

Conversations with Emeritus Professor William Rodolph Cornish

by

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Third Interview: Scholarly works

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In January - May 2015, Professor Cornish was interviewed three times at the Squire Law Library to record his reminiscences of over forty years of research and teaching in Oxford, LSE and Cambridge.

The interviews were recorded, and the audio version is available on this website with this transcript of those recordings. The questions and topics are sequentially numbered in the interviews for use in a database of citations made across the Eminent Scholars Archive to personalities mentioned therein.

Interviewer: Lesley Dingle, her questions are in **bold type**.

Professor Cornish's answers are in normal type.

Comments added by LD, [*in italics*]. Footnotes added by LD.

121. Professor Cornish, this is our third interview for the Eminent Scholars Archive and I hope that today we can discuss your published work, concentrating on your books which were published over nearly 45 years during the period 1968 to 2013. They cover an impressive range of topics; the jury system, intellectual property and the development of various legal topics during the 18th to the 20th centuries. So, could we start with your first book that was published in 1968, "The Jury" by Penguin Press? ³ I wonder if you can tell us how you devised and executed this project and what originally motivated you?

It arose out of the work that was being planned by a group of teachers at the London School of Economics, all of whom were masters of their particular crafts. They had been drawn together by Charles Clark⁴, the legal editor at the time of Penguins, a young man full of inspiration, and books such as Street's *Freedom, the Individual and the Law*, Borrie and Diamond⁵ on *The Consumer Law and Society*, Wedderburn on "The Worker and the Law"⁶ and many others followed in this process of establishing a socially realistic view of how the law operated as distinct from learning its principles in a relatively abstract way. The jury system suggested itself to me because I was teaching the English legal system, and it seemed particularly enticing because, of course, it is a secret system. Judges instruct jurors in our courts without being present during their deliberations and nobody knows much about what happens. I thought I could conduct at least some preliminary enquiries in order to make a start on opening up the jury system to public inspection. Perhaps it was a rather strange thing to do since the jury trial was becoming focused on serious criminal offences also. It had practically lost all role, for instance in accident law, even though juries did set the level of damages when it found a defendant to have wrongfully caused injury to another.

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³ Allen Lane, The Penguin Press (1968), 298pp.

⁴ See Q 78.

⁵ G. J. Borrie & A. L. Diamond, 1981 4th Edit. *The Consumer, Society and the Law*.

⁶ (Pelican) Paperback, 3rd Revised edition, 1986, by Lord Wedderburn of Charlton, 1040 pp.



So, I set about various ways of trying to meet people who dealt with juries, judges, of course, counsel and I was able to get the names of some who had served as jurors in London and arranged to interview them. Very interesting it was. Of course, the impression you get from people who are prepared to give you an interview is that they were deeply involved in their court experience and they certainly were. That is why they wanted to talk about it. They were not people who it had been an awful bother in their lives to have to come to a London criminal court or wherever it was instead of working in their one man business, very often, though some exemptions were available in the system because of that sort of factor. And so out of these various conversations about what either participants themselves as jurors or other people in court came to know from experience with jurors, I was able to build up something of a working picture, although as some of the critics pointed out, I really had no objective across-the-board knowledge. Thousands of people are serving each year as jurors and how to get a bit closer to a social picture of them was under the rules then and now very difficult. It wasn't actually illegal to interview jurors at that stage, so that was introduced into the law in 1980 when more people got interested in talking to them. So, the blinds came down in the form of a statute.

122. I think I recall one of the reviewers, a former student of yours, Neil Cameron⁷ who himself has written on this topic, saying that it was difficult because, like the Chicago work, there was not much hard basic information. Do you think this has altered in the intervening 15 years?

No. I don't think it has seriously altered at all. Different issues, of course, have come up. The social make-up of juries changes as more and more people are drawn into the system. In 1970 women were admitted for the first time as jurors, and there was some concern about whether people of lower intelligence, working people, should be serving on juries because they might find the subject matter difficult simply to comprehend or their task difficult to carry out. Some of these attitudes were certainly there but you couldn't say they were dominant factors which the serious critics of the legal system discussed constantly with a view to change; not at all. Judges have many reasons for wanting the jury system to continue as a means of public acceptance for what went on, particularly in criminal proceedings.

123. Thank you very much for that, Professor Cornish. Perhaps we can move to your second book which is "Law and Society in England 1750 to 1950". This was originally a collaboration with Geoffrey Clark⁸ who was also at the LSE and I wondered what motivated you to join him in this very complex exercise.

We were driving to the Annual Meeting of The Society for Public Teachers of Law (now the Society of Legal Scholars) which was taking place in Manchester, so we had plenty of time to talk to each other. Geoffrey was trained, first as an historian, but was teaching in the Law Faculty by then of University College London. He had been a solicitor in the interim in a left wing firm of solicitors, very well known, Thompsons, in the Temple⁹, and he was naturally interested in historians' approaches to something as wide ranging but non-specific as the law surrounding us. We thought there was certainly room for a book which attempted in one volume to give students, in particular, law students, some grasp of the history of the

⁷ N. Cameron, New Zealand. *Victoria University Wellington Law Review*, 406-408, 1968-70

⁸ 19 Cornish, W. R. *Law and Society in England 1750-1950*, 1989, 690 pp, Sweet & Maxwell 1989

⁹ <http://www.thompsonstradeunionlaw.co.uk/> "Thompsons Solicitors is uniquely committed to trade unions and the labour movement. From our foundation in 1921, we have taken a central role in helping unions to protect the interests of their members."



system they were studying before they went on to such subjects as comparative law or international law or jurisprudence and many of them came to law studies without any real sense of recent British history in general. They had done other subjects at A level and the whole idea that history might in essence be something different from legal study didn't impinge on them. They went ahead, absorbing the law and they passed their professional exams on the basis of that and then they were trained. Geoffrey and I didn't think a legal education should just be about training for a profession. It needed a critical perspective on it and so, of course, I knew enough history without ever having studied it formally except at school to realise that this historical enterprise is in essence different from what much of lawyers do when they think about principles, how to shape a case and so forth.

Historians are tied to the best sources for examining a contemporary event of a particular time and in deep historical study you must have a backing of mainly written literature. Interviewers may be in the modern period, but always what is the evidence that tells how it appeared to be to people at the time, and lawyers, of course, are not often concerned with that. They want a solution for their clients' problems. If they're dealing with it, having to deal with it from an historical perspective perhaps in the common law system because there is case law there that needs to be put in its own surroundings and not simply judged as though all the concepts were the same as they have learnt to abide by today and there are many examples of that sort of difference arising. Lawyers are pursuing different paths for different purposes. Nevertheless, the feeling that it is only proper that they should have an historical appreciation of their own system at the same time and that it might well lead them to doubt the certainties of what they are told is a legal principle are always there. Geoffrey and I were to provide some sort of relatively modest teaching book explaining the whole to them which could be used to put courses on modern legal history into law faculties in particular, but not necessarily restricted to that, and we're delighted when we hear that historians are themselves introducing sections on the law and its impact into many of their courses. So, that's the general background to the book.

Geoffrey Clark died of cancer within four years of our agreeing the contract for the book with Penguins and that distorted the whole working programme. He had written bits and pieces. I decided I was probably best able to produce a coherent book with a certain style to it if I did the whole of it by myself, working from Geoffrey's drafts when they were available, but thoroughly redrafting them to fit with what he hadn't done and what I thought was the truly significant historical story to be told on a particular subject. So, it was a big chunk of work and it took me 20 years.

By that time Penguins narrowed their focus on new ideas in that 20 years and weren't interested in publishing it. In the end my, first publishers... no, not my first publishers. The publishers of my other big book on intellectual property, Sweet and Maxwell, undertook to put it out and it came out in 1989. I can't say that, apart from one editor, Sweet and Maxwell were much enamoured with the book. I don't think they sold many copies. They certainly had no plan for a second edition and so there it sat. It came into fully expected criticism from the left who thought it was too complimentary to the English legal system and it should have been all about its failings, its class prejudices, the narrow education of its judges and like matters. I prefer to take a more descriptive attitude of trying to get at evidence and that shows up throughout the book. I mean, there were points where what were becoming hot topics in legal studies, such as the relation of husband and wife, the impact of that sort of family law on children, where many of the modern discussions of where society was turning



in its familial relations. That was a dominant interest around 1970, made their due appearance in this history. So, such things certainly deserved a place.

124. One of the interesting points that was made, I thought, by Professor David Sugarman¹⁰ and also Professors Douzinas and Warrington¹¹ was that you were dismissive of Hay's¹² theory of criminal justice depending upon a mixture of terror and gratitude.

In the 18th century in particular.

125. That's correct and I wondered whether you felt, Professor Cornish, that perhaps the revolutionary events in the United States and France in any way influenced the criminal justice system in the UK?

Well, I think the major influence of France was on the formation of systems police in our modern sense, but at the top end of inference with people of some standing knowing whether they related to royal prerogatives and so forth was in question. One of the things about all these theories about just how unjust the criminal system was is that there was no established police in our modern sense. That starts only with the LSE Police Act in 1829, at least as the beginnings of national spread of such a system. It was that those who ran localities, some of them kindly, some of them just trying to keep order, some of them with a thorough distaste for the poachers and the poaching classes and all relating to them, were therefore involved in running this system and naturally they took different attitudes to their role. It's terribly easy to pick up the cases of bullying and just plain social dislike in all this, but that's what the Hay thesis is built upon.

There has been a contrary school of writing led by Professor John Langbein¹³, a formidable scholar, who takes a more adaptive view, if you like, of this system that it was made to work for the cases which today we have no difficulty in justifying, theft, a certain amount of personal violence but not a great deal, and he builds up this picture by tracing through caseloads in courts that were functioning quite substantially in all this, not just the Central Criminal Court, at the Old Bailey as it became where it had its own records; but cases in the countryside, around London in particular, and there was quite an influence in that work of people trying as anthropologists who thought you needed to get into the stream of life of the whole community and therefore criminal records were one way of importantly establishing what was going on at grass roots and that produces more modified theories. I chose to side with them.

126. Another reviewer, Jeffrey Hackney¹⁴, made an amusing comment saying that religion gets very little attention in the book. He muses that this may have been because you'd spent so long at the London School of Economics and he wondered whether a spell at Cambridge would restore the balance.

¹⁰ Law School, University of Lancaster. 1992. Sugarman D. Writing "Law and Society" histories. *The Modern Law Review*, 55:2, 292-308.

¹¹ Douzinas, C. Professor of Law, Birkbeck. Dr Warrington, Dept of Law University of Lancaster. 1992. Douzinas C & Warrington, R. *Revue de Droit de McGill*, 37, 947-960

¹² Douglas Hay, Professor of Law, Osgoode Hall Law School. For example: Hay, D., Linebaugh, P., Rule, J. G., Thompson, E. P. & Winslow, C. *Albion's Fatal Tree. Crime and Society in Eighteenth-Century England*. Allen Lane, London, 1975, 352pp.

¹³ John H. Langbein (1941-), Sterling Professor of Law and Legal History, Yale Law School.

¹⁴ Jeffrey Hackney, sometime Fellow and Tutor in Law at Wadham and St Edmund Hall, Oxford. 1991. Hackney, J. *Law Quarterly Review*, 107, 500-502.



Well, you must understand that we were fellow students at Wadham College, Oxford between 1960 and 1962. So, that is written with a certain smile on Jeffrey's face, but it makes a very definite point. The role of religion is a force which promoted the moral attitudes of the governing class and the rising layers of bourgeoisie as such, and there is so much historical writing about this, that somehow I tended to underplay it. There were the strange church courts which turned over to be the administrators of personal property in wills and whatever family relationship could be undone under the law before 1857 which introduced judicial divorce where church courts were directly involved, and of course there was church business as well and highly inflammatory some of that was by mid-19th century with Newman¹⁵ in there exciting Oxford to all sorts of positions that took a great deal of time to sort out.

So, in the later "Oxford History" on this period which six of us wrote together, and we'll come to that, we made a definite effort to put in two things which were not covered in "Law and Society". One was a more distinct description of religious morality which was reflected through ecclesiastical law and, to some extent, through other legal problems, because it was such a part of society and that is something which has faded since and continues to fade. Nevertheless, it is important.

The other was military law which was... Jeffrey didn't comment on but it should also have been part of his critique given the size and economic importance of the British Empire and its foremost role in international relations.

127. Professor Cornish, that brings us to the works which arguably you are most famous for and for which you've been described by Professor Bently¹⁶ in the preface to your festschrift which was written to celebrate your retirement from the Herchel Smith Chair here as the father of intellectual property teaching and scholarship in the UK. Of course I'm talking here about your textbook "*Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*", first published in 1981¹⁷, with successive iterations so that we are now currently in the eighth edition published in 2013. So, you kindly told us in a previous interview how you were urged by Professor Kahn-Freund¹⁸ to teach courses on intellectual property while still at the LSE. This was in the late sixties, but your textbook did not come out until 1981. I wondered if you could describe for us the main factors in driving you to compile this very important work.

What was lacking in any British literature about intellectual property in the 1960s was one book that could contain all that you can call intellectual property. It has major subdivisions and it was important then to put them into the title. There was a danger otherwise that readers would think it only covered industrial property, patents for inventions, trade marks and so forth, The field as a whole was very much the world of specialists doing a job to get these rights for clients or fighting off people who were asserting them against their clients because intellectual property is illusive stuff. The essential characteristic that binds the various parts of it - patents, copyright, trademarks, trade secrets, industrial designs

¹⁵ John Henry Newman (1801-1890), evangelical Oxford academic and priest in the Church of England, later created cardinal by Pope Leo XIII in recognition of his services to the cause of the Catholic Church.

¹⁶ Lionel Bently (b. 1964-), Herchel Smith Professor of Intellectual Property; Director of CIPIL, Cambridge

¹⁷ 1981, Cornish, W. R. 1st Ed. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*. 2013. Cornish, W.R., Llewelyn, D., & Aplin, T. 8th Edit, 945pp, Sweet & Maxwell.

¹⁸ Otto Kahn-Freund (1900-1979), Professor of Law, LSE 1951-64. Professor of Comparative Law, University of Oxford 1964-70. Goodhart Professor 1975-6.



adapted, plant variety rights and so forth. The essential characteristic is that the law gives those who have generated or adapted particular pieces of information the right to stop others, particularly their competitors in trade, from adopting that information as though it were their own, but even if they acknowledged that they were copying it from somewhere else, the rights still applied against them to some degree and it varies from the different types, through the different types.

It's not a law which imposes responsibilities on those who have the information to start with. You can have a trademark which is used on goods and there's something in them which suggests that it contains a particular ingredient when it doesn't. It's not chocolate. It's a substitute for chocolate, but chocolate is there in the trademark. So, it's not a law which imposes obligations on people who have the information in the first place. There have been suggestions because it's a subject that is always controversial and therefore is financially and so forth very significant to industries. There have been suggestions that it should also become a responsibility package and from time to time the European Union, which has got more and more involved in this field, likes to start thinking about how it should draw lines so as to make even the possessors of intellectual property behave more responsibly, but it doesn't happen very much.

So, what to say more about this? It took as long as that to write because I needed to get a sabbatical for a year in which I didn't do anything else. It was at that stage I was able to draw upon my link with the largest academic organisation in that field by far. This is the Max Planck Institute in Munich for what was essentially intellectual property then and it's not greatly changed since though its title is now a Max Planck Institute for Innovation and Competition¹⁹ which certainly brings a link with competition law in the sense of unfair trading practices. So, I didn't get that chance to go to the Max Planck Institute until 1978/79. We took our family then first to Australia and then to Munich and very, very beneficial that was, and I always kept my connection with the Max Planck Institute. I've been to many of their meetings and eventually I also became an external academic researcher there which is, I do say it myself, a considerable honour for a foreigner.

128. Yes, absolutely.

So, out of that came the book. In Britain, as I've already just remarked in passing, it was more sweeping in its scope than anything that there was on the bookshelves at that stage because that consisted of very large tomes on the different subjects; patents, registered designs, copyright, trademarks etc, all written for the specialist practitioners in this little known field and the aim was to provide teaching material in law schools and there is no doubt that this book, though the publishers didn't think they'd sell a copy, did catch on reasonably quickly. Within ten years there were many courses in British universities in this field and that was very gratifying, it really was. Other books began to appear that had a certain tendency to go round exactly the same course, of course, and there's now a huge literature of that type from which you can teach along with an increasingly hectoring and critical attitude to the very idea that for an invention, say, you can get an exclusive right to exploit in industrial terms for a term that's a maximum now of 20 years from the moment you

¹⁹ The institute was founded in Munich in 1966 as the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law. In 2002 its scope of research was extended to include core areas of antitrust law and tax law. In 2013, the institute was expanded to include innovation and entrepreneurship research. In 2014 the institute changed its name to Max Planck Institute for Innovation and Competition.
http://www.mpg.de/916499/immat_gueter_wettbewerb



file your application.

It's a system as a whole which is enormously complicated. The factor to stress, I think, this afternoon, is that all these rights were regarded as part of the economic policy of governments of states. So, the intellectual property law is confined geographically to the borders over which Courts had national jurisdiction. That has been added to in complication since from the 1970s the European EC and certain states associated with it, but not yet part of it, including the United Kingdom, each had their own national law and if, as often happened, an invention, say, was being used by someone else in a variety of countries around the world, not just Europe though Europe was often an entity in this game, you had to sue then in each country where infringement of the right was taking place and therefore in any planning to reform the law, a first question would be which of the major industrial countries have effectively the same law as ours, and of course the British had passed intellectual property rights on to all their colonies, so that was quite a starting point in these international discussions, but wider than that there were all sorts of links between countries because the international aspect is in reality so very important to leading traders. Not businesses just starting up, though they all hope to go down that track if they can keep the material coming in, and that's the life of publishers, for instance and their copyrights but... so it builds up. Private law systems in individual countries are what it's made up of but there's a great deal more and more of interlinking and harmonisation and the Americans have, of course, been one of the great promoters of this, but their law tends to be country specific for all sorts of historical reasons. In the 1980s, when they were thought they were losing badly in the battle for overseas revenues against the Japanese, for instance, they became determined to push developing countries, in particular, countries that the Americans could see in ten years' time would be essentially developed when it came to industrial production, maybe specific fields but far ahead of what they were in the 1970s, would need to be brought into a working complex, not at the level of whose right were you... which right were you enforcing but as an agreement over and above that and the Americans leading European industry and the Japanese managed to establish when the General Agreement on Tariffs and Trade was revised in the early 1990s, the measure that became the World Trade Organisation, and of the various sub-agreements which the WTO then ran, supervised, the Agreement on Trade-Related Intellectual Property known as TRIPS.

TRIPS generally required all members of the World Trade Organisation, and that's most countries in the world, 160 or something, to adopt intellectual property laws for their own territories which had high standards that you found in the industrialised countries, not some vague mention in very general terms of what might be possible which is never enforced, but something much more like what the American pharmaceutical and entertainment industries were demanding around the world because they said they were losing huge amounts of revenue coming into them, and that represented in many ways the high point of intellectual property worship which is found particularly strongly in American industries because they have so much to gain for it, if they can only make it work, and ever since... that was 20 years ago... ever since, the various countries involved from their highly different economic positions have been fighting over what TRIPS really requires and how much it changes things and what its future should be. Academics are particularly interested in this and have all sorts of theories.

The movement at the moment nevertheless seems to be backward from TRIPS because... how would one put it? TRIPS is an international agreement. It therefore moves



very slowly in any direction because all countries currently members have to agree to it and can put in a developing country perspective by joint action and so forth. So, people are now beginning to doubt whether TRIPS is the way forward and the Americans don't waste time on this sort of thing. They're constantly entering bilateral or small range international agreements with the territories they go around pointing out the sins that have taken place there despite all this stuff and are much more concerned to get these new approaches in smaller agreements into position and functioning and then use them as an example of what should happen elsewhere. So, all this is big business I can tell you, and it leads on to many different perspectives about where all this wondrous world should go. Exciting time. Not altogether optimistic, whatever some Americans may tell you and that had been the essence of capitalism for the future.

129. Well, actually, Professor Cornish, one of the reviewers mentions that you were critical, speaking of the Americans, of the US rule that patents are permissible for computer programs which produce the information and results and don't involve technical means and similarly biotechnology in the US Patents Office accepts patents that wouldn't pass muster in the European Patents Office. Is this still the case?

Yes. This is a reflection of the great American push to ensure that everything you could conceive of as intellectual property should be protected within the patent system, the copyright system, the trademark system, and Europe is much choosier about this. For instance, the copyright system first of all protects the works of authors, painters, composers, classical forms of art and expression. Laxer countries, which typically are from the common law tradition, are not so bothered by that. They don't, for instance, call for an intellectual contribution by the author for there to be copyright. Something laxer, that there has been writing and it's not copied from somewhere else and it's in some sense substantial enough to protect. So, there is this great division between the common law and the civil law attitudes to copyright and it reflects from the latter perspective a deep trust and belief in artistic creation as a high human endeavour and something we must protect from predia people who are likely to turn only to protection for pop tunes.

So that is going on all the time. One stream within it are those lawyers in particular who argue that it shouldn't any longer be a law for authors, because in real life, of course, the authors then assign their rights to management societies and so forth to get the revenue in, and that the author should be dropped out of the picture. That will be fought to the death by Germany and France leading most continental countries in the same tradition. Whether it is as strong as it was when I started in this game 50 years ago, is hard to say but I would say it's a bit less overblown than it was from this perspective because, in fact, so much of what is copyright is pretty low grade stuff. It's what you can make money out of. Eurovision stuff etc.

130. Another contentious point that is raised by Professor Enchelmaier²⁰ who reviewed your fifth edition is he says he comments on the relationship between the internet and copyright and quoting you he says it's the most inflamed issue in current intellectual property, and I wondered whether the Google case involving the right to be forgotten in the ECJ ruling²¹ is an example, a good example, of the different attitudes between the continent and the US cultures.

²⁰ Stefan Enchelmaier, Professor and Tutorial Fellow in Jurisprudence, Lincoln College Oxford. 2004, *Int. Rev. Intellectual Property & Competition Law*, 35(7), 872-876.

²¹ In Case C-131/12, <https://www.eff.org/deeplinks/2014/05/hidden-in-plain-sight>



It is but I don't think it has directly to do with intellectual property. It has to do with rights of privacy in their contest with the right of free expression. So, it's not giving a property right to someone who's written a book so that it can be exploited in the market.

It is there and it had been there in national laws long before the EU to allow people to say you're telling the world that I have convictions 15 years ago. They're exhausted. They're of no significance. I should have a right to have them removed from any public directory and in the EU case you're talking about concerning Google Spain, that's what the Court of Justice said the law was, but it's talking in terms of a right of privacy for the person about whom the information is being given, not about an author, for instance for commercial reasons and so you could certainly call it information law and some people are beginning to do that because information is used in ways in law that are very different from just the intellectual property but people may be most interested on the whole in the intellectual property because they make money out of it.

131. Well, actually it's a very interesting point you make, Professor Cornish, because in the preface to your *Intellectual Property*, you do mention that the ECJ has issued many rulings on copyright and related rights in which you detect a, what you call, "superficial reliance on human rights" and this was also mentioned by Professor McQueen²² in a review. Why do you think there's so much reliance on human rights rather than patent issues? Are they saying these are not patent issues?

Yes, they are rights which give people who object to their name being placed on a public record to have it removed, nothing more, if you like. So, it's not intellectual property.

132. I understand.

It's not giving them something they can then go out and commercialise. If they don't want the information out then they want the opposite. They want it removed. Think of European history over the last century and all the twists it got itself into. It's not surprising that a right of privacy is valued to a very considerable extent in countries like Germany - Stasi and so on. Most Americans wouldn't counter [*it*: LD] because they think anybody can get up and shout about anything and it's all good and that it will be censorship if somebody removes their murder conviction from their file etc. So, it's an aspect of the same sort of attitudes to knowledge. The Europeans [*accept there*: LD] must be limits, but they must be the right limits.

What can be said about the Americans? Of course you can publish anything about people unless you offend the law. There is the law of defamation, so don't tell lies, whether you know they're lies or not, but nothing further. Nothing if the person is giving out the truth.

133. Another interesting point that you made in the preface to *Intellectual Property* is that the EU is now the driving force for intellectual property rights in Europe. Apropos patents, you mentioned that Spain has instituted proceedings to test the competence of the council and the parliament between enact regulations that underpin.....

That case has just been decided²³.

²² Hector MacQueen, Professor of Private Law, University of Edinburgh. 2008, IP in review, *Jl. Intellectual Property Law & Practice*, 3 (10), 673-674.

²³ 5th May 2015, C-146/13 - Spain v Parliament and Council



134. I wanted to ask you about that.

The Spanish did not win. I won't begin to describe to you the complications that were written into this legislation to satisfy certain points of view, the most important of which was that the European Court of Justice, being a very general court, does not have specialists in it who would handle the technical side, necessarily, of patent law and these are mostly patent lawyers objecting, and a very tricky way was found by the European Commission's Presidents, the Poles, of putting, it is hoped by those people, an embargo on cases on positive patent law. Is this invention really an invention or was the idea obvious, for instance to the European Court of Justice? In my view it hangs most peculiarly from the lips of the British involved in this campaign since our cases at home go to the Supreme Court which couldn't be more general if it tried, and we have twelve judges or whatever it is there who can cover anything that's put before them but of course we assume that they're all so brilliant that it's not a problem; not necessarily a view shared by those people of the European Court of Justice.

135. Well, Professor Cornish, on the subject of court rulings, you also make what I thought was a very interesting point, again in your Preface - slightly cryptic comment. You say that there's evidence of sleight of hand in a measure designed to impose major limitations upon references to the ECJ concerning the interpretation of substantive patent law as distinct from general....

I would stick by sleight of hand. It's an extremely tricky piece of drafting which the Commission, the European Commission and others hope will achieve their objective, but it will at the end of the day depend on what the Court of Justice says about this. The Spanish have had a go at getting them to say this legislation makes no sense whatsoever. As I said earlier, I won't go into the technical reasons of why this argument can be made. The proposed European Community patent has been the subject of a treaty never implemented since 1975 and European politicians, European officers are heartily sick of the whole row about what it should say. That's why it's getting through to the stage of becoming legislation that is governing this new kind of patent, one which covers the whole of the geographic territories of the member states and there's some add-ons by bilateral treaty, the European Economic Agreement as well.

So, it's a big deal. Come back to IP people in five years' time and I'll tell you whether it's just a hopeless mess or something which can really be made to work.

136. Yes. Well, I suppose there's always this problem of fragmentation and one of the reviewers, Mr Schilling²⁴, actually reviewed two of your editions.

That's very nice of him. He's a former pupil of mine. Go on.

137. He remarks on the danger of the subject being in the hands of experts who only know about single segments and similar fragmentation has been alluded to by one of our eminent scholars, Professor Koskeniemi²⁵ in relation to international law. I suppose, Professor Cornish, that with the technical complexity in IPR it's inevitable.

It's not just that. It's the way in which those who know... as the review suggests,

²⁴ Keith Schilling, Senior Partner at Schillings. *Entertainment Law Review*, 15(4), 135. 2007. *European Intellectual Property Review* 29(12), 504.

²⁵ Martti Antero Koskeniemi (b. 1953). Professor of International Law and Director of the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki. Visiting Goodhart Professor of Legal Science (2008-09).



those who know about the law and its practical enforcement tend to become specialists within. They may be film lawyers. They may be biotechnical lawyers. They may be geneticists. They may just deal with trademarks which is relatively straightforward, but probably their practice will be very often restricted and these days you have firms with intellectual... firms of solicitors with intellectual property departments in which you will have specialists in each of these sub-disciplines, so in a way it's more integrated than it was and it was one of the objects of my book to make people see that an IP problem may be about a patent, a trademark, a copyright on some literature and so on and on so that you have, in the end, to be reasonably adept at spotting which rights relate to a particular case.

138. Yes, very interesting.

So, in a way it's integrating more than the old system where people were absolute specialists in one or other aspects and probably edited the book on that subject.

139. In your previous interview, you gave a very interesting account of your chairmanship of NAPAG²⁶ and all the wrangling between various institutions re technology transfer²⁷. Has that to some extent been resolved now by EU legislation?

Not really, I think. There are highly sensitive points about ownership of intellectual property when academic institutions are involved. In German patent law there is a right of the actual inventor. However much he owes all his duties to his employer, there is a right to a flow of revenue that comes from using his idea when it's been patented and this is a big part of German industry's interest in the patent system and in avoiding such cases. They arise in this country as well and millions may be involved.

One of the things that I have done for Cambridge University was to chair the committee which finally drew up a policy on the ownership of intellectual property rights within the university and I think a little led by me, with the right kind of other academics sitting on the committee, we eventually concluded that this question of ownership should be liberal in the sense that so far as it's practical and possible, the actual inventor, the actual author should be the person who first gets the rights and they can then deal with them including handing them over to the technology transfer office of the university.

Now, that's not a view that has been adopted by most vice-chancellors who are able to lead their academic councils into a solution to this. Their first aim was to get all the rights for the university on the basis that that's probably what the government would like them to do, and there's every variety of that around institutions in this country. The Germans, of course, will have produced model policies which are much more centrist. It's taken them quite a long time to get there because German professors individually are powerful people still. So, the solution to this won't be high on the EU's agenda. I can see it's just a minefield of problems.

140. So, Professor Cornish, in an area which is so fast moving and where you've updated your book every two or three years, looking into the future, what do you see as the main trends and areas opening up?

Well, there will be more regulation in the interests of copyright owners because, of course, it's been terribly difficult in many situations for them to adapt to a digital spread of

²⁶ Intellectual Property Working Party of the National Academies Policy Action Group

²⁷ See Q99



materials where the intermediate seller with another piece of hardware isn't there any longer for the ways in which you can use this material. So, that's going to be a very big copyright question. The regulation of copyright societies who collect revenue for authors because individuals collecting revenue for their song or whatever it is would be much too diffuse and wouldn't work, and that's boiling up again, mainly at the European level.

As far as patents are concerned, there has always been a problem about over-elaborate, over-difficult approaches to subject matter and as it gets bigger and bigger a field in genetics or biotechnology more generally, this is only increasing. Not much, I think, can be done about it and that is a world where in 1970 IBM said we don't need intellectual property rights, i.e. we are so much the leader of this whole field that we will always be ahead and we can keep our advice secret; lots of exploitation. Contracts given to people who buy their software work in exactly those terms. Everything is secret, but then there was a rebellion against that and we have free copyright licences and so forth which is a very interesting new development.

More generally, it is proving terribly difficult to draw a line between abstract information about what biotechnology achieves in the scientific sense, what you can pull apart and what you can put together again and all those techniques, and reaching the stage where the consequences of what you do has an external use. So, you find a bit of a chromosome or something where you can predict, for instance breast cancer, raising all sorts of problems about practicability of using that knowledge and all the associated moral problems that some people think should keep the patent system out of the whole area of human biology, but that's a more intermediate position that's being taken bit by bit round the world very slowly because except for a few lucky cases, there's not much money yet in microbiological exploitation. Unlike, of course, stuff on the internet which is there and being stolen.

141. Well, that brings us to the last book today, Professor Cornish, which is your monumental "Oxford History: The Laws of England 1820 to 1914"²⁸ and you mentioned in your previous interview that you'd given an undertaking to Professor Baker²⁹ to contribute to his Oxford History when you first arrived in Cambridge in 1990. It was published in 2010, so the implication is that it's been 20 years in the making. I wonder if you could tell us something about how you went about organising this huge project because it strikes me as much as writing and researching, a managerial project as well and I'd be very interested to know how you selected your contributors.

Well, of course it was a matter of give and take and one of the factors in that give and take was how much would anybody who became an author lose chances to write lesser stuff for what was the research exercise in the early days and has since become a framework. I lost one very good contributor through that, but beyond that it was a matter of personal appreciation of who had emerged as the leading, modern legal historians and then thereby hangs a tale of a kind about my firstborn "Law and society" book. There was so much that

²⁸ 2010, *The Oxford History of the Laws of England, 1820-1914*. Vol XI: English Legal System, Vol XII: Private Law, Vol XIII: Fields of Development. Cornish, W.R., Anderson, J. S., Cocks, R.C.J., Lobban, M. J. W., Polden, P., and Smith, K. J. M.

²⁹ See Q107. Professor Sir John Hamilton Baker (b. 1944-), Librarian, Squire Law Library 1971-1973, Professor of English Legal History University of Cambridge 1988-98, Emeritus Downing Professor of the Laws of England 1998-2011.



could have gone into that and didn't. Hackney pointed out religion; quite right. Although the book sold very few copies in the early years because nobody had courses on the subject and only gradually at the teaching level did it spread. I'd been able to do that at the LSE whilst I was still there and when I came to Cambridge we tried to do the same thing, but research on the other hand involving the modern history of a legal subject grew like crazy, just like with intellectual property, but only on the research side. So, these people, most of them trained as historians as well as lawyers, who were open to invitations to join in a big project like that and it couldn't have been done without my good collaborators, Stuart Anderson³⁰ from Otago, Michael Lobban³¹ from the LSE, Ray Cocks³² at Keele, Patrick Polden³³, a great expert on legal system and so much of the English court system and Keith Smith³⁴ on the criminal law in particular but did other bits in the book as well. So, together we pushed each other into a sort of position and we held regular meetings and discussed what can be discussed in those sorts of circumstances, but essentially it was left for each person to write his own chapter.

I had an oversight, and I had to do a bit of pushing to get people into roughly the same style but not seriously as far as starting points were concerned. These were all people who wanted the history to be expressed and stated, not people who wanted to use it as a tool for political criticism. The class structure and so forth determined everything - it didn't tell you much. So, we were thinking along... we knew we would all think along the same sorts of line because we'd already all written history of this kind in a period really of 20 years. Ray Cocks had some important perceptions about the Bar that was earlier and I, of course, had my book, but this was a phenomenon of the 1990s and the first decade of this century and it goes on at a pace. John Baker, amongst his many, many contributions to the whole of English legal history, started or not quite started, but promoted the biennial legal history conference, British Legal History Conference, and the number of people coming and wanting to present papers as is now are such that there have to be three streams over the large part of three or four days to fit everybody in.

142. Right. One of the reviews, as I recall, commented on just how little mismatch there was in interpretation, given such a large number of contributors, how consistent the....

Well, I would claim that that was kind of the initiatory discussion I had with everybody, brought them together, and it was clear that we just did adopt in all sorts of ways the same sorts of judgements about not being too typical, but to not be too obsessed by a position, trying to be straightforward and allowing other people to decide what to make of the material.

So, to take an example which I think is provided by one of the least fair of the critics of the first book. One hundred percent trade union law. There had been fine writing with much research behind it by Sidney and Beatrice Webb³⁵ and those who followed from them

³⁰ Stuart Anderson, Professor of Law University of Otago, Dean of the Faculty of Law (1993-1998, 1999-2001)

³¹ Michael Lobban, Professor of Legal History London School of Economics

³² Ray Cocks, Professor of Law, University of Keele, Modern Legal History and Property Law.

³³ Patrick Polden, Professor Emeritus, Brunel Law School, Brunel University, Law of Debt, Legal history; Legal practice; Religion and the law; Trusts and equity

³⁴ Keith Smith, Emeritus Professor of Law at Cardiff Law School, criminal law, legal history.

³⁵ Martha Beatrice (1858-1943) & Sidney James Webb, 1st Baron Passfield (1859-1947), socialists, social reformers - co-founders of the London School of Economics (1895).



like the Hammonds³⁶ which was judgmental at a time when they were trying to make a case for trade unions out of it and the history of movements of trying to do so. The first thing that modern history pointed out about that was the lack of success for so long and to be told that I was repeatedly disdainful of trade unions as a whole when I had been trying to write this long, hard history ending up with the Taff Vale case³⁷ against the unions striking and then the liberals of 1906 as Trade Union Act as their triumph and then what followed from that just has to be dismissed as rubbish.

143. Yes. I imagine, Professor Cornish, that you brought to bear on this work your considerable experience in writing the “Law and Society” and also your “Intellectual Property” because even though the timespan, I think it’s 90 years, it was of course hugely eventful in terms of political and social development and you had all this experience from these previous books that could feed into this project.

Of course it does help on decisions, first decisions over such things as how much general social history do I put in? How far to pick out the political figures who dominate discussion for a while and then disappear off and do something else? Was it the great names or was it people with obsessions who’d got parliamentary seats or what was it? Some of that has to go in, but you have to be circumspect or you will have ten volumes, not three.

144. Yes. Well, if I can just ask a few specific questions. In the Manifest, in volume 11, you make the point which I found very interesting that English law took very little notice of developments to the common law by colonial regimes and that this tendency increased as the 19th century wore on and I wondered why this was.

Well, first of all because the societies that Britain was establishing around the world so that it could boast that it owned a quarter of the people in a quarter of the territory by the time the empire was finished, these were primitive societies much preoccupied with keeping enough stability from violence, dealing with native populations as they saw fit for their little systems not to amount to much and whatever I might have said about it in the introduction, there’s plenty of evidence that the people who were sent out as judges, who weren’t fools, were very reliant on what their British legal sources told them. That’s the first authority they would turn to. They probably didn’t have many precedents on many subjects of their own. Add to that a somewhat disdainful attitude in the India Office and in the Colonial Office to any attempt to rise above this and become independent minded. That’s how they mostly behaved. There were wars. There was a judge in my state of South Australia who proclaimed that none of the other judges had been properly appointed by the Queen, so he was the only judge entitled to rule on precedents, but more importantly on statutes passed by the local legislature as they began to acquire some legislative power and he would hold acts of parliament, in these dependent colonies, to be invalid. He did it in relation to the famous foreign system for the title of lands and after that steps had to be taken. The big step was something called the Colonial Laws Validity Act of 1865 in which effectively the Colonial Office got power to overrule statutes which were thought to be completely beyond management, not used very much but that was a way of getting rid of the judge in South Australia.

³⁶ John Lawrence Hammond 1872-1949, historian and journalist, husband of Barbara Hammond 1873-1961, social historian.

³⁷ 1901, House of Lords decision upholding the Taff Vale Judgment, which ruled that a trade union could be sued and compelled to pay for damages inflicted by its officials. The dispute was between the Taff Vale Railway Co. and the Amalgamated Society of Railway Servants in south Wales.



145. Well, another point that you made in your Manifest was the legal fiction or pretence and you imply that this development was a 19th century phenomenon and I wondered if you could....

I don't think I meant to.

146. Perhaps I misinterpreted.

Legal fiction is a very large part of the development of the whole of the common law. X would be treated as Y because X gave a right. I'm sorry, Y gave a right and X did not. If anything, that was replaced by statutes which said plainly what the law was in relation to X without having to refer to Y and pretend that Y was X as well.

It's a type of procedure for legal change and any system that is insisting that the judges know the law, they don't make any of it up and so you answer it by creating a fiction, but on the whole that's gone from modern practice since you get these statutes which interminably define concepts themselves. That's an aspect of 19th century legal development certainly and Ray Cocks has a lot to say about it in the Oxford History volume 3... sorry, volume 13.

147. Right. Just as a final question about this work, much of what you describe, the legal evolution, was driven obviously by these massive social changes in 19th century England, industrialisation, and I wondered whether you think that eventually a similar kind of legal revamping would be necessary as we become increasingly immersed in the sort of pre to post digital age which has caused so much disruption to social, moral and political values?

Well, that's a very difficult generalisation, isn't it, because you have to take each case and say give it a quantity? Is this a really big change or not? In many ways, of course, life is just becoming more and more complicated as more and more bodies get legislative power to put their stamp on something and then in places like the Commission of the European Communities your whole future depends on your getting your piece of legislation through and that will be a triumph for the state you come from and all sorts of nastinesses go on, but in many ways the law is becoming so complicated already. The Companies Act has 700 sections, just to police companies, roughly speaking, we get them properly registered and a stupid companies office, I can tell you, don't record what you've just told them and you have to ring them up and tell them 20 times etc. Much of the driving force of new law that's really important is now European Community law and Brussels, no question, and it results from a process of infusion together of solutions from 28 member states already. By the time Turkey and Georgia have joined, who knows. So, I don't have any straightforward answer to your question. I don't think there will be big efforts to produce law at its most general level in a more coherent form such as happened in the continent with things like the Prussian Code of 1796 or in the common law with all the efforts to put it into a statutory form the work of the criminal law commissioners, who in two goes operated from 1834 to 1850. That's an awful lot of legislative planning, especially as the results were not great.

148. Well, Professor Cornish, before we conclude, I wonder if you could tell us something about your contribution to the law of restitution.

Yes, I'd be glad to though it hasn't been raised in any way, but I did teach it as a subject at the LSE from 1964, I think it was, until I left in 1990.

It was not recognised, the idea of restitution, otherwise known as the entitlement to



recompense for an unjust enrichment that you have given someone else, as one of those basic classifications in the legal systems, classifications I mean like tort, contract, public law, companies law and so forth. Until in a common law system the American restatement of the law of restitution appeared in 1937 written by two leading scholars, one of whom was a common lawyer and the other of whom was an equity master. That attempt to do it was very much divided along the lines of these legal sources, because in America in some states they had a very strong division with them still, just like the state in New South Wales, you understand. After the war one of the brightest young men coming out of Oxford then immediately became a tutor there was Robert Goff³⁸ and he decided to write the English law of restitution when no-one else had done it in that form. So, it is a new book as well, sort of on the same lines as the kind of work I was doing in other subjects, and I was lucky enough to be asked at the LSE very early on to teach it with him because he was in a big practice at the Bar by then, and that was a fascinating experience for me.

His book, “The Law of Restitution”, written with Professor Gareth Jones³⁹ of Cambridge, appeared in 1965 and I saw the original proofs of it. It seemed that most of the book was actually written on the proofs and I believe they didn’t get much by way of royalties on the first edition because there was a rule in Sweet and Maxwell practice that if you went over ten percent of corrections you started paying for them out of your royalties. So, that’s how they proceeded, both very busy men, and it was a pleasure to teach alongside Robert for a few years and then he had to give up and other teachers at the LSE were glad to join in because this was becoming yet another new subject that students wanted to come and study. Again, because it was new, it was met with considerable hostility from judges who didn’t know what it was and from lawyers who even less knew what it was and one mark of that was that it didn’t go through a second edition, despite all that was happening, for 15 years. Now, it’s done every five years or so, of course.

So, I wrote case notes on various things that came through even in that field but really it was a one day a week job for me. I got the notes out the night before, went through them and the classes were very lively seminars and that was great. The famous Professor Peter Birks⁴⁰ started teaching it. Of course, the London LLM could have teaching of the same subject in different colleges. From the late sixties as well, of course, he was adding his particular passionate concern for the subject which he took unto himself and that was very influential as well.

May I just mention the one serious bit of writing that I did do in restitution which was to give the first Azlan Shah Lecture⁴¹ in the University of Malaya in Kuala Lumpur because I was out there as an external examiner. Its title has become the larger Azlan Shah Lecture in Law and it’s been given since by all sorts of high legal personalities, many of them members of the House of Lords or now the Supreme Court but not entirely from Britain and so it really ranks. My contribution to it was to take a sort of private public law aspect of restitution which was to ask the question if a government or other public authority demands money from

³⁸ Robert Lionel Archibald Goff, Baron Goff of Chieveley, (1926-). Senior Law Lord.

³⁹ Gareth Jones, (1930-). Downing Professor of the Laws of England in Cambridge University, 1975-98.

⁴⁰ Peter Brian Herrenden Birks, (1941-2004). Regius Professor of Civil Law, Oxford, Fellow of All Souls College, Oxford (1989-2004).

⁴¹ Sultan Azlan Muhibbuddin Shah Ibni Almarhum Sultan Yussuf Izzuddin Shah Ghafarullahu-lah, (1928-2014), Lord President of the Malaysian Federal Court. Sultan Azlan Shah Law Lecture series was established in 1986 to honour his contribution to the development of Malaysian law and jurisprudence.



an individual and the individual gives into that demand and pays the money, but it turns out afterwards that the authority had no legal power given it by statute to extract the money in the first place, did they have to pay it back? This was rising in the eighties in case law in all sorts of places, but not least in local government in England. It became a real problem. There were old precedents which said everybody's expected to know the law, so if you make a payment, you must be taken to have known what the law was and you can't get it back for that reason; pretty sweeping.

The approach I took was that a mistake of law should be treated in the same way as a mistake of fact such as, oh, I paid a second time and I didn't mean to. In other words that there would have been an entitlement against public authorities who made demands in the same way as for the mistake of facts and in doing that I was being tougher on the local authorities so that even Peter Birks was prepared to be... he thought there should be... judges should have a discretionary power to say whether it would be too tough on the local authority if it had to pay the money back, to which my answer was, well, they can always pass a new statute, they've got taxing authorities, or they can get new statutes out of government departments, and Peter graciously agreed that that was the better approach in a private law subject. So, we had done this writing and not long after a local authority gets into trouble in England, the case goes to the House of Lords. Who is sitting there by that time? Lord Goff of Chieveley, our old friend, and he uses the opportunity to install this kind of solution in the common law, changing it, so it was all very gratifying.

149. What case was that, Professor Cornish?

I can't remember without looking it up.

150. I'll try and look it up.

Would you? It will be under mistake of law. There may have been more than one case. That's another reason why I hesitated and have to look it up⁴².

151. In the eighties?

No, in the nineties. Early nineties. If you have any difficulty, I'll look it up in my restitution book.

152. Professor Cornish, all that remains is for me to thank you, yet again, for another outstanding interview for which I'm extremely grateful. I know that it's going to be of great interest to our readers along with your second and your first interview, and I can only reiterate my thanks again. Thank you.

I've enjoyed it. Thank you.

⁴² Kleinwort Benson Ltd V Lincoln City [1999] 2 A.C. 349

