

FOREWORD (PUBLIC LAW)

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A Law Journal dedicated to presentation of academic articles written by undergraduates seems to me to be an excellent project.

In modern legal practice judges and practitioners have to be willing to read and absorb academic writing touching on the topics which they have to examine and the disputes they have to resolve. Lord Goff of Chieveley explained the interaction between what judges do and academic examination of the law in his leading speech in the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. He explained how useful he had found the work of academics in deciding that case and concluded with these words:

“For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding.”

In addition to deciding cases, a vital part of the work product of judges is legal doctrine, meaning considered formulations of legal rules and principles which are intended to provide guidance in future cases. A great virtue of the common law is the tough, resilient legal doctrine which judges have produced which is the heart of it. But production of good doctrine is hard. It is not

always appreciated how difficult it is to do well. In my experience, it takes much thought, time and effort.

In part, common law legal doctrine is tough and durable because of the conditions under which it is produced – an endless stream of individual cases over decades and centuries, each argued out with formidable skill by talented advocates, to furnish the judges with an in-depth understanding of the facts in each case and how the applicable legal rules might bear upon those facts and on other similar cases. But to produce really durable and helpful doctrine, one also needs to have something of a strategic vision, a sense of where the law has come from and where it ought to be going. Judges, particularly those operating at an appellate level, have to cultivate this sort of vision. And academic writing can help supply it. It makes its own valuable contribution to the production of legal doctrine.

One can look at the contribution of the academic approach to law from three angles: the time factor; perspective; and sources.

Judges work under pressure of time to discharge their public duty to decide cases. Justice delayed is justice denied, so they know they have to get on with writing their judgments. Also, there are always new cases coming into their court, so to delay writing a judgment for a long time means that many others tend to pile up behind it, demanding attention for themselves. By contrast, an academic lawyer can immerse himself or herself in a subject area with the time to think really deeply about it. Judges working with a comparatively tight timetable benefit from being able to draw on that reservoir of knowledge and reflection.

The academic approach to law provides a different and wider perspective to the understanding of legal issues. Lord Goff had been an academic lawyer as well as a practitioner before becoming a judge of the commercial court and then rising to the House of Lords. He was one of our most distinguished judges, and he knew what he was talking about. In his 1983 Maccabean Lecture in Jurisprudence, entitled *The Search for Principle*, he set out the different but complementary roles that judge and jurist play:

“Judge and jurist adopt a very different attitude to their work. For the [judge], the overwhelming influence is the facts of the particular case; for the [jurist], it is the idea... [But] different though judge and jurist may be, their work is complementary; and...today it is the fusion of their work which begets the tough, adaptable system which is called the common law.”

Reading academic writing gives judges the opportunity to stand back and see the wood for the trees. It can provide an overview of a whole area of law and a sense of how the particular rules falling to be applied in the specific case fit within the whole.

Linked to this is the wider range of sources that academic writing may draw upon. It can look at law in its historical, or philosophical, or sociological context more readily than any individual judge working on a case can be expected to do. It can make detailed comparisons with the solutions adopted in other legal systems, from which we might be able to learn something. The academic perspective on law enables one to examine its development over time, and can assist in trying to penetrate to the underlying forces and factors which drive that development.

The common law does not stand still, but adapts to changing circumstances. This is always regarded as one of its great strengths. Appellate judges develop the law and provide guidance for the whole system, but they need to know in which direction they should be pointing and how far they should be taking that development. Drawing on academic work helps them to make good choices.

Since judges are interested in the academic perspective on law, practising lawyers have to be as well. In order to win cases for their clients they have to present the arguments which judges will find persuasive. So thinking deeply about a legal topic from an academic point of view is a wonderful way for students to develop and hone important skills of legal analysis and explication. It makes them better lawyers.

I have very much enjoyed reading the public law essays in this collection, which I was asked to review. Each of them displays legal thinking and analysis of a high order.

I found Luca Geary's essay, *With (State) Power Comes (State) Responsibility*, a really imaginative examination of the complex notion of jurisdiction in international law. It uses legal analysis to face up to real world problems of the greatest importance. In international law, it often takes time and debate for ideas to gain currency and traction. This essay makes a serious contribution to the discussion.

Tevž Sitar's essay, *Better Call Brockovich*, sets out a careful analysis of the principles governing the grant of injunctive relief and deploys an instructive comparative law approach in order to

interrogate and suggest positive development of those principles in our law. I very much liked the practical dimension of the essay. If law does not provide practical solutions to real problems, it fails in its task. The essay points out what a powerful form of remedy an injunction is, particularly to prevent harms arising, and uses that perspective to show how this form of remedy could make a real difference in cases of environmental pollution.

Marlon Austin's essay, *A Drop in the Oceana, or a Tsunami of Change?* engages with the deep structure of the UK's constitution through the prism of the *Privacy International* decision in the Supreme Court on the interpretation and effect of ouster clauses (statutory provisions which exclude the ordinary jurisdiction of the High Court in some way). This is an area of law which I find very interesting. I thought Marlon's essay was a fine piece of analysis both of the divergent approaches in the different judgments in *Privacy International* and of the way in which later authorities have followed (or limited) those approaches.

Last, but by no means least, we have Lucy Ryder's essay, *Exploring the Utility of the Tort of False Imprisonment in Addressing Arbitrary Immigrant Detention*. This takes one back to the basics of the law of tort in relation to false imprisonment, but succeeded in integrating that with an insightful discussion of how the domestic law of tort resonates with the dimension of human rights in both a philosophical and a practical way. Again, I particularly liked the way in which careful legal analysis was used to suggest ways in which the law could address the serious practical questions which arise in relation to detention of immigrants.

All the authors are to be congratulated on what they have achieved in these essays. And the Law Faculty is to be congratulated for encouraging undergraduates to engage with legal topics in such a profound and thoughtful way, by participating in the production of this Law Journal.