what actually happens to someone when they have a serious legal problem; how easy it is for that to happen to anyone; what the system of justice achieves; why it matters to each individual citizen.

The public is entitled to the opportunity to make clear that it is important to them to have access to the system of justice when they need it.

But to make that shift to public trust through public understanding we need a concerted effort. Just as *pro bono* is part of being a lawyer, so too increasing public understanding of the system of justice should be. There are 250,000 lawyers to deploy here. There is the organizing power of the professional bodies, and all that technology can do to help. There should be the support of the regulators too: it is now 17 years since

Parliament passed legislation that made increasing public understanding of the citizen's legal rights and duties a regulatory objective.

To where do we deploy those lawyers? We quickly think of schools first, and they are key—this week is the week of the Big Legal Lesson organized by Young Citizens. But I mean deployment in every way possible: community events, parents' associations, council estate meetings, leaseholder associations, clubs and associations, charities for the elderly, court open days, churches and centres, social media, local news articles, radio interviews. Please add to that list.

One Pro Bono Week some years ago we had a bus travelling across England & Wales to deliver advice—it was symbolic of the point that we need to get out there—that is as true to build understanding as it was for advice (I promised Mike Napier I would get a reference in to that bus …).

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Committing ourselves to sustaining public trust through building public understanding of the system of justice is the starting, foundational, point.

As I look back over the last decades of development of organized *pro bono* delivery and of partnership between the *pro bono* sector and the advice sector and others, I think we have seen chapters to the efforts to address access to justice. One chapter has built on the other, and we need them cumulatively. First a chapter of cooperation, then of collaboration, and most recently of some coordination. Not perfect; not complete. But positive and in the public interest and in the service of the public.

The logical and necessary next chapter is integration. And for legal aid to be part of that. So too, changes by His Majesty's Courts and Tribunals Service (HMCTS). Integration to the point where access is part of the system of justice. Not "here is the system of justice, what about access to it?" but "here is the system of justice and access to it is part of it".

This means carefully, but ambitiously, bringing together the contributions that are available. Bringing them together around the public, with the public at the centre.

The public funds made available for legal aid, the profession's *pro bono* contribution of legal services, the sums that are fundraised by the advice and *pro bono* sectors; and perhaps some of the other resources to which I will refer; these are best seen as a pool of resources to give better access to the system of justice.

The case for more money, from government, could not be stronger and there would be every place for it in this next chapter. But it is also down to us all to develop the best overall strategies we can with what we have. To be prepared to use differently the resources we have, and to combine them well.

Thus, *pro bono* initial advice might in one subject area integrate with representation that was publicly funded. In another subject area it might be the other way round. No just *ad hoc*, but planned and agreed, and designed with reference to good value for the resources committed and to effectiveness and sustainability.

LASPO—the Legal Aid, Sentencing and Punishment of Offenders Act of 2012—involved decisions by Parliament about what legal aid would be offered and where. It left other contributors to access to justice to try to work out what to do from there. Where legal aid is not enough to provide access to justice, that approach is difficult to work with. It can take even further out of reach the system we could have if we combined even existing resources with greater coordination and integration.

Integration can only help us develop better, safe, trusted points of access to the justice system from the start. To provide the more assertive outreach that actively takes services to people who are vulnerable. To improve the handover from early advice to further assistance and to lay a more efficient pathway to further help, up to and including representation, defence, enforcement and appeal. Mediation could be welcomed more readily as an integrated part of the justice system (it has increasingly taken that place in commercial dispute resolution), when it is alongside advice.

A commitment to integration could help us view court and tribunal buildings differently so that they could become one of the main homes to access. What would be more natural if we strive to ensure that access is part of the rest of the system of justice. They could be used as hubs for everything from early advice to court and tribunal hearings and enforcement, of course combining with technology where appropriate. This is not a new idea, but integration could give it the concerted action and ownership that is needed. The opportunity would be there to improve communication with the user; a crucial area.

And with coordination and integration we might bring access to justice for small businesses into the picture rather than leave them outside.

We will need more from our universities, law schools and training institutions in this, and I hope this will be welcomed by them. Their

involvement has already transformed from 20 years ago, 10 years ago even. But there is another step change ahead. We must ask them to recognize that the sustainability of legal subject areas, like housing law, benefits law, immigration law, is part of their responsibility to society and to the—one—rule of law. I believe the entry point here lies in their offer of involvement in *pro bono* becoming an offer to all students of law, and not just to some. In partnership with the profession and the advice sector and experts, we need the help of universities to sustain the capture by database and by writing of our knowledge in these areas. The next generation of lawyers will—should—look different to the current. As brilliant, but encouraged and trained to the needs of our system of justice, from commercial to employment to benefits. We also need our universities to help us understand more about how clients can take advice in and make decisions so that we can provide the advice they need in the way that helps most.

I do not say this lightly, but we do also need the *pro bono* and advice sectors to simplify. The position is today too challenging, including for resourcing and signposting and engaging. There might be partnership, joint working, consolidation and more. But a collective focus and commitment to an integrated result, and to the success of each other to that end, would take us a long way. It has not always helped that the arguments in favour of awarding grants to charities by competition have been allowed to eclipse the point that competition can deter collaboration and restrict strategy, and it consumes precious time from all applicants. But if funders embrace integration alongside a *pro bono* and advice sector committed to the same approach, I am sure solutions can be fashioned.

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I believe we are ready to take on this approach to integration, step by step. Engagement with government is much improved; this includes the Ministry of Justice (MoJ) and HMCTS and I am grateful to them. The legal profession, including its commercial and international arm, understands that the problem with access to justice is serious and is everyone's business. We have a mature *pro bono* legal sector and both the profession and its *pro bono* sector are fitting partners to an advice sector that they know so much better now and respect so much. Our judiciary has seen for itself more of the problems faced by the public, although it is still in places uncertain about its role. Our universities and places of training are showing that they realize that they have a larger role to play.

The MoJ proposes a Green Paper in the summer. Ahead of that there is work by officials and consultants, review from a call for evidence,

economic analysis, and some international comparative research. I have nothing but respect for this. I do not underestimate the political will that it will have taken to get it underway and keep it moving.

But there are only so many people in the MoJ, and consultants bring insight but are not experts in our legal system and in the rule of law. Colleagues at MOJ and HMCTS want to do what it takes to improve things, just like everyone else. They don't claim to have all the experience and expertise; none of us do. They do know about contributing to strategy and securing budget. They are able, given the time and opportunity and encouragement, to achieve truer understanding within government, across departments, of the rule of law and how to sustain it. We all need to support their focus and best efforts on these things.

The Green Paper and the work towards it might make all the difference if viewed as a leading contribution to a future guided by the principles of coordination and integration. But we need to accept that the problem is too deep now for a traditional, government-led, exercise alone. We all have a responsibility to work to resolve it.

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We need something from the Legal Aid Agency (LAA) right at the start. I, respectfully, suggest that it is time now for the LAA (not MoJ, as this is operational) to be asked to set out in detail what it achieves for the public by way of access to the system of justice with the resources it has. That is not the same as the question of how it spends those resources. Nor is it a question that is answered simply by numbers. This will benchmark our starting point. The LAA should share the answer with the public.

We should get ready for the LAA, HMCTS, MoJ, the Ombudsman Service, the profession, the *pro bono* sector and the advice sector to sit down together on equal terms, openly, with an agreed chair or sharing the chair between them.

The purpose would be to examine together, one step at a time, how their contributions could coordinate and integrate for the benefit of the public, and the system of justice. Much can be achieved without legislation. But when change did need legislation they would be able to recommend that change for all-party support and they should expect to get all-party support.

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I suggest further that integration would give us a better opportunity to bring in other resources.

I venture a current example on the subject of apprenticeship levies, because this may hold a further key to sustainability in social welfare law. The legal sector is generating more levies than it can use to create apprenticeships in areas of social welfare law. The reason it cannot use them all is lack of resource to pay for supervision. Allowing some of the levies to pay for that supervision would make for more apprenticeships that the levies were intended to achieve. Permission to do that should be another example attracting all-party support as readily as the *pro bono* costs jurisdiction did when introduced in 2007.

We would have a better chance to take an opportunity that is clear and is being wasted. Take the example of legal expenses insurance. Many more of the public have it—as part of their car or home policy—than are using it. Every time they use it is a time we can reserve legal aid or p*ro bono* resources to help others. We cannot afford to continue to overlook this sort of thing.

Another example is this. Under our collective redress arrangements large sums could be made available for access to justice where unclaimed by parties in competition cases. The same had at one point been proposed in financial services cases, and could yet be proposed again. It is important we are ready to use those sums well, and to encourage similar arrangements.

An integrated system might allow closer consideration of investment in other ways. To take discussion about bonds and Contingent or Community Legal Aid Funds (CLAFs) to a conclusion.

Another suggestion is this. A relatively new entrant or proposed entrant to the justice sector is the third-party litigation funder; those looking to make a commercial return by funding legal advice and representation. It presents as access to justice but, with exceptions, doesn't seem to go after big gaps in justice. Perhaps understandably, it has met with uncertainty in various parts of the world and must be handled with care. But it is here, and we should be thinking strategically.

So we should call on the litigation funders as a body to demonstrate how they would increase access to the system of justice. The proposal might be by a new funding model directed to a particular area or court user, allowing us to reserve legal aid or *pro bono* resources to help others.

Or it might be for a serious financial contribution, adding materially to legal aid and *pro bono* resources. I am not talking about the modest contributions volunteered so far, welcome though they have been. I am talking about the type of contribution that shows commitment to the system of justice by a responsible participant in that system. In the same way that thousands in the profession commit to a *pro bono* contribution.

These are just examples. But I suggest they support an approach centred on coordination and integration to maximize use of resources, and illustrate that with that approach there are steps we can take to further access to justice and the resources available.

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Given where we are there is a great deal of work ahead. We will need help.

We will need help from data gathering. It is only in the last several years that we have gathered data to inform us. Everyone is stretched, but good data gathering, and analysis, is one of those things that repays more than the time it takes. It informs strategy; it helps avoid wrong turns; it persuades. Workshops could be held to show how.

We will need the assistance of those with expertise we don't traditionally have. Those whose profession is technology and AI of course, but also delivery and logistics, behaviour and health, rather than the law. We need their ideas not just ours. Some will remember arguments about law being treated as though it was a can of baked beans on a supermarket shelf. It isn't but we need to learn from those who are expert at getting baked beans onto shelves. We need to welcome their disruption of our thinking, and their facilitation of what we want to achieve for the public. Some of this may be in areas very suitable for voluntary contribution of expertise from the corporate sector through the good offices of their general counsel and in-house legal departments. And the combination of expertise—expertise about users and expertise about the law—of the sort we saw in the pandemic, and at the National Forum of the Civil Justice Council, and have seen since through cross-sector roundtable discussion.

We will need the help of the press. The press has its careful part to play in raising public understanding of the system of justice. And to keep us up to the mark.

We will need the help of the public. As we move to sustaining public trust through building public understanding of the system of justice, we

should welcome the rigour of that form of accountability. What we learn through it. The strength that comes from it.

This all requires leadership, and government will play its rightful part there. But not alone. We need, not one or a few leaders, but the leadership of many. It is the leadership of many that helped create a world-class system of justice and it can help ensure access is an integrated part of it.

The public counts on our system of justice. We cannot afford to diminish one of the greatest national assets we have. And, with humility, we have a job to do worldwide; that responsibility comes with having a world class system of justice. The public interest and the business case are aligned.

Thank you for giving me the time you so generously have.

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About the author

Sir Robin Knowles CBE *is the Chairman of the National Pro Bono Centre. A High Court Judge, he became one of the Judges of the Commercial Court in 2015 and is a designated Judge of the Financial List. He is the Judge with day-to-day responsibility for SIFoCC, the global forum of commercial courts. He also sits in the Administrative Court and in crime. See his profile page on the Courts and Tribunals Judiciary* website *for further details.*

Legislation, Regulations and Rules

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

ZHANG WANHONG (张万红), 1976-2024

PENG DING, WEI GAO, ZHONG HUANG AND HANXU LIU
Former staff at the Public Interest and Development Law Institute, Wuhan University

In Memoriam

Amicus Curiae is pleased to republish below a memorial note commemorating the life and work of the very distinguished Chinese legal scholar Professor Zhang Wanhong, of Wuhan University.[1] Professor Zhang passed away earlier this year. The note came to our attention in *The China Collection*[2] (formerly *Chinese Law Prof Blog*) an important forum for posting news and other materials on China' s legal development. We thank the authors for kindly giving *Amicus Curiae* permission to republish the commemorative note.[3]

Zhang Wanhong, a renowned scholar of human rights and public interest law, a dedicated advocate of social justice, a legal educator, a professor and doctoral supervisor at Wuhan University, died at 5:47 am on 29 June 2024 in Wuhan, at the age of 49, due to a critical illness.

Professor Zhang was born on 15 June 1976, in Luoyang City, Henan Province. He studied at Wuhan University from 1993 to 2004, where he received his Bachelor of Laws, Master of Laws, and Doctor of Laws degrees; he also studied at Columbia University School of Law, where he received an LLM degree and a diploma in comparative law from the American Law Institute in 2012. Starting July 2003, he taught at the Wuhan University School of Law; he was also a Visiting Professor at the China University of Political Science and Law.

Professor Zhang was an empathetic, pioneering, prolific, and socially-engaged academic, who devoted his life to the study and teaching of

[1] See further biographic details of Professor Zhang and his profile page on the Wuhan University website.

[2] See *The China Collection* website.

[3] And Professor Donald Clarke for his kind assistance in this matter. For some of the work of Professor Zhang and his colleagues in English, see Wanhong Zhang, Elisabeth Bjørnstøl, Peng Ding, Wei Gao, Hanxu Liu & Yijun Liu. *Disability, Sexuality, and Gender in Asia: Intersectionality, Human Rights, and the Law*. London: Routledge, 2023.

jurisprudence and human rights. He was dedicated to human rights research rooted in basic principles of jurisprudence, and is one of the most visible and influential scholars in the field of the rights of marginalized groups in China. He co-founded and was the Director of the Wuhan University Institute for Human Rights Studies (a national base for human rights education and training). He played a key role in shifting the paradigm of disability research in China, advocating and promoting a rights-based, empirical and multidisciplinary research methodology. He published more than 60 papers and edited more than 10 books in English and Chinese with reputable academic journals and publishers, major newspapers and magazines at home and abroad, covering various topics such as legal aid, disability rights and business and human rights. He also led over a dozen major national research projects, including projects funded and commissioned by the National Social Science Fund and the State Council Information Office.

As a lifelong advocate for human rights and the public interest, he drew his academic insights from spending time on the ground and working shoulder to shoulder with communities. Through the years, he founded the Public Interest and Development Law Institute (PIDLI), East-Lake Institute for Social Advancement and other social organizations working to empower disadvantaged communities to use legal tools to advance their own rights, where he, together with colleagues and students, conducted community needs assessments, convened seminars and conferences, and organized participatory legal education for community members.

His rigorous academic achievements made him a guest, member, and consultant of numerous prestigious academic institutes as well as high-level domestic, regional, and international organizations.

Through these affiliations, he made policy recommendations, promoted the domestic application of international human rights standards, and illuminated for the world the experience and learnings from China. He was involved in drafting a series of laws and regulations concerning human rights, and participated in the formulation and drafting of National Human Rights Action Plans and the National White Paper on Human Rights. In 2017, as an independent expert, he drafted China's combined second and third periodic reports of states parties to the Convention on the Rights of Persons with Disabilities. He was nominated as a candidate for a member of the Committee on the Rights of Persons with Disabilities for the period 2025-2028.

In addition, Professor Zhang was an effective, approachable, and innovative educator. As a professor of jurisprudence, a believer in the law and literature movement, and a "movieholic" (as well as a "coffeeholic"), he masterfully weaved movie and literary materials into his teaching, turning abstract legal principles into vivid life experience and sparkling serious reflections on the concept of justice and rule of law. His impact went way beyond the classroom, as he was always extremely generous in providing career and life advice and assistance to his students and colleagues. He also lived as a role model and inspired many to be independent, open-minded, curious, and walk the path of human rights and social justice.

Professor Zhang encouraged everyone he taught to establish good ties and practice virtue all over the world. He himself lived by this motto, and that's why he is respected, celebrated, and missed by so many.

A truly dedicated teacher, a humble and quick-witted learner, a kind and generous spirit, and a wonderful example for us all—may Professor Zhang rest in peace.

About the authors

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A Research Agenda for Administrative Law edited by Carol Harlow

Patrick Birkinshaw
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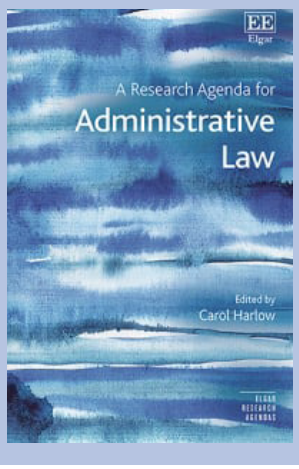

Carol Harlow (ed) (2023) *A Research Agenda for Administrative Law*, published by Edward Elgar ISBN: 978-1-80088-375-8.

On page 10 of the first edition of one of the most influential United Kingdom (UK) legal texts in the 20th century, published in 1959, Professor Stanley de Smith hoped that his treatise on judicial review would inspire other scholars to build on the research that he had produced in his work. Carol Harlow describes how the purpose of her edited work is, following the publisher's guidelines, to "reflect on the future of research in a given subject area" *viz*, administrative law, a part, I add, of public law. Whereas de Smith's work focused on judicial review, Harlow has taken a very broad view of the domain of administrative law. This is to be expected from a lawyer who has been at the forefront of research in administrative law for many years and who was a member of the Ministry of Justice committee reviewing judicial review. The subject is not confined to the courts. It is in its broadest sense the law relating to public administration and the enormous changes that that administration has undergone. Its purview covers policy development, rule-making, grievance redress, management, efficiency, effectiveness and accountability in the public sector, promotion of the public interest, openness and transparency to name a few. Increasingly, responsibilities are assumed by private parties either off-loaded by the public sector or by private entities by way of contracts with public bodies. Increasingly, we

witness entities that transcend national boundaries and whose impact on the public interest and repositories of power have attracted the attention of global administrative lawyers. All, of course, taking place in a world of artificial intelligence (AI) and digitization. As my former professor used to say addressing first-year students: there are only two problems with public law. One is defining public; the second is defining law. After that plain sailing.

The essays in this work pick on particular topics of interest, pointing out research vistas for the young researcher. The authors are well-known experts in their fields and the chapters are well presented. I will outline briefly the areas covered and then examine more closely several of the chapters.

Elizabeth Fisher examines research in judicial review. As she expresses it, imagining and developing method in a subject that has been fragmented and polarized. Within judicial review, different approaches are adopted, and one may be the constitutional context. A broader approach based on public administration may be preferred but underlying the choice should be a "reflexive relationship with method". How is one to proceed? Maurice Sunkin pursues the area of judicial review to examine the research that might take place on an examination of the impact of judicial review on public administration as well as its impact on, for instance, different groups of litigators or the administration itself. Robert Thomas looks at immigration and its heavy resort to tribunals. Janet McClean concentrates on disaggregating power in the executive for accountability purposes. What do we mean by the "Crown" for instance when we subject official action to analysis to establish responsibility or liability in a variety of English, New Zealand and Canadian examples?

I pause to reflect on the use of the Crown as a metonym for the state. In English usage, power rarely resides in the Crown meaning monarch. If we advert to the frequent—and frequently criticized—bifurcation of the Crown into its personal and political (governance) capacities, political power does not reside in the Crown, or it is not supposed to. The Crown as governance is dissolved into a labyrinth of natural and corporate entities and the powers of these bodies constitute the powers and body of the Crown. The Crown is their repository not their source, a point made by Stephen Sedley (2015: 228). Many years ago, F W Maitland pronounced whenever anyone asserts that the Crown has the power to do this or to do that, never be content until you know precisely who has the power. The Crown is a convenient cover for ignorance, he continued, especially

when the Crown is used as a representation of the nation and a symbol of comforting solidarity (1908: 418).

Alexander Horne and Michael Torrance review parliamentary oversight of the legislative process and delegated law-making given added spice by Brexit, Covid regulations and devolution. Joanna Bell and Sarah Nason write on judicial review in a more realistic context given executive attacks on judicial review and developments such as regional sitings for the administrative courts and how these have affected judicial review. Other developments include systemic review of policy and policy development and crowd funding for litigation.

Harlow's chapter on administrative justice in new contexts shows her panoramic grasp of detail and milieus and is an interesting account of many of the areas highlighted such as tribunals, internal grievance devices and ombudspersons. While the areas offered by Harlow have been pretty well studied, including by Harlow herself, new areas are highlighted such as online justice, global or internationally based schemes and "watchers" of the quality of the ombuds themselves. The chapter does bring home the very rich seam that administrative justice offers, and has offered, to younger researchers.

Jason Varuhus commenced with a challenging denial of the binary existence of public and private law (PL/PL) in common law jurisdictions. His belief is that the public/private divide—a "fundamental" division—is overstated and initially, I believe, the chapter is overstated. It is problematic to rely on the PL/PL division in legal reasoning, he asserts. Before he gets to the research outlines and excavation of appropriate legal reasoning in contested areas of PL/PL controversy, he seeks to persuade the reader that there was never anything reflecting a public law tradition in England. From a sensible position that one should not adopt a Procrustean approach to the division between PL/PL, he asserts that the existence of a "distinctive field of public law is unknown to the history of the common law". Of course, there was no *droit administratif* as necessitated in France by the separation of powers and the incapability of the civil courts to rule on administrative matters. He points to the development of prerogative writs as no evidence of a system but his treatment of *mandamus* is skimpy. There is no mention of the Star Chamber, *cursus scaccarii* in the Exchequer Chamber, the closest we came to a form of administrative law in England (Holdsworth 1956: 238-239), other writs such as *scire facias* and *quo warranto* and interpretation of prerogative powers. Of course, these were common law processes, but this does not deny their public law content and provenance, laws that are

dealing with matters of state, or put another way, "officialdom". Even the Star Chamber administered the common law through a special process. Sedley has written about the development and mainly, but not totally, short-lived reforms of public law in the interregnum (2015: chapter 4). If I may be so bold, the province of public law is the establishment and distribution of governance and governmental powers and the exercise and control of power on behalf of the public interest. Its provenance is not confined to the formally public. It may cover bodies who are acting on behalf of the public or as its surrogates or whose powers challenge those of government.

The chapter then analyses subject areas that have occupied the courts and more novel areas that are emerging which raise deep questions about the best legal instruments to tackle traditional interests of administrative law: power, abuse, distortion, accountability. If I may, is there a law of public contracts distinct from ordinary contract? Should there be a public law of tort based on a "control" theory or overall responsibility theory which courts have rejected? Should bank managers be subject to review for rejecting loans or mortgages? Should Elon Musk be subject to more effective legal controls and, if so, which? And why? After the introduction, I found the discussion on related matters very interesting and challenging and a rich area for future research investigation.

The theme of contractual governance is taken up by Richard Rawlings, co-author with Harlow of a law in context text which truly broke new ground in administrative law. The criticism that government contracting has been the Cinderella of the legal curriculum has long been made and Rawlings' own remonstrance and plea for greater involvement by the academy in this area seems at first sight to be gainsaid by the large number of references he cites on the subject, although Turpin's 1972 work on *Government Contracts*, and works by others in the 1950s and 1960s, are not among those. On a personal note, when I was asked to be the FIDE rapporteur on public procurement and European Community (EC) law at its 1990 conference, the future importance of EC law and its impact first came home to me, not just in contracting but generally. My adoption of an interest in EC law had been slow and I was obtuse. Rawlings traces the growth of contract techniques in governance in more recent years and indicates numerous possibilities for academic research, including the impact of the new domestic procurement regime to replace the European Union (EU) directives and the development of the market relations between the UK and devolved states. Quite rightly, he addresses the theme of publicization, meaning the incorporation of public law standards of fairness, transparency and public responsiveness with such

objectives as financial regularity, oversight, management and delivery within a state/private entity contractual framework. Administrative lawyers, he writes, must not bury their heads in the sand ostrich-like and ignore government contracts, which may sound a little hectoring but he is right to spell out why this is such an important area for research.

Tony Prosser's chapter on regulation covers an area that is comparatively new to the UK context in its association with privatization and regulatory agencies, although we have had more basic forms of regulation for centuries. He analyses different types of regulatory techniques and different instrumentalities in the modern era in an accessible and clear manner. Like Rawlings, he indicates the post-Brexit and nominally EU-free climate in which regulation will have to take place and its impact on the subject area and has graphic illustrations of the failings in combatting the Covid pandemic.

Paul Daly, Jennifer Raso and Joe Tomlinson investigate the impact of AI and the digital world on the administrative sphere and administrative lawyers' experience and exposure to online technology.

The final chapter comes from Joana Mendes. This chapter alone in the book engages in high theory and is to be welcomed as an inclusion for those researchers who wish to take this route. The author poses the question of whether EU law owes too much to national systems of law built on liberal constitutionalism. The message seems to be that as the EU assumes more of the responsibilities of nation states it takes on the additional responsibilities of integration, cooperation and compromise. A system of law built on individual liberty and its normative values is not best placed to address the challenges of multilateral cooperation.

Mendes places great store in the work of the Italian jurist Santi Romano from the 1930s and 1940s. Well-known in Italy, little of his work is published in English. The central idea of Romano's work that the author adopts is law as "institution" and its place at the centre of Romano's theoretical construct. Law as institution is much more extensive than normative instruments and provisions. Law owes existence to an executive, administrative, socio-economic and political matrix, the societal "humus" as she describes it. I was minded of the United States realists' dichotomy between "law in the books and law in action". Mendes accepts that her approach may be seen as "esoteric" (298, 301) but I wonder whether there is such a divergence between the techniques of national law and EU law where the former has numerous problems from interpenetration of authorities, public/private collaboration and the growing resort to soft law and a lack of transparency. Sometimes the message gets lost in

a complex delivery of ideas wrapped up in technical terms or phrases: “morphology”, “syntony”, “imbrication”, “liminality” and there are some examples of poor proofreading—“the tents of liberal constitutionalism”, I take it should read “tenets”? She does raise some important and interesting challenges and the comparative and theoretical gauntlet will be one taken up by administrative and EU lawyers in all member states, and rightly so.

This volume is a rich collection of ideas on areas for future reform in administrative law. Nearly 50 years ago I was present at a conference organised by Jeffrey Jowell and Martin Partington on welfare law and policy, law and the poor. Harlow was present and as a young lecturer I found much in the presentations to set me on my course of research in public law. So much has changed, not least in the academy itself, and I hope this work will inspire young academics to take up the cudgels and to be bold and adventurous in confronting the challenges posed by seeking justice and fairness and responsiveness in complex and often opaque organizational structures.

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Legal Aid and the Future of Access to Justice by Catrina Denvir, Jacqueline Kinghan, Jess Mant and Daniel Newman

Emma Cooke
University of Kent

C Denvir, J Kinghan, J Mant and D Newman (2023) *Legal Aid and the Future of Access to Justice*, published by Hart ISBN: 9781509957804.

This book opens with a foreword by Shami Chakrabarti, in which she ends with the words:

> the pandemic reminded many of the dangers of inequality … During this health emergency, the United Kingdom lost at least twice as many civilians as during World War II. If that war prompted a societal reset, this important book … argue(s) that another is long overdue" (pages vi-vii).

As such, in a *very timely* manner, this book provides an essential *and necessary* insight into the world of legal aid provision. Legal aid, as a "crucial component in the fabric of the justice system in England and Wales", is very much undermined, overlooked and ignored within its broader context, by the Government, the general public and the media alike (page 1). Here, the authors offer an (open access) snapshot into the world of legal aid; here, it's very function, importance, positionality and standing within the broader legal and welfare systems is explored. Students, scholars, practitioners, politicians and the general public alike will benefit from grasping the ins and outs of legal aid provision, given that without it, justice simply would not exist. Yet, 11 years after the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)—which called for the most significant economic cuts

to legal aid provision yet—current provisions are not sustainable, and the system is on its knees. Working within legal aid is more challenging than ever before and, without an appreciation of this, the fate of access to justice remains questionable as it is becoming increasingly difficult for providers to sustain business.

Legal Aid and the Future of Access to Justice is not only an academic text, but also a practical guide in a sense. The book consists of eight substantive chapters, focusing on the context and conditions, as well as the future, of the legal aid profession. This book therefore takes the reader on a journey to educate and inform, on such a forgotten and very often hidden, pillar of the welfare state. Its practical offerings likewise speak to future legal recruits and students alike, with an incredibly valuable section on "Preparing for a career in legal aid". In a sense, this book offers an all-encompassing "legal aid toolkit", whether it be for a reader who has never even heard of the term legal aid, or whether it be someone who has an existing interest in it. This book therefore speaks truthfully to the challenges, shortcomings and realities of legal aid work. This makes it an ideal resource for practitioners, academics and students alike.

The authors do not shy away from the realities of the legal aid world, in their very honest and real account based on data collected through the Legal Aid Census (2021), incorporating over 1000 accounts from current and former legal aid lawyers. It is a *very* impressive piece of work, given that the legal aid field is also difficult to access due to time and resource constraints. Generated by the very fruits of labour of a research team formulated by the Legal Aid Practitioners Group, it provides (a long overdue) evidenced-based overview of motivations, perspectives and real-life experiences of legal aid practitioners *across the board*. This is incredibly valuable, as most existing research has tended to focus on specific practice areas of law, as opposed to the sector as a whole.

The census explored key themes such as demographics, education and training, salaries, barriers and challenges, as well as job satisfaction levels. It comprised five surveys, "voluntarily self-administered online" by respondents from the following five groupings: (1) former practitioners; (2) current practitioners; (3) chambers who offer legal aid; (4) organizations involved in legal aid; and (5) current law students (22). The first four groupings were clustered together in terms of the questions asked—given their past or current involvement within the legal aid field—whilst students were asked slightly different questions in the fifth survey, which were more focused on plans and aspirations post-degree. A variety of legal aid practitioners contributed, including directors, managers, executives,

practitioners (former/current/aspiring), clerks, paralegals, caseworkers and students. Whilst the census has provided rich and detailed findings, the authors are not shy in also exploring the implications of their findings in each individual chapter, showing true reflexivity and thought in how they have chosen to carefully formulate and present their research.

With chapters 1 and 2 creating a strong contextual basis for the rest of the book to develop, chapter 3 is of particular value for those aspiring to work within the legal aid field. This chapter illuminates the realities of the work, drawing on real-life experience, from education, work experience, career guidance, to barriers in the profession—this provides a "toolkit" for those seeking more practical insight, such as aspiring law students. This is worth its weight in gold, as often legal aid is omitted from legal education—as highlighted as a key finding of Young Legal Aid Lawyers (2022) *Social Mobility Report*. To this end, 50% of their respondents indicated that the lack of modules relevant to legal aid work within their law degrees left them feeling unprepared going forward. Yet, the principle of equal access to justice implies that the provision of legal aid is an essential part of the legal system as a whole. This makes the book in question—and specifically chapter 3—so incredibly valuable, as an ideal and educative resource to help fill gaps in institutional provision by offering a *real* and *holistic* insight into legal aid work.

The subsequent sections of the book focus on the current state of the sector, as well the social and economic factors that make working in legal aid more challenging than ever before. Given my opening comments, this element of the justice system can no longer be ignored and the requisite for change is critical at this time. Chapter 4 draws on Fineman's (2013) theory of vulnerability (see Newman & Ors 2021; Newman & Dehaghani 2022; Newman & Robins 2022), as a theoretical framework to further understand how austerity—as well as the Covid-19 pandemic—affects legal aid practice. As Fineman notes (2008: 9), "Institutions as well as individuals are vulnerable to both internal and external forces", which coincides with the findings set out in this chapter. Experiences of working within the legal aid field revealed in the census data illustrate that there are significant issues faced, which makes both the sector and those within it incredibly vulnerable (page 125). To this end, working conditions, financial insecurity and unsustainability all contribute to this. Whilst some readers may already be loosely aware of these issues, this book provides robust and concrete data in support.

Chapter 5 follows suit, drawing specifically on the economic implications of the work, something which will be of great significance for those either

already working in the field, or those seeking to join. The findings of chapter 5 prove that—in spite of lawyers often being referred to as "fat cats" or well paid, in the sense that it is believed that *all* lawyers have a high rate of pay—legal aid lawyers express frustration about low rates of pay alongside their challenging working conditions. As cited here, Wilding (2021: 26) quite rightly notes that there is significant disconnect between thought and reality. This book does a great job of providing a bridge between the two; it provides that critical voice in an otherwise silenced system.

Chapter 6 specifically focuses on the impact of Covid-19 and its unprecedented consequences. Census data gathered here shows that several new challenges emerged within the legal aid sector as a result. The authors highlight here that factors such as the implementation of technology, remote and distant working, lack of community, erosion of boundaries, training difficulties, economic sustainability, job (in)security and enhanced economic precarity, all contribute to an even rockier legal aid terrain (page 195). A key strength of this chapter is the initiation of discussions on the post-Covid future of the legal aid workforce. This ultimately prompts further discussion and vital dialogue, given that the system was already in tatters prior to the pandemic. Chapter 7 follows nicely on from this, providing insight into recruitment and retention.

The final substantive chapter of this book explores the future of legal aid. Given that the authors have provided such a comprehensive overview of the legal aid field here, it is not surprising that its future needs to be questioned. Chapter 8 does a great job of exploring proposals and recommendations for policy change and future research in order to secure the sector going forward. Not only have the authors offered such a complete and authentic snapshot of what it is like to work in legal aid, but they have also gone above and beyond to think about the terrain outside their own findings. Informed by the largest study of the legal aid sector, frontline experiences taken from the census data indicate that "radical and foundational" change is needed (page 248). The authors conclude here that justice *should be taken seriously*, and this speaks volumes.

If somebody told me that they would like to read only one book about legal aid, I would recommend *Legal Aid and the Future of Access to Justice*: it is comprehensive and rich, but not complicated by any means, which makes it so accessible for a variety of audiences. It is critical and not blind to the realities of legal aid work, whilst many other strings of life are. Most importantly, it puts being human at the centre of it and stimulates debate as to the fate of access to justice, a concern which

needs addressing more urgently than ever before. This is an excellent and highly admirable addition to the literature; if you have any interest in legal aid, or simply care about access to justice, the authors absolutely have you covered.

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Legislation, Regulations and Rules

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

Arbitration and Mediation in Nineteenth-Century England by Francis Calvert Boorman and Rhiannon Markless

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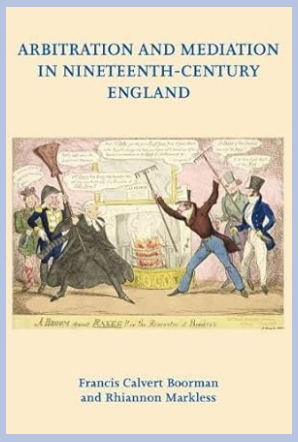

Francis Calvert Boorman and Rhiannon Markless (2024) *Arbitration and Mediation in Nineteenth-Century England*, published by HOLO Books: The Arbitration Press ISBN: 978-1-9196318-3-7.

This book—*Arbitration and Mediation in Nineteenth-Century England* by Francis Calvert Boorman and Rhiannon Markless—provides a comprehensive examination of the evolution and growing significance of arbitration and mediation in 19th-century England. It complements earlier work by Derek Roebuck on the unfolding development of dispute resolution, especially the study by Professor Roebuck and his co-authors (2019)—also Boorman and Markless—on developments in the 18th century[1] and draws to a fitting conclusion Professor Roebuck's multi-volume history.

The study by Boorman and Markless examines the legal landscape of 19th-century England, emphasizing the growth of arbitration and mediation as alternative ways to resolve disputes. The authors offer a detailed look at the manner in which these dispute resolution processes developed, their incorporation into the legal system, and their impact on the handling of both commercial and civil disputes. The book is organized into 19 substantive chapters, each focusing on different aspects of the legal and institutional framework, social attitudes towards arbitration

[1] Other titles are usefully listed at page ii of the book under review here.

and mediation, and so on during that time.[2] Careful attention in given to the historical context and legal framework, with the authors examining the origins of arbitration in English law, tracing its roots to the medieval period while emphasizing significant legislative developments in the 19th century. Notably, the Arbitration Act of 1889 is highlighted as a crucial milestone in the formalization of arbitration practices. The book also gives careful attention to the relationship between the judiciary and arbitration, highlighting the courts' initial hesitance to relinquish control over legal matters to arbitrators. However, as time progressed, the courts increasingly came to see arbitration as a valuable method for alleviating the pressures of growing caseloads. Arbitration emerged as a preferred method for resolving commercial disputes, largely due to its perceived efficiency and flexibility in comparison to the hitherto more orthodox path of court-focused litigation. The authors emphasize that businesses, especially within the rapidly industrializing economy, significantly contributed to the growing demand for arbitration. The book also provides an in-depth analysis of shifts in social attitudes towards dispute resolution, highlighting a significant acceptance of arbitration and mediation as legitimate and effective alternatives to traditional litigation. It examines the growing recognition of these methods as viable options for resolving conflicts in both personal and commercial contexts, making them increasingly popular among commercial actors and also individuals. The study gives attention to the historical influence of prominent legal thinkers, such as Jeremy Bentham, whose insights and advocacy for reform have helped to shape changing perceptions of arbitration. By analyzing such contributions, the book illustrates the manner in which these theoretical frameworks paved the way for a more favorable view of alternative dispute resolution (ADR) in legal practice.

Detailed analyses of significant cases illustrate not only how arbitration was employed in practice but also the sometimes intricate manner in which legal precedents have shaped its evolution over time. Useful insights into the complexities of these cases are offered, highlighting the various factors that influenced their outcomes. The study delves into how these landmark decisions impacted the interpretation and application of arbitration laws, ultimately contributing to the refinement of the arbitration process and its standing within the legal framework.

[2] These chapters examine issues of the institutional framework (higher courts: structure and changes, assizes and county courts, magistrates, summary courts, the Privy Council, and police courts, law reports and key cases, legislation, arbitral procedure), substantive areas of disputes and their "management" (land, transport, local government, business and commerce, debt, reputation religion (Church of England and Quakers in particular), family, labour relations, friendly societies and savings banks, and issues in the abolition of the slave trade), and international dimensions (the Alabama claims and the international peace movement).

By exploring these critical examples, a deeper understanding is offered of the practical implications and theoretical foundations of arbitration as a dispute resolution mechanism.

At the same time, the book does note the challenges faced by, in particular, arbitration as it became incorporated into the judicial system. Increased procedural complexity,[3] the rise of appointment nepotism and costs, and the sporadic nature of legislative reforms that failed to create an efficient arbitration system are noted. The integration with courts diminished the conciliatory dimension in arbitration, while legal community resistance also hindered its development—for example, lawyers in Parliament often opposed the establishment of separate arbitral institutions, preferring to keep arbitration within the purview of the courts. Additionally, some insights are offered into how English arbitration aligned with international trends. Overall, the reforms during this period did not adequately address key issues such as revocability and enforcement.

Religion is also considered, in several dimensions. As the authors state at the beginning of chapter 14, "as well as the natural place of arbitration in the intellectual worldview of people of several religions, particularly various stripes of Nonconformity, it was useful for regulating the organisational disputes of various churches". In this chapter, the authors discuss the intersection of religion and arbitration in 19th-century England, portraying arbitration as an integral part of the religious and social landscape of the 19th century, reflecting a broader trend of seeking peaceful and private resolution to disputes that aligned with religious values. This chapter is one of the most absorbing in the book. More specifically, religious leaders and communities often advocated for arbitration as a method of conflict resolution that aligned with their values of peace and reconciliation. Religious leaders, due to their standing in communities, often acted as effective arbitrators. Support for arbitration and mediation in labour disputes was associated with Nonconformity. Baptist and Methodist writers, for example, hoped for a reconciliation between capital and labour and viewed arbitration as a way to avoid confrontational organization through trade unions. Other religious communities, such as the Quakers and the Sephardi Jewish community, had longstanding arbitration mechanisms, often requiring members to seek permission before turning to secular courts. The Church of England experienced a shift in its relationship with arbitration due to the emancipation of Catholics and Protestant Nonconformists. While

[3] A seminal study of this process of institutionalization is provided in Flood & Caiger (1993).

the Church did not have a doctrinal commitment to arbitration, it was used widely for institutional and private disputes involving clergy. For some groups, like the Quakers, arbitration was a tenet of faith. It was also associated with the ideals of the peacemaker and was valued for its discretion and preservation of reputation (see also O'Connell 2009).

Given the important role of religion, this reviewer would have liked to have seen some comparative analysis in the book and more engagement with ADR literature, especially engagement with Jerold S Auerbach's *Justice without Law?*[4] Auerbach's historical work, a seminal study of dispute resolution developments in the United States, also gives significant attention to the influence of religious values and organizations on the tension in the American legal system between formal institutions and ADR methods. It highlights historical patterns, including the influence of religion where communities sought justice outside formal law. The analysis examines how various communities throughout American history, from religious utopians to immigrant groups, have sought justice through community-based, non-legal means such as mediation and arbitration. He notes that these methods often fostered communal harmony, but society's shift toward legal formalism diminished their effectiveness. Comparative analysis might have helped to identify the elements necessary to securing a balanced approach to justice that integrates both legal and non-legal methods to better serve the public interest.

The book makes a significant contribution to the field of the development of alternative dispute processes, providing as it does a detailed account of how arbitration and mediation were woven into the fabric of 19th-century English society and its legal system. It is an exploration of the dynamic interplay between law, commerce and society, and how ADR mechanisms adapted to meet the needs of a rapidly changing world. The book is an invaluable resource for historians, legal scholars and anyone interested in the history of dispute resolution.

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[4] 1983; see also the analytical review by Nader 1986.

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Visual Law: What's in a Name? Children's Rights and Legal Voice within Administrative and Juridical Procedures of Recognition of Same-Sex Filiation*

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Abstract

This performative text, consisting of writing and visualizations, explores children's voices within court proceedings connected to the legal recognition of intended mothers within lesbian-parented families. The research used long-term ethnographic observations and biographical interviews focused on French and Italian families from the "activist generation" who devoted their efforts to obtaining reproductive and family rights. The article provides a critical account of the implementation of Article 12.2 of the United Nations Convention on the Rights of the Child 1989 (UNCRC)—that is the right to be listened to in judicial and administrative proceedings affecting children. Our main argument is that, in contrast to the intention of Article 12.2 of the UNCRC, children are given a more symbolic than substantial voice in court proceedings and administrative procedures. The text situates children's voices both in the wider context and in everyday life. Drawing on ethnographic research data, we show where and to what extent children's voices emerge or, on the contrary, are silenced.

Keywords: same-sex parenting; filiation; children's rights; ethnography; creative writing; visual methods; performative text; Euro-American kinship; Italy; France.

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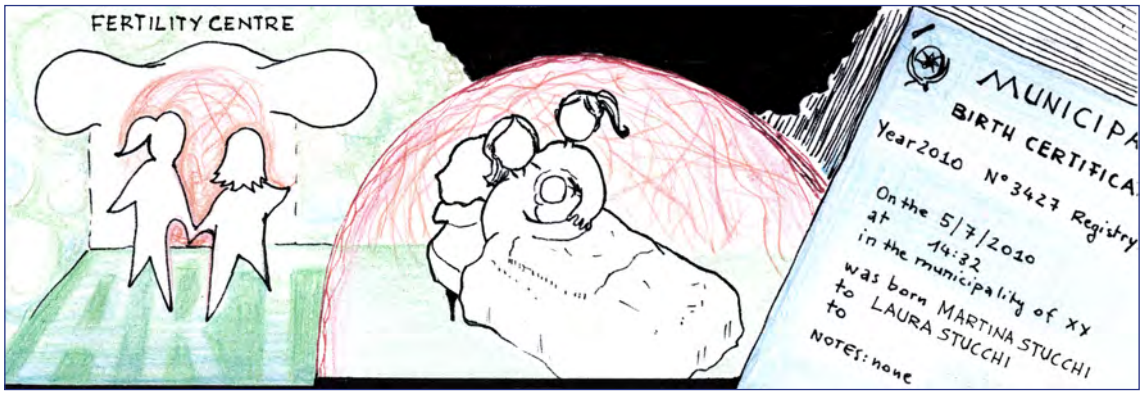
"What's in a name? That which we call a rose by any other name would smell just as sweet." W Shakespeare

[A] INTRODUCTION

The last decades have been characterized by the emergence of new forms of child production, family reproduction and kinship practices, thanks to the development of assisted reproductive technologies (ART). These social changes within family structures implicated a shift from the concept of "being" kin based on genealogical positions and the biological facts of "doing" kinship, namely the constructed and processual dimension of relationships which undergo a continuous process of making (Carsten 2000; Franklin & Mckinnon 2001; Strathern 2005). This is the notion of "intentional kinship", that is, a relationship without any biogenetic or legal basis between a child and the parent who participated in the child's birth from a social point of view (Tarnovski 2017).



Visualization No 1: Outside the space of legal recognition

A consequence of these social changes was the destabilization of the "internal reciprocal coherence" of the Euro-American kinship system (Leaf 2001: 74). Visualization No 1 engages with the growing gap between legal and practical kinship that has characterized this process. Legal filiation—that is the political-juridical dimension of family ties—had been built upon a conception of filiation rooted in real or assumed genetic ties within the framework of heterosexual reproduction (Grilli & Parisi 2020). Several European states were confronted both with the growing gap between legal and practical kinship as well as social movements advocating for the recognition of intentional kinship in the name of the children's best interests (de Cordova & Ors 2023). In countries such as Italy that have not adapted their legislation, intended ties still require a juridical or administrative translation of intentional kinship ties. Against this background, this article addresses

the following research questions: how do children of same-sex parents experience and act within these processes of parental recognition? To what extent are their voices and experience of kinship listened to during the processes? In this article we refer to the former as "legal voice" and to the latter as "children's kinship".

This article draws on data collected within the research project "Lesbian Moms and Their Kids at Court—LeMoKiaC" carried out by Sarcinelli.[1] The data was analysed additionally through the use of visual methods with anthropologist and illustrator Weissensteiner. LeMoKiaC explored the extent to which children's voices are taken into consideration by mothers as well as by professionals during legal recognition proceedings. The research provided an ethnographic account of the implementation of Article 12.2 of the United Nations Convention on the Rights of the Child 1989 (UNCRC)—that is the right of children to be heard and taken seriously in judicial and administrative proceedings affecting children—within procedures involving lesbian households in France and Italy.

Despite differing legislative attitudes towards same-sex parenting in those two countries over the last few years,[2] the children who participated in the study were born with two mothers, only one of which was initially recognized as a legal mother and they experienced a process of legal recognition of intentional ties initiated by their intended parent between 2013 and 2023. Italy's 2016 law on civil unions[3] for same-sex couples does not address parental rights. Thus, most lesbian households resorted to the so-called "*adozione in casi particolari*"—adoption in special cases (Farina 2017), a judicial procedure that does not involve the genealogical line of the adopting parent.[4] This process requires the legal mother's consent and the intended mother must demonstrate affective ties to the child. In some cases, the intended mothers managed to be registered

[1] See lemokiac.hypotheses.fr.

[2] ILGA's Rainbow Europe Map 2023—a chart evaluating the current status of laws, policies and practices affecting LGBTI people in Europe—gives France an overall score of 64% and ranked it 10 out of 49 countries and on the thematic criteria "family rights", 76%. Italy is ranked 34 out of 49 with a total score of 25% and for the thematic criteria "family", received a score of 17%.

[3] Law No 76 of 20 May 2016, entitled Regulation of Civil Partnerships between Same-sex People and Regulation of Living Together published in the Official Journal No 118 of 21 May 2016.

[4] Italian adoption Law No 184/1983 has been applied since 2014 on the principle of the child's best interest and is now a well-established practice in most courts, although there are still diversified practices among them in terms of timing and the kind of documentation requested. Although the child thereby acquires a juridical kinship tie with the co-mother, the child does not enter her genealogical line as full kin. This form of recognition is used by couples that have procreated both through ART and through self-insemination.

on the child's birth certificate at the foreign clinic where the ART procedure took place.[5]

As for the French lesbian-parented children who participated in the study, they underwent adoption following the legislation on same-sex marriages of 17 May 2013 (Law No 2013-404).[6] They were therefore unable to benefit from the recent revision of the bioethics law of 2 August 2021 (Law No 2021-1017) that introduced a so-called "anticipated joint recognition" (*reconnaissance conjointe anticipée* (RCA)) by two women undertaking a parental project through ART[7] and the revision of the adoption law voted in on 22 February 2022.

In the first section of the article, we reflect on the methodological and epistemological questions raised by the attempt of producing ethnographic child-centred knowledge. In sections C and D we present—both visually and verbally—an anthropological analysis of children's living rights within lesbian households. In the conclusions, we reflect upon the social and cultural contexts and the nature of the moral communities shaping children's voices. By doing so, we highlight the role of the state in the definition of hierarchical relations within families, especially in minoritarian configurations, and we raise the point that the recognition of kinship ties is always framed as a parents' right to kin their child, and never as a child's right to kin their parents.

[B] FROM "VISUAL ANALYSIS" TO "PERFORMATIVE TEXTS"

LeMoKiAC's purpose was to provide child-centred perspectives on legal recognition of lesbian-parented families' intentional ties. It accounted for children's voices both within internal family discussions before and during the procedures as well as within all sorts of actions related to the procedures (the

[5] Such a registration of intended mothers on the birth certificate was rendered possible in some Italian municipalities between 2018 and 2023 for couples having procreated through ART abroad before the practice was suspended following an order by the Interior Minister to erase the non-biological mother's name on birth certificates, leading to ongoing legal cases in several tribunals of Northern Italy.

[6] Their intended mothers could either ask for full adoption (if the child was under 15 and the couple were married) or for simple adoption. In the absence of an adoption authorization provided by the legal mother, an intended mother could issue a *demande de droit aux relations familiales* (request for the right to family relation) or a *délégation de l'autorité parentale* (delegation of parental authority) (see Mesnil 2021).

[7] The new birth certificate mentions the mother who gave birth (Art 311-25 *Code civil*) first and the mother who did not (RCA) (Art 342-11 *Code civil*) second: they share parental authority (art 372-1 1 *Code civil*). See the circular *Direction des affaires civiles et du sceau*, Ministère de la justice from 21 September 2021. A catch-up system for children born before 2021 created by Art 6 IV of the law will be come into force on 22 February 2025.

creation of a dossier, meetings with lawyers, inquiries by social workers on behalf of the court etc). The method of local comparative studies (Kröger 2001) between Italy and France was adopted to avoid the issues with micro-ethnography and to include different territories without renouncing the technique of ethnographic observation. I (Alice Sophie Sarcinelli) focused, for each country, on a generation of children who grew up during a period of strong politicization of same-sex parenting in the public space[8] (Courduriés & Tarnovski 2020; Prearo 2024).

The research thus focused on families belonging to the "activist generation" (Sarcinelli & Simon 2021), namely the generation whose efforts were devoted to obtaining reproductive and family rights through activism, litigation and presence in the public space. But how can the voices of these children be grasped? I moved through "plural kinship spaces" (Sarcinelli & Ors 2020)—both everyday spaces and legal/administrative spaces of kinship—and through time, thanks to both long-term ethnographic relationships and biographical interviews with young adults. I used participant observation with a reflexive approach. This consisted of informal conversations with children using a set of ethnographic child-centred research techniques (ie observation of first uses of kinship language, production of kinship charts, informal conversations, written data) chosen according to the participant's age, competences and social characteristics. This approach also included biographical interviews conducted mostly in person[9] with parents and grown-up children. Both the administrative procedures and court proceedings were studied through semi-structured interviews with lawyers and analysis of written documents (ie adoption applications, court decisions, reports by neuropsychiatrists etc).

I created a sample of interviews and ethnographic observations conducted with 15 French and Italian daughters and sons, 14 of whom self-identified as cisgender and one as transgender. The participants were aged between 3 and 32 at the time of the survey, came from families with a middle- to upper-class socio-economic profile and

[8] The period of strong politicization of homoparentality started in France in 2012 during the preparatory works of the law on same-sex marriage, while in Italy it began in 2015, during the public debates surrounding the parliamentary discussions around the law on civil unions. For an overview of legal initiatives and debate concerning same-sex couples and their parenting rights before 2015, see Moscati (2014).

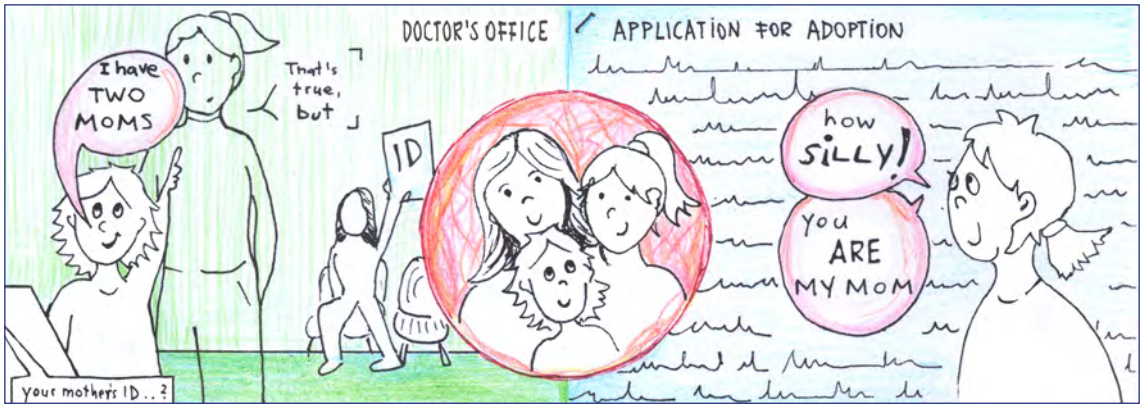
[9] Most interviews were carried out in person, and I invited participants on site to meet them. In a very few cases interviews were conducted online, due to the fact that some grown-up children had moved abroad. Online interviews usually lasted between one and two hours. I have also communicated with the children on numerous occasions through several means (in-person meetings, online interviews, instant messaging).

had between zero and three siblings. Their parents were sometimes still together, sometimes separated.

If extensive academic debate has focused on child-centred methodologies and on restitution (Razy & Ors 2022), little attention has been paid to translating child-centred ethnographies into description and analysis. Thus, this research aimed at filling the gap.

The ethnographic data of this research underwent a collective process of analysis and translation into a performative text through several steps. Sarcinelli carried out a first-level analysis and shared it with Weissensteiner who then visualized and translated it into sketches and visual maps. This in turn inspired conversations and reflections. Visual methods enabled a different form of analysis: "The creative forms engender a way of thinking that, each in their own way, moves from rational to associative or intuitive, from linear to circular" (Sarcinelli, Weissensteiner & Ors 2022: 154). A constant movement between fieldwork data, analysis, visualization and textual representation enabled further developments of the emerging shared reflections as well as new drawings. In this context, drawing is to be understood as a *verb*, not a noun, a practice that is primarily process-oriented and not product-oriented (Agerbeck 2016).

Additionally, this contribution integrates visual elements. One may "read" the visualizations simply as classic ethnographic vignettes translated into illustrations; as visual vignettes that resemble research-based graphic novels that have emerged through the graphic turn in social science (Atalay & Ors 2019). However, the process of production did not consist of translating a descriptive narrative into images. Analysis is embedded in the published drawings themselves, creating a "multi-layered surface of interpretation and meaning" (Weissensteiner in Sarcinelli & Ors 2020: 146). Legal scholars have argued that the visualization of law and of legal process is still "an opportunity missed" (McLachlan & Webley 2021). The drawings contribute to expand practices aimed at "visualizing law" (McCloskey 1998) and move beyond concept- or process-maps. This article examines the experiences and voices of children in relation to plural spaces of kinship and recognition procedures: readers may notice the colour coding of spatial data in the illustrations, as well as the ways that relational elements are also visualized through the direction of gesture and speech. The choice of using illustration is hence not meant as a form of "child-friendly restitution" nor as an output for non-academics, but rather a "creative ethno-graphic practice" (ibid)—namely a creative and alternative means of expression that has been used in all phases of the research.



Visualization No 2: Children's awareness and sense-making through practical kinship

[C] CHILDREN'S AWARENESS OF THEIR LEGAL KINSHIP TIES

Visualization No 2 engages with children's awareness and sense-making through practical kinship. Like most children, sons and daughters of lesbian couples understand very early who their parents are from a social point of view, but not from a legal one. Even children of the most militant couples are often unaware that they lack legal kinship with one of their parents (Sarcinelli 2019-2020). Their early childhood is mainly spent in the everyday spaces of kinship (intimate and domestic settings), where they first learn a "kinship repertoire", that is rules and social norms regulating family practices and the proper exercise of kinship (ibid). The prevailing repertoire in these spaces is that of intended kinship as opposed to the heteronormative one prevalent in administrative and legal spaces of kinship based on "being kinship" rather than "doing" it. Once children start to actively circulate in other spaces, they find themselves thrown into this new kinship repertoire which they do not quite understand. Let us take, for example, this Italian case:

> *Rebecca*[10] *(5 years old) arrived at a dermatological consultation with her two mothers: Sara queued with her, while Monica (the legal mother) waited seated. No matter how many times Monica told her companion: "Take my documents right away, because afterwards you'll forget," Sara didn't. When it was their turn, the receptionist asked for the mother and the child's IDs. Sara said loudly towards the other side of the office: "Moni, I need your ID!" The receptionist, a little impatient, asked Sara, "What about your identity card?". When Sara replied,*

[10] In order to protect anonymity and confidentiality, all names and some personal information have been modified and replaced by sociologically equivalent information.

> *"It's on its way", little Rebecca interjected, "But I've got two mothers!" And Sara responded: "That's true too, but they don't want my ID, they want the other one's."*

Rebecca was suddenly confronted with the logics of legal kinship in this ordinary situation. Some children are unaware until major events occur, such as an adoption application or upon the intended mother's registration on the identity card (Visualization No 2). For example, following the legal proceedings initiated by his mothers, Luigi used the expression "*fratelli di legge*" (brothers by law) when talking to me, in order to indicate that he was referring to another concept of brotherhood than the one he usually meant in our discussions. Finally, other children are confronted with legal kinship when the issue of homoparenting becomes politicized (such as the passage of the laws on Italian civil union or French same-sex marriage).

Lucia, 16 at the time of this specific interview, who was always aware of the lack of legal recognition, felt it was not really acknowledged for a long time:

> When I was little, I never thought about that [lack of legal recognition], because in my head it was as if they'd always been there. I'd never given any thought to the fact that my mother Vale wasn't my mother, because as far as I was concerned she was, full stop [...] I remember that from that moment – for the law – my mum Ylenia, my grandmother Elena and that whole part of the family would have become legally legal. And I remember that for me it had always been the case. I didn't know that they weren't recognized by the law. [...] Maybe they did tell me, but in my head it was like that. I had never acknowledged it.

In the next section, we will show how children perceive the procedures of legal kinning.[11]

[D] THE LEGAL INEXISTENCE OF INTENTIONAL TIES: A (LARGE) PROBLEM FOR PARENTS, A (NON-)PROBLEM FOR CHILDREN

To understand how children experience legal kinning, we need to analyse how their voices emerge within internal family issues and concrete settings, as well as within the wider, social, political and institutional context of kinning. First of all, we need to consider

[11] By the term "kinning" we refer to Signe Howell's definition as "a universal process" through which a "foetus or new-born child (or previously unconnected person) is brought into a significant and permanent relationship with a group of people that is expressed in a kin idiom" (2006: 63). The kinning process is thus the effort of incorporating adoptees into a network of kinship.

how mothers present the legal procedure to the children. Although mothers generally act according to the repertoire of intention, they also feel the urge to obtain legal kinning both to protect their children and as part of a struggle for recognition (Honneth 1996). However, this urge can vary according to the family configuration or the degree of conflict within the couple, which are in part due to the asymmetric relations between the mothers because of the unbalanced legal kinning. Let us consider the case of two French children: Kelly, 34 when we met, whose mothers split up very early and had conflicts over childcare, and Élise, 32, who grew up in a non-conflictual family.

When asked if, as a child, she was informed or became progressively aware of the legal status of her mothers, Kelly answered:

> The legal aspect was very present, very early on, because my social mother, in fact, spoke to us [the children] a lot about this. She suffered a lot from this inferior status from a legal point of view. And so, she often made this clear to us, she also had this fear of being … precisely this risk of being abandoned because she had no link with us, and … she very early on communicated to us the desire to adopt us, so ….

Contrary to those children who discover the issue of adoption at a given moment, for Kelly it had been an omnipresent question:

> It was always with the argument of inheritance in mind, "well, I'm going to die soon, I want you to inherit", that was basically the reasoning. […] as her father died earlier […] and when her mother died around 2016, it was urgent for her to, well … to leave us an inheritance.

Wills and the possibility of a conflictual separation were also recurrent in Élise's family:

> She [intended mother] talked a lot about wills, in fact, with the idea that if something happened to Mum, I should have the papers drawn up as much as possible so that her inheritance went to me and didn't go back to her family ….

Children do not really understand the mothers' concerns around inheritance:

> We [the siblings] always kind of put that aside, because we were in the mode of "no, you're not going to die, that's stupid" [laughs] completely stupid … (Kelly).

> I never conceived the idea that Mum could have done that … could have split up with Nina [intended mother] and prevented her from seeing me […] this fear I've always found a bit unfounded because even on my family's side they knew the situation

> very well and in fact they would have listened to what I wanted. (Élise).

Kelly's and Élise's were among the first French families who, in 2014, could adopt; theirs is not only a personal and familial matter, but also a collective one. However, the children felt indifference towards adoption, seen as normal yet unnecessary:

> At first I was quite … well not opposed to adoption, but rather indifferent. […] I didn't necessarily have anything to say about it … […] it was an economic issue as well, obviously a symbolic recognition too, but the two were fairly equivalent. […] After all, we've [the siblings] always been in favour of being adopted, of more equality, that's for sure. When it came to doing it, it was obvious. (Kelly).

> Nina adopting me was … normal. Well, yes, it was normal. After that I was 16, so it wasn't … 2 years later I was going to be of age, there was no need. In any case, if at that age something happened to Mum or they separated or something happened to Mum, I'd have had my say. (Élise)

These children didn't have real reasons to be opposed to adoption, but rather reasons to support their mothers' needs:

> I understood that for them [the mothers] in terms of the papers it was important, so there was no problem. Adoption was never a problem, for me it was normal, it's something that should have been allowed from the moment I was born, even the term "adoption", I find it silly because for me she didn't need to adopt me, because she was my parent from the outset. (Élise)

Kelly and her sibling had an additional reason to support adoption, namely the fact that their legal mother resisted agreeing to adoption, so they felt a responsibility to contribute to the debate.

Kelly's and Élise's cases are representative of the experiences of many children I met, namely that they had to reappropriate the logic of the repertoire of the law that does not make sense to them but still proves to be critical for the mothers, despite raising the children with the intentional kinship repertoire. The day when the intended mother becomes a legal mother is unforgettable and extraordinary for the parents, marking the transition from not-kin to kin, whereas children's experiences depend on the specific situation. For some, it was an ordinary moment. They hardly remember it or they only recall the new picture on their ID card, the route they took to go to the office or the fact that they went from their rural town to the city:

> It wasn't special, at all, I don't know. Knowing them [the mothers], I think we

> might have gone to a restaurant because we were in Tours, but I don't even remember [laughs]. So, I … no, it was just something to do. Yeah, it was normal. (Élise).

Some Italian children were completely unaware of what transpired or did not participate: Adriano, four years old at the time, was not informed that an adoption procedure was taking place and the social worker who visited their home was introduced as a friend of her mother's; neither Lucia nor Giorgio were present when the mayor signed the new birth certificate. Alternatively, Claudia (5 years old) attended the public "ceremony" where the mayor of the city signed the certificate and she presented him with a drawing she had made which was published in the newspaper.

What varies is also how children participate in the procedures for adoption and those aiming at issuing a new birth certificate. In the case of birth certificates, only teenage voices count. In the case of another Italian family, Margherita, the oldest of four siblings, was 16 when the mayor of Milan issued the new birth certificate. Because of her age, she was the only sibling whose permission was requested by the mayor before he added her mother to the document, during a publicized event. As the daughter of two well-known activists, known also to the mayor of one of Italy's larger cities, Margherita's legal kinning with her intended mother was a public, mediatized and political victory.

Also when the right to be heard in judicial proceedings affecting children is formally respected, this does not *per se* guarantee that it is meaningful to the children, nor that their legal voice will be taken into account. Take the case of Élise, French, also 16, who experienced a judicial proceeding for adoption and who did not feel that the consent she gave was meaningful. She first gave her consent alone in front of a notary without her mothers being with her, and then had to give consent again during the proceeding in court:

> I just remember going to the notary to give my consent and sign. […] Did I read the papers, I don't know, maybe. And then I remember going to court, same thing, to give my consent. And that was it […] it was pretty smooth. […] It was a small-town court, there were lots of people in the room, they were going through the cases one after the other. At one point it was our turn, we stood up, I don't know, maybe we had to agree or say that's what we wanted, I hardly remember, then we sat down, left and that was that. I was struck by the insignificance of the whole thing, because I'd never been to court before.

Children's perception depends on the setting of the single legal recognition. It is not surprising that for Élise:

> there was nothing to celebrate in fact because it was the same thing. It was more symbolic, and it didn't really change anything. I think the only time it's going to be felt is when there's something legal, something legal like a death perhaps, that's when it can be felt, but that's all.

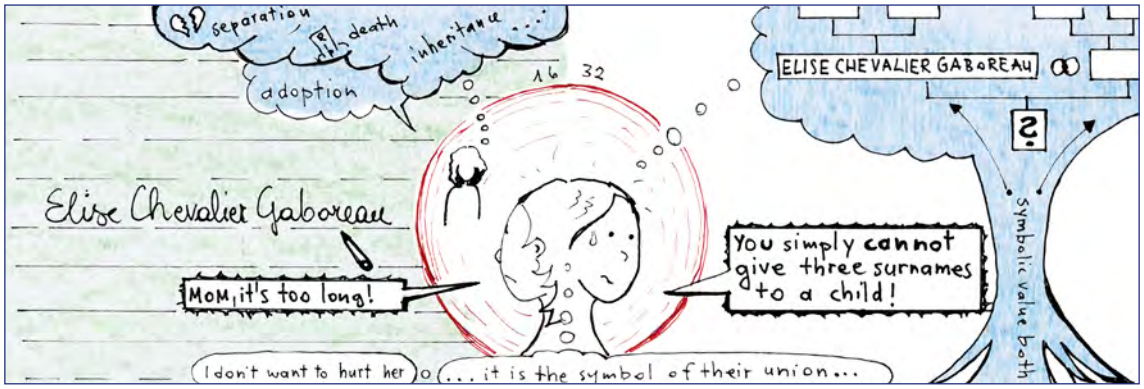
On the other hand, Margherita's recognition was followed by a celebration inside the municipality with the presence of the mayor and an activist organization and filmed by the media. To sum up, these experiences show that how the voices of children emerge depends on internal family issues and concrete settings, as well as on the wider, social, political and institutional context of kinning.

Let us now consider what most children refer to as an important change within the process of legal recognition, namely the addition of a surname.

[E] WHAT'S IN A NAME: THE OBJECTIFICATION OF KINSHIP OR PERSONAL IDENTITY?

Martina Stucchi (Italian, 12 years old at the time) cried when her parents suggested adding the intended mother's surname Luppi to her name. She cried at the thought that adding that surname would change her position in the alphabetical order of her class at school: "I'm not going to be an S any more", she had exclaimed. Her intended mother, Laura, told her that adding the surname would have helped their struggle to have their family legally protected. Laura reassured Martina that, if she wanted to rechange her surname at the age of 18, Laura would cover all costs for the procedure.

From the intended mothers' perspective, the possibility of passing down their family name has great symbolic value. From the perspective of the children, it



Visualization No 3: … in my name.

is often considered a problem: they have not initiated this procedure and it is not their necessity and choice to change the surname used to identify themselves, especially at school. As anthropological literature has extensively shown, names objectify kinship, but they are also a space to assert identity (Fine & Ouellette 2005). Therefore, the name change is the locus of a tension between mothers (whose aim is to objectify kinship) and children (for whom name changes question their identity affirmation).

The suggestion to finance a new name change at the age of 18 shows the different temporality between Martina's concern which is her identity affirmation "here-and-now" and the temporality of the solution proposed (6 years later). At 15, Martina revisited that moment:

> It had made an impression on me- the fact of becoming the letter "L" and not "S" in the alphabet. I go from the last third of the alphabet to the middle. Worse still, I already wasn't fond of Stucchi [...] When you have to sign up for something, you have to say Stucchi and they don't understand you, you have to repeat it two or three times ... Say LuppiStucchi ... In the end it [the surname] wasn't changed. I got a little lost as to why!!!

Ultimately, Laura decided not to impose such a change, and, at the moment of our last conversation, she is waiting for the siblings to make the final decision once they turn 18. Over the years, Martina's affiliation with her intended mother and her family has increased (ie intended grand-parents, intended uncles and aunts etc). Now 16, Martina is more concerned that her and her brother Giulio does not have the same surname as each mother gave birth to one of them. Thus, she has progressively accepted the idea of changing her surname:

> After a while, I understood that it was something that would happen and I said "ok, no problem". Recently, the subject came up again and I told my mother Laura that there was no problem. But she said that it is something we will do once we turn 18, but I am not sure because Giulio turned 18 this year and nothing changed. So, to be honest I don't know. I thought that at 18 we would both change our last name. You should confirm with my mum. Anyway, changing it is still an option and I have no problem with it.

The quote raises questions like: whose choice is it? Are the mothers just suggesting adding a surname or are they letting their children choose? The terms that Martina uses ("would happen", "I don't know") reveal this ambiguity. Élise's relationship with her surnames furthers the reflection:

> The only thing that bothered me at the time was that they'd changed my

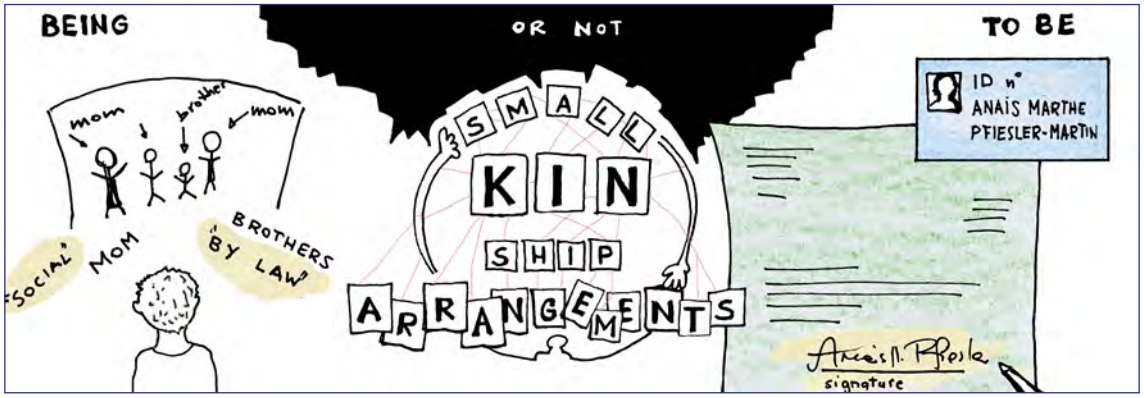
> name, because "Chevalier-Gaboreau" is a very long name. I was already 16, so I also didn't want them to change anything that I didn't want to be changed, it was a bit of an attack, I don't know … I didn't understand why anyone would impose anything on me at that age.

When Élise said that she didn't want to change surname, her intended mother reacted in an aggressive way as she recalls : "I remember telling her, 'But no, I don't want anyone to change my name', and, and I think she was hurt, she shouted at me a bit and it didn't go down very well, so I had no choice." Élise describes the change of her surname as "a bit of an attack", an imposition, a non-choice, something over which she didn't have a say. In Visualization No 3 we see Élise struggling with this imposition. Opposing from a practical point of view the change, she exclaims to her mom that such a name was simply too long to write. Notably, she acknowledges the symbolic importance of her surname for her intended mother, but not for herself.

In the case of Kelly's sister, it was the judge who seems to have imposed the name:

> Our mothers had given her [my sister] a middle name which was the equivalent of my mother's social surname: so she was called "Anais Marthe Pfiesler", the female equivalent of Martin. Accordingly, the judge, how shall I put it, got a bit sensitive about it and my sister didn't actually want to change her surname, she wanted to keep her name as it was. […] Because she already had more or less that name, and she thought it was absurd to be called "Anais Marthe Pfiesler-Martin", it was a bit long. For the judge, it was unthinkable that we could have two different surnames. Me and my sister … we had to have the same surname, otherwise it wasn't possible … so my sister was a bit confused at the time, but in the end, she said OK.

At the suggestion of adding a name Martina cried, Élise fought with her intended mother, whereas Anaïs was confused in front of the judge. From the adult perspective (the mothers', but also the judge's), the entire family needs to have the same surname. Did the adults intentionally silence the children? As Ann Lewis (2010) points out, the elevation of children's voices has become a moral crusade that has sidelined consideration of the issues surrounding the very practice of revealing these voices. Sirkka Komulainen (2007) highlights the moral dimension of asserting children's right to speak and underlines the ambiguity and complexities of communication between adults and children. In the ethnographic cases presented, children ended up accepting adult's suggestions not only because of



Visualization No 4: Being, to be, not to be/to be not: small kinship arrangements.

the existing power relationship between adults and children, present in queer families as well (Hiffler-Wittkowsky 2023), but also because the repertoire of filiation prevails. Moreover, children prefer to accept the loyalty demands of their intended mother, whose existence has been institutionally silenced until then:

> She's proud that my name is "Chevalier-Gaboreau". When I write something, I have to put down "Chevalier-Gaboreau", otherwise she says "well no, you've forgotten Gaboreau", she doesn't feel recognised. (Élise)

Choices concerning adoption and surnames are more or less imposed upon or accepted by the children who, nevertheless, manage to rearrange such choices under the form of "small kinship arrangements", namely negotiations, adjustments and shifting that, while not always remarkable, are more or less intimate and well thought-out (Sarcinelli 2020). For example, Anaïs accepted the judge's choice, but in her everyday life she uses her original name instead of the official one (Visualization No 4).

Following Kallio & Häkli (2011), the political dimension of children is implicit and emerges in their everyday life negotiations. Meanwhile, the perception of the weight that their own voice should have, grows over time; older teenagers like Élise have stronger reactions to the surname imposition. Moreover, the voice of each child is not static but continues to change throughout the course of life. Martina gradually affiliates herself more with her family and thus sharing her sister's surname trumps her identification with her own. Once married, Élise re-affiliates to the family she created and her perspective on the surname changes, as in Vizualisation No 3.

> My name is symbolic because it's the name of the union of my parents who fought for it. My husband's name is symbolic because it comes from an indigenous

> group, so we both have these symbols and we know very well that you can't have three last names. So what happens now? Well, we don't know, we haven't settled the question. It's been two years and I think the question will come up the day we have children.

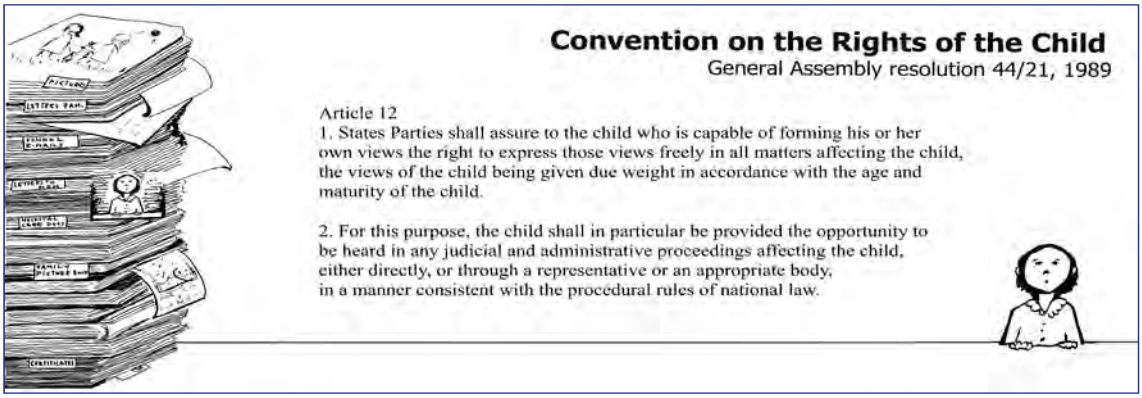
The analysed cases show that the question of naming holds a different meaning for children and adults: for children it is the expression of their personal identity; for the adults it is the objectification of kinship. The extent to which children can make their voices heard on this subject varies according to the particular situation, but also over time as they grow up.

[F] CONCLUSIONS: CHILDREN AS SUBJECTS (OF RIGHTS)

In conclusion, let us re-engage with Article 12.2 of the UNCRC, quoted in full in Visualization No 5. The terms used are very informative: "the right to be listened to and taken seriously in judicial and administrative proceedings affecting children". Here children are notably passive subjects of rights: it is not the right to speak, but rather to be heard; not the right to shape the procedures, but rather to be affected by them, not the right to kin their social mother, but the rights to be kinned by her. Exercising their voice is dependent upon others. "To be heard", then, requires setting the conditions so that this voice can emerge both in domestic kinship spaces (ie discussions about adoption and surname changes) and in public ones (ie the notary, the court or the municipality).

In domestic spaces, children found themselves forced to choose between being faithful to the family fight for kinning rights and to their own need to preserve their personal identity expressed in their surname.

In public spaces, children's legal voices are literally quashed by the bureaucracy. For example, in the case of Lucia and Giorgio's adoption application, whilst lacking children's voices, it was substantiated by a mountain of official documents. Their application included family pictures from 2006 to 2017, tax returns of both mothers from 2014 to 2019, school documents beginning from preschool, eight register office certificates, six documents from the clinic where ART procedures were performed, 11 written testimonials from friends and professionals, two medical documents and notary documents. The children's voices emerged only through the inclusion of a few school projects describing the family and the story of the family, as well as in two family trees realized by the anthropologist with the children.



Visualization No 5: Article 12 UNCRC

In contrast to Article 12.2 of the UNCRC, children's voices have little space in the procedure, yet become symbolic and appear in the media through their drawings or interviews. Thus, the point is not whether children have a voice or not, but rather when and in which spaces this voice emerges, is drowned out or silenced. The ethnographic gaze can inform us about the social and cultural contexts and the nature of the moral communities shaping children's voices, as well as children's ways of reappropriating the decisions of adults through small kinship arrangements. This calls for a relational approach to the law focusing on the interdependence between adults and children (Ronfani 2006).

Moreover, children's voices are to be redefined in relation to time, kinship spaces and interlocutors, recognizing the historical and situated position of children (Spyrou 2011). The cases analysed here refer to a specific generation of French and Italian lesbian-parented children. Meanwhile, the political and legal framework has changed. French children are now born with two legal mothers.

In Italy, the legal system still lacks full legal protection for same-sex couples and their children. Thus, according to our data, same-sex partners who would like to adopt their partner's child/children, are advised by lawyers to submit the application for adoption in the early months following the birth of their child.

In contrast, the previous generation of parents were urged to obtain legal status and the right of the mother to kin her children seemed to prevail over the child's right to keep their surname. Yet, the relation between children's and parental rights, as well as interactions between the family and the state, were already far from being linear and free of tension. An ethnographic analysis of "the thin line of demarcation between the responsibility of parents and the agency of children" (Ammaturo 2019: 1152) showed that children were not at all against legal kinning,

but they had to make sense of plural kinship repertoires. We considered the combining logics and different temporalities: the "here-and-now" of children's kinship voice versus the urge in the present to facilitate the future of their mothers. To conclude, we should acknowledge the role of the state in the definition of hierarchical relations between family members, especially in minoritarian configurations, as well as the fact that the political discussion calls for the recognition of the parents' right to kin their child, and never for the children's right to kin their parents.

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Legislation, Regulations and Rules

Adoption Law No 184/1983, Italy

Civil Union Law No 76/2016, Italy

Code Civil, France

Law No 2013-404 on Same-Sex Marriage, 17 May 2013, France

Law No 2021-1017 on Bioethics, 2 August 2021, France

Regulation of Civil Partnerships between Same-sex People and Regulation of Living Together (Law No 76 of 20 May 2016), France

United Nations Convention on the Rights of the Child 1989 (UNCRC)

News and Events

Compiled by Eliza Boudier

University of London

Professor Anat Rosenberg appointed Professor of Law and the Humanities IALS

The Institute of Advanced Legal Studies (IALS) is delighted to announce the appointment of Anat Rosenberg to the newly created position of Professor of Law and the Humanities. Professor Rosenberg joined the Institute in September of this year having previously been Associate Professor at the Harry Radzyner Law School at Reichman University in Herzliya, Israel.

Professor Rosenberg graduated with her LLB *magna cum laude* from Hebrew University and received her PhD in 2011 from Tel Aviv University. She has been a visiting research fellow at IALS (2017-2019) as well as at the EHESS—École des hautes études en sciences sociales—Paris (2024); the University of Cambridge (2017-2020); and Columbia University (2006-2007). Her research uses multidisciplinary methods in law and the humanities, including law and history, law and literature, law and visuality, and law and materiality, to study modern capitalism, liberalism and media. She is the author of *The Rise of Mass Advertising: Law, Enchantment, and the Cultural Boundaries of British Modernity* (Oxford University Press, 2022) (open access) and *Liberalizing Contracts: Nineteenth Century Promises through Literature, Law and History* (Routledge, 2018). She is the co-editor of *Arts and the Aesthetic in Legal History* (special issue of *Critical Analysis in Law*, 2015), and *Law and the Material Turn* (special issue of *Law, Society and Culture*, 2024). Her research has also appeared in leading journals internationally, including the *American Journal of Legal History*, *Law and Social Inquiry*, *Journal of Legal History*, *Law and History Review* and *Law and Literature*.

Professor Rosenberg's forthcoming projects include a research series on normativity in legal history; a co-edited special issue on enchantment in the history of capitalism; a study of affective propaganda and law in the attempted regime overhaul in Israel; and a book-length transnational cultural legal history of propaganda.

WG Hart Workshop 2025: Regulating the Global Movement of Care

The topic for the 2025 Hart Workshop is 'Regulating the Global Movement of Care'. The workshop will seek to consider the role of law in managing the global movement of care, broadly defined to include healthcare, social care, domestic care and unpaid care. Immigrant labour has long been the bedrock of the care systems of many countries in the world and law is intimately involved in ordering the movement of care and care workers. The workshop invites participants to explore the numerous distinct involvements of the law in this process of movement, such as by creating precarity through the imposition of stringent immigration or regulatory requirements, by providing migrant carers and their supporters with a tool to fight oppression, or by defining relationships between migrant carers and their broader kinship networks. The workshop will be organized around four themes—precarity, advocacy, protection and kinship networks—and will provide an opportunity to explore the legal regulation of care through the lens of a variety of disciplines, including history, anthropology, politics, sociology, criminology and creative arts.

The 2025 Hart Workshop will feature two invited plenary speakers: Professor Majella Kilkey (University of Sheffield) and Professor Eram Alam (Harvard University). There will also be a lived experiences panel, featuring care workers and individuals and organizations that support them, and a creative arts panel, featuring Dr Ella Parry-Davies (King's College London) and her collaborators on research in performance as method with migrant domestic workers. The organizers of the 2025 Hart Workshop are Priyasha Saksena (University of Leeds), Adrienne Yong (City, University of London), Amanda Spalding (University of Leeds), Amrita Limbu (University of Leeds) and Marie-Andrée Jacob (University of Leeds). The call for papers will be published in autumn 2024.

The WG Hart Legal Workshop is a major annual legal research event organized and hosted by IALS. Over the years this eponymous workshop series, subsidized by funds from the WG Hart Bequest, has focused on a wide range of comparative and international legal issues and topical interests.

Library News

IALS Library Reader Satisfaction Survey 2024

The full report of the IALS Library Reader Satisfaction Survey for 2024 is now available to read online from the IALS website. The overall satisfaction rating from readers

was of 95.6%. It is reassuring for the IALS Library team to see that its core readers continue to rate and value them highly. All members of the IALS Library team will continue to work towards maintaining these excellent results, and to implement suggested improvements where practicable.

Read online or download the IALS Library Reader Satisfaction report for 2024.

Training at IALS Library

Boost your legal research skills by attending library training sessions which are held throughout the Autumn term. The following sessions are available both online and in person:

- Introduction to OSCOLA, 15, 18 & 28 November and 3 December 2024
- Introduction to Westlaw UK and Lexis+, 8, 12 & 20 November 2024
- Finding legal journal articles for your essay, dissertation or thesis, 5 & 11 November 2024
- Finding sources of public international law, 7 & 19 November 2024

See website for details.

Selected Upcoming Events

ILPC Annual Conference 2024: AI and Power—Regulating Risk and Rights

Dates and venues: 21 November 2024, Council Chamber, IALS, Russell Square, London; 22 November 2024 online via Zoom

The Information Law and Policy Centre (ILPC) Annual Conference will include the ILPC Annual Lecture 2024, which will be delivered by world-leading scholar, danah boyd. Danah boyd is a Partner Researcher at Microsoft Research and a Distinguished Visiting Professor at Georgetown University. Her research focuses on the intersection of technology and society, with an eye to how structural inequities shape and are shaped by technologies. She is currently conducting a multi-year ethnographic study of the United States census to understand how data are made legitimate. Her previous studies have focused on media manipulation, algorithmic bias, privacy practices, social media and teen culture. Her monograph, *It's Complicated: The Social Lives of Networked Teens* has received widespread praise. She founded the research institute where she currently serves as an advisor. She is also a trustee of the Computer History Museum, a member of the Council on Foreign Relations and on the advisory board of the Electronic Privacy Information Centre. See website for details.

Legal Education and Law Reform: Reimagining the Relationship at the Law Commission of Canada

Date: 27 November 2024

Venue: online via Zoom

Speaker: Professor Shauna Van Praagh, President, Law Commission of Canada and Professor of Law, McGill University, Quebec

Chair: Professor Carl Stychin, IALS Director

In 2023, the Law Commission of Canada re-emerged after a 17-year hibernation. The experience of discontinuity encourages broad and deep reflection on what a Law Commission can or should do, and how it justifies its existence. In particular, the relationship between legal education and law reform might be reimagined. Each can support and enrich the other in what might be surprising or unexpected ways that confront easy or usual assumptions. The vocation of a Law Commission can and should include supporting and enriching legal education; that of a Faculty of Law can and should include supporting and enriching law reform. The speaker suggests that law students and legal scholars can be thought of as creators of law and active participants in its evolution, while jurists engaged in law reform can be understood to do so in classrooms, community organizations, and courts, as well as in law commission offices. All are at the same time plumbers, problem solvers and poets. By challenging what we mean by "law reform" and "learning and researching law" along these lines, we may begin to see more clearly how both domains incorporate and indeed demand creativity, evolution, dreams and hope. See website for details.

Lunchtime Seminar: The European Union and the Citizen

Date: 4 December 2024

Venue: Council Chamber, IALS, 17 Russell Square, London

Speaker: Professor Ivan Sammut, University of Malta and Associate Research Fellow IALS

Chair: Dr Constantin Stefanou, IALS Taught Programmes Director and Director of the Sir William Dale Centre for Legislative Studies

The lecture focuses on the role of the individual as a subject of European Union (EU) law. It explains the rights and standing of the individual before courts with jurisdiction to deal with EU law and the rights related to free movement and settlement. The first part of the lecture is dedicated to the nature of EU law within the context of international and local law as a *sui generis* legislation. It then evolves into how the individual participates in enacting and enforcing EU law. Reference is made to the citizen's access to the

European Parliament, the Members of the European Parliament, and the national courts necessary to interpret and apply EU law in the domestic context. In this part, the citizen must understand the relationship between the domestic courts and the Court of Justice of the EU (CJEU). The third part of the lecture deals with EU institutions' access, particularly direct access, to the CJEU by private citizens. Here, brief reference is made to the notion of *locus standi* for actions of annulment under Article 263 of the Treaty on the Functioning of the EU and access to the European Ombudsman. The final part of the lecture is dedicated to free movement and the rights of third-country nationals in EU member states. The lecture does not focus on UK law post-Brexit or on Brexit itself. However, it deals with British citizens' rights in EU countries, particularly as potential third-country permanent residents in the EU. See website for details.

Podcasts

Selected law lectures, seminars, workshops and conferences hosted by the Institute of Advanced Legal Studies in the School of Advanced Study are recorded and accessible for viewing and downloading.

See website for details.

SAS IALS YouTube Channel

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Advanced Study are recorded and accessible for viewing and downloading.

See website for details.

Library Exhibitions

Recent Library exhibitions displayed in the 2nd floor entrance are now available to view digitally:

- Trans People and the Law: A Long Road to Equality
- Cultural Property and Cultural Heritage Law

Library Opening Hours

- Monday-Friday: 9:00am to 11:00pm
- Saturday: 10:00am to 8:30pm
- Sunday: 12:30pm to 8:30pm

Please check the library's website for opening hours on and around public holidays.

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