

Conversations with Emeritus Professor Christopher Forbes Forsyth

Part 2: Career Part 1

by

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This is an interview with the thirty-fifth entrant in the Eminent Scholars Archive. Christopher Forsyth was the Professor of Public Law and Private International Law (2005-16) and inaugural Sir David Williams Professor of Public Law (2016-17) at Robinson College. The interview was recorded at Professor Forsyth's home south of Royston.

Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.

Interviewer: Lesley Dingle. Her questions are in **bold type**.

Professor Forsyth's answers are in normal type.

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

31. Professor Forsyth, in the previous interview we reached the end of your time as senior lecturer at the University of Cape Town but before we move to your Cambridge days I wonder if I could ask you about your experience at the University of the Western Cape where you taught law. I You mentioned this in your 'Private International Law' book.

Yes. I have explained to you how that came about. I was at UCT and I was willing to teach at UWC on a part-time basis and so I was approached to teach jurisprudence and I've seldom taught jurisprudence although I have a very strong interest in it. So I was very happy to go out and teach jurisprudence at the University of the Western Cape and it opened my eyes a great deal to see a university like that operating. The formal language of the university at that stage was Afrikaans and the audience consisted in the main of people who in South African jargon are called 'coloured', people of mixed race. So I taught jurisprudence, a sort of a broad jurisprudential course starting with the Greeks and ending with Professor H.L.A. Hart. So it was a very broad-brush course and the only thing of note that I have mentioned is that I had two lectures on Marxism, and again this is in the somewhat fetid political atmosphere of South Africa, and I gave my one lecture on Marxism in which I pulled up the Marxist theories to show how persuasive it is and how valuable it is in explaining things that happen or how persuasive it is in explaining things that happen and when I finished the lecture the students, I'd always liked to think as a result of my lecture but in fact I'm sure they were quite unrelated, had a protest and burnt down the lecture theatre the day afterwards.

So I had to give my second lecture on Marxism in which I explained all its weaknesses in a different lecture theatre but that was the way it was there. I taught on a similar basis some years later at the University of Fort Hare and your life in the university was much disrupted by student protests of one kind or another which on the whole I was in sympathy with the student protests but it made for a lively time and perhaps if I can tell a story about the University of Fort Hare.

I arrived at the University of Fort Hare as a visiting lecturer teaching private international law, as it happens, to one student. They only had one student of private international law. This was in about 1982/1983 and I couldn't give my lecture because there

¹ Foreign & International Law Librarian, Squire Law Library, Cambridge University.



were armed men on every corner of the campus, the Ciskei police, and the students had protested and they'd been set a deadline that they had to return to lectures by a certain point otherwise they'd all be dismissed and they didn't return to lectures, and they were all dismissed and sent away from Fort Hare and some of the students were unhappy with this and I was one of the members of staff who was known to their lawyers which they had brought in from Cape Town. Ian Farlam² was one of them. He was a well known counsel in the Cape and I think afterwards a judge.

One of the issues was whether the students didn't go back to lectures because they were so scared by all the armed men on the campus and the rector of the university made an affidavit in the proceedings to say they were no armed men on the campus on that day and I then made an affidavit saying I was there on that day and there were, indeed, armed men on the campus and this all featured prominently in the litigation when they challenged their dismissal and they lost before the Ciskei courts, the judge saying at one point that he noticed the affidavit that I had made but he didn't accept it, he didn't believe it. So I was disbelieved under oath in the Ciskeian High Court but I see that rather as a badge of honour.

32. Was Ian Farlam acting for the students?

He was acting for the students, yes. I'm not sure how the challenge was funded at this stage but they could... or Ian Farlam might have been acting pro deo. It was a cause célèbre.

33. Yes, very interesting, thank you. So in 1982 to 1984 you completed your PhD, two years it took you, and I wonder why you chose the topic, 'The Appellate Division of the Supreme Court of South Africa from 1950'?

It's a reflection of what I was interested in at that time and I turned to law after having tried most other things. I turned to law with a sort of naive understanding that one might achieve justice through the law and essentially this narrows down to a question of how did the judiciary perform? Did the judiciary perform well in the circumstances or did it perform badly and my thesis was really an attempt to do that. Judges at that time had a sort of very simplistic or almost vulgar approach to jurisprudence in that they thought law was the command of the sovereign and you had no choice but to obey what the sovereign commanded and the counter view was that led by another interviewee in the series, I think, Professor John Dugard³, who took the view that the law was seldom so certain that the answer to a particular question was compelled, had to be reached and therefore the judges had a judicial choice in many, many cases and they should make the choice that favoured human rights and personal liberty and so forth and they'd failed to do that and they were therefore open to similar condemnation as that to which the executive was subject. I wanted to explore that, not so much from a jurisprudential point of view or an empirical point of view but just to see whether it was right to criticise the judiciary on that ground and I duly churned out my thesis which I thoroughly enjoyed doing.

Colin Turpin⁴ was my supervisor and he was a very gentle, perceptive man and made many great improvements to my thesis and I came to the conclusion, justified by a detailed analysis of all the leading cases, that the judges had often had in law a choice. They weren't

² Ian Farlam SC (b.1939-), retired South African judge, Cape Provincial Division of the High Court (2000-09), Chaired commission of inquiry into the Marikana killings.

³ Christopher John Robert Dugard, (b. 1936-), Professor of Public International Law, University of Leiden (1998-). Professor of Law, University of Witwatersrand (1975-1990), Goodhart Professor, Cambridge (1995-96).

⁴ Colin C. Turpin, (1928-2019), Emeritus Reader in Public Law, University of Cambridge, (1992-95), Clare College.



in law bound to decide the way that they did and in making those choices they very often made a choice that favoured the executive rather than liberty; liberty, liberal principles that were to be found in the Roman-Dutch law. So that was quite a condemnatory conclusion that I reached and why the thesis when it was published was called ‘In Danger for Their Talents,’ the general idea that they could have done better.

To give an example, the lives of many people in South Africa were ruined through the operation...So I analysed the decided cases in the appellate division very closely and showed that there were some in which the courts had very little choice and there were others in which they had a wide choice. So you could assess how they had performed and on the whole I came to the conclusion that they’d not performed well.

34. Your research for this would have been conducted in of course the Old Schools where the library was situated, and at that point Clive Parry⁵ had died in 1982 and Keith McVeigh⁶ had taken over in 1983. Do you recall any of these two gentlemen?

I don’t really know Clive Parry. I knew who he was of course but I didn’t know him personally. I knew Keith McVeigh in the old Squire, he was one of the characters, and with Kurt Lipstein of course always to be found in the Squire Law Library which had quite a distinctive smell to it of sort of old musty books and polished linoleum, always make me think of the Squire Law Library and I spent many, many hours working there. The path of the research student is often a lonely one so it was always nice to gather with other research students and I was blessed by the fact that I was a student in Caius. I was a member of Caius at the time so one could just pop across the road to the MCR in Caius to have a cup of coffee or whatever. It was quite a sort of social edge to life in the Squire.

I remember Keith McVeigh helping me obtain what was the first report I read on Lexis. You had to go and talk to the librarian about it before you could log onto Lexis and you logged on through a telephone modem and eventually the report may be printed out in an unconventional format but how the world has changed since that.

35. Your thesis was published by Juta in 1985 and we’ll visit this in your next interview when we come to talk about your scholarly work. From 1983 to the present you’ve been at Cambridge and from 1983 to 2002 you were Director of Studies, Fellow in Law at Robinson College. What were your duties as Director of Studies?

Nothing exceptional about my duties as Director of Studies. One had to participate in the interviewing of candidates and the decision-making on which candidates to admit or not to admit and I took that quite conscientiously because you’re really changing the lives of people who one admits or which one doesn’t admit. So I did that, I think, quite diligently and then I had to teach, to supervise the young and I taught, supervised in five subjects, doing about 17 hours a week, which is a much broader range than would be commonplace these days, and as a teaching fellow I had to do a fair bit of teaching but I did more teaching than I was required to do chiefly because I came to enjoy it.

I like to see the students’ faces light up when they see, when they understand a point and so I liked teaching particularly in supervisions although I never had an undergraduate supervision myself in Cambridge because I was never an undergraduate in Cambridge. So I have no experience of it from the receiving end. I hope my supervisions which have been made up entirely by me are up to standard but I think they were. That’s what I did as Director of Studies and I taught and I directed studies and of course I’ve left out a major duty

⁵ Clive Parry, (1917-1982), Professor of International Law (1969-82).

⁶ Keith J. A. McVeigh, (b. 1948-), Librarian, Squire Law Library (1983-96), Hughes Hall.



of the Director of Studies to arrange the supervisions for his or her students and I always found colleagues very helpful and the Law Faculty is different from other parts of the university where they wage great battles over who is prepared to supervise and who isn't. Most people in the Law Faculty were very helpful and friends with me.

36. So you were associated with the college right from its beginnings.

Pretty close to its beginnings. I was elected a Fellow in, I think, 1983 and I was [elected praelector for which supposedly because I would have been able to handle the latter and I was praelector in the first occasion that Robinson presented a full tranche of over a hundred students to general admission to get their degrees. That was in '83. I think these students would have been admitted in '79 or '80.

37. Apropos your fellowship do you recall a tenure at Robinson of one of our recent Goodhart interviewees, the late Sir John Laws⁷....

Of course I do.

38. who was made Honorary Fellow in '92.

I recall John Laws as a friend rather than necessarily a Goodhart Professor. I was fortunate when I was using one of my sabbaticals to qualify for the Bar to be John Laws's pupil and I had a most exciting time. As his pupil I would rush around behind him as went through the courts. He was Treasury Devil at the time which is a noble office to... the Treasury Devil is employed by the government to defend it in court and this means essentially in judicial reviews and I would dig out the authorities for John where I'd draft him things which he didn't necessarily agree with. We attended numerous conferences with its civil servants to discuss their legal problems and it gave me an insight, an invaluable insight into the operation of judicial review and the operation of government litigation as a whole to be able to sense when government is fighting a point on tactical grounds or when they're fighting a point on strategic grounds.

It's rather different from ordinary litigants who just have their own interests in mind, that the government always has a broader public interest to consider, and so that introduced me to judicial review in a way that I hadn't previously experienced and it also introduced me to John Laws who was a most remarkable man, ebullient and witty and really brilliant. When you were discussing a point of law with him he had a successful barrister's knack of being able to pick from a whole range of different issues and arguments and things that have been put forward, the one crucial one and rely on it, and if you would argue with him over a point of law and you made a certain point, say, and then say, "This must be right because of X," he would say, "Well, that may be so but if you consider X more carefully you will see that it in fact supports the opposite proposition."

So he'd twist your words in that way, in a very persuasive way and which is why he was such a brilliant advocate and probably one of the best advocates at the Bar, almost certainly one of the best advocates at the Bar. Then he went on to the Bench and was a very successful judge, although sadly he never made it to the Supreme Court. I don't have any private knowledge or anything like that as to why he wasn't elected to the Supreme Court. He came close quite often but I think the body that elects Supreme Court judges possibly found him too colourful, not a safe pair of hands if you knew he might go off, he might follow some brilliant idea rather further than grey people would like. So he never made it to

⁷ Sir John Grant McKenzie Laws, (1945- 2020), The Rt Hon. Lord Justice Laws, a Lord Justice of Appeal (1999-2012).



the Supreme Court and I think he was very disappointed by that but he was always interested in academic life which is probably why he agreed to let me be his pupil because I'd take a more academic approach to things.

He was always interested in the academic life. He'd been at Oxford and read Greats and he put his hat in the ring for an All Souls Fellowship and was disappointed when he didn't get it. He might have had an academic career if All Souls had elected him to a prize fellowship, might have had an academic career and not a judicial career, but as it was he had a judicial career. I don't think this is confidential but I in fact proposed his election to the Goodhart chair. I was on the committee at the time and I proposed him and I nominated him and Lord Judge⁸ who was on the committee spoke out very strongly in favour of John Laws as well, so he became Goodhart chair.

39. And was held in very high esteem and affection by everyone during his tenure.

Yes, indeed. He was already a Fellow of Robinson because again that was my doing. I'd proposed him as an honorary Fellow when I returned from the Bar and he was elected to a fellowship at Robinson's, years before he was Goodhart Professor and of course as a Goodhart Professor he would probably have been elected to a fellowship with a bigger, more prestigious college perhaps but in fact he was very loyal to Robinson and insisted that he was going to stay at Robinson. So he became a stalwart of what is called 'Wednesday night supper' when fellows of Robinson would gather for an informal supper in the SCR and John really revelled in that because it wasn't talking shop about how the college should be run but it was talking about more political or intellectual matters and the debate would often be quite rumbustious and lively and he became a stalwart of that and was always to be found in Wednesday night suppers. Then of course there was the great tragedy of the death of his wife, Sophie during the course of his tenure as Goodhart Professor. It seems so incredibly unfair that she should be taken from him in that way.

They have a daughter called Margaret Grace who loved her father very deeply and she was very upset by both deaths. As inevitably as is the case when someone dies like that before their time, it's a huge tragedy but one that the college felt very keenly because he'd come to be part of the college and was always to be found at feasts and formal dinners and things like that.

40. What a lovely account, thank you very much. You were a university lecturer in law from 1988 to 2000 and at that time the Faculty was still in the Old Schools, so do you have any memories of the colourful but cramped quarters that you would have occupied in the Old Schools?

Yes, one didn't have any quarters at all if one... as a student I would sit in one of the readings rooms and as a don I would go into the Squire much more frequently than I do these days, the reason being of course that you didn't have electronic resources. If you were going to do serious work you would need to have access to a law library and you would have to be in the law library physically in order to do that. So I spent a lot of time in the little rooms that were off the main hall of the Squire Law Library. Up on the first floor had a whole series of little rooms off it and again you would find Kurt Lipstein⁹ and Bill Wade¹⁰ and me, and Kurt had his own little room and Bill had his own little room and afterwards it became the room

⁸ Igor Judge, Baron Judge, PC, (b.1941-), Lord Chief Justice of England and Wales, the head of the judiciary (2008-13).

⁹ Kurt Lipstein, (1909-2006), Professor of Comparative Law (1973-76).

¹⁰ Sir Henry William Rawson Wade, (1918-2004), Professor of English Law, University of Oxford (1961-1976), Rouse Ball Professor of English Law, Cambridge (1978- 82).



that Bill and I used as we worked together on administrative law.

41. When the move was made in 1995 did you have any involvement in the administration or the organisation?

No, I didn't. I attended various faculty discussion mornings and I remember one in particular when Norman Foster¹¹ came to introduce his design for the Law Faculty to the Faculty and a meeting of the Faculty took place in the Senior Parlour at Caius, one of their larger public rooms, and Norman Foster explained his design, great big pictures of what it would look like and so forth and so on and some member of the Faculty, I can't remember which it was, raised the issue of noise and the prospect that noise might filter through into the supposedly quiet reading areas of the Squire Law Library and Norman Foster said, no, he knew what he was doing, noise was not going to be a problem because it would all have died down before it reached the quiet areas.

There were several members of the Faculty making a note of this, this representation that induced the contract because of course that afterwards became a great controversy as to who would pay for what we called in the Faculty "remedial action", to build the glass wall that now ensures that the noise from the vestibule of the Squire Law Library doesn't intrude into the quiet areas of the library. That was known as the "remedial works" amongst the members of the Faculty and then as "specification enhancements" by Foster.

42. Did the Faculty have to pay?

We were all sworn to secrecy and we're not supposed to tell a word but I think it's enough to say that the Faculty didn't pay.

43. Very interesting. So what subjects did you teach during this time?

I supervised Roman law, administrative law, conflict of laws, constitutional law. Those were the subjects I supervised at that time but I was trying to shed my subjects. As far as university lectures were concerned I started off by teaching in the public law seminar course and the conflict of laws LLM course. No, sorry, those were both LLM courses, the public law LLM course and the conflict of law course for the LLM as well, and then I slowly got into teaching admin law. I think I taught admin law and lectured in admin law for something like 25 years all told and it became my mainstay but I always taught Roman law because I enjoyed Roman law and I also taught the public law seminar on the LLB or on the BA law, on the undergraduate degree.

I don't think I taught anything else, nothing else occurs to me as I'm sitting here. We had an interesting experiment with Duke University. I'd participated in that where we had a joint course with Duke University and the courses had the same syllabus but different assessment. We assessed them in the normal way and the Duke students weren't students of Cambridge and the Cambridge students weren't students of Duke and this was done by an early kind of Zoom video call, video conference between us and Duke in North Carolina and it wasn't a sort of startling success, I don't think. The students seemed reasonably happy with it but because it was supposed to be a mixture of US and UK law I think one got to the situation where it wasn't very advanced US law and it wasn't very advanced UK law. So that was an interesting experiment that I was involved with.

44. So during this time, 1989 to 1995, you became the university representative on the Cambridgeshire Police Authority and I wonder if you could tell us something about this

¹¹ Sir Norman Robert Foster, Baron Foster of Thames Bank, (1935-), architect.



and your personal interest in police matters?

I was interested in the constitutional status of the police because of course it's something that I had knocked my head against in the situation in South Africa: how do you ensure that the police are within the law, and then in Cambridge, the University of Cambridge through the proctors had long been involved, for centuries had been involved with the policing of Cambridgeshire and there were I think in total the two proctors, two proctors in office and then two other members of the university were appointed by the university to the Cambridgeshire Police Authority and they were statute-specific, statutorily powerful right until the 1964 Police Act and so I was quite interested in this and David Williams¹² was actually one of the representatives on the Cambridgeshire Policy Authority and he suggested that perhaps I might want to become a university representative and I said "Yes" and so I agreed to do it.

I was first of all a university representative and then when I became proctor I became a member of the police authority as a proctor *ex officio* and then I was abolished for the first time. That is when Michael Howard¹³ as Home Secretary introduced legislation that removed anomalies such as university representatives and repeals relevant parts of the Police Act but established in its stead a system of what was called "independent members" that were appointed by the Home Secretary or actually appointed by the police authority subject to approval of the Home Secretary and so I cast my hat in the ring and I duly became an independent member of the Cambridgeshire Police Authority, which was fine.

I'll talk a bit later about what sort of work I did in the police authority but I served as an independent member and I was renewed once as an independent member but then... was I renewed once? When I came up for renewal the second time David Blunkett¹⁴ was Home Secretary and he refused to approve my appointment. The police authority wanted to keep me but the Home Secretary refused to approve my appointment. I think I was just a pale male Oxbridge man and he thought the time has come for somebody else, a more diverse person to be there so I was not renewed. So I have the distinction of having been abolished from the police authority both by a Conservative government and by a Labour government.

That's when I ceased to be a member of the authority and I always have wanted to do other things as well and that's when I began to think of throwing my hat in the ring as a Recorder, sitting as a judge, but perhaps I should tell you about my work on the police authority. I think the police authority, which consisted in those days of a mixture of magistrates and county councillors and then the university representatives the... I think I benefited from the fact that I was politically completely impartial and they knew that I was politically completely impartial and so I found myself doing all kinds of jobs which might have been done by other members of the authority but which they were too politically divided to do it easily.

So I chaired several appointments committees for the appointments of chief constables and assistant deputy chief constables and I ran for many years the lay visitor scheme, which is a scheme whereby good citizens appointed by the police authority have the right to turn up at any police station at any time to say they've come on a visit and they go and ask the prisoners whether they've got any complaints, whether they've been well treated and so forth or questions of that kind, to serve as a guarantee that there's been no abuse or oppression in police stations and so I did that for many years.

I thought it was quite a useful thing to do and then I also chaired several disciplinary

¹² Sir David Glyndwr Tudor Williams, (1930-2009), Rouse Ball Professor of English Law (1983-92), President of Wolfson College (1980-92), Vice-Chancellor, Cambridge University (1989-96).

¹³ Michael Howard, Baron Howard of Lympne CH PC QC (b.1941-), Home Secretary (1993-97).

¹⁴ David Blunkett, Baron Blunkett, PC (b.1947-), Home Secretary (2001-04).



hearings, held against assistant chief constables and so forth and there again I think I may say I was completely impartial. I tried very hard to be impartial at any rate and they seemed to go quite well. One particular case that I remember was the case of a policeman who arrested a woman on the streets of Cambridge and raped her, which is obviously a dreadful crime. She complained and an investigation was launched and the miscreant was identified and charged and convicted and sentenced to, I think, 16 years in total.

The police authority removed his pension as they were entitled to do and I chaired the committee that decided that he was going to lose his pension and this was fought by him saying it was contrary to natural justice and various other things and when we didn't listen with favour on his representations he took us on appeal to the crown court and I went up to the appeal hearing in the crown court in Leeds where they were holding it for some reason and appeared in front of... it was in fact a high court judge, I can't remember which one, in the crown court to give evidence as to why this policeman had had his pension removed.

I'm pleased to say the appeal was rejected and he then went to Europe and lost in Europe as well, so his pension was removed. So this kept me busy and I enjoyed the work in the police authority and was sorry when I was not approved by David Blunkett, but that led me on to become a judge myself.

45. Right, which we will come to. You were a member of the Law Faculty Board on two occasions, '94 to '97 and '99 and 2003. Can you say anything about this?

There were innumerable things that we dealt with and none of them spring to mind. I was on the board when... I don't know how much of this is confidential but we had a change of chairman, if you remember, when one chairman was forced out, that I think would have been the biggest event here in my time on the Faculty Board.

Yes, very traumatic but the reasons seemed to be clear at the time. We moved into the new building and we dealt endlessly with the deficiencies in the building. It was John Tiley¹⁵ of course who oversaw the change from one building to the other and then John Spencer¹⁶ who then had to make the building work and innumerable problems with the ventilation and the plumbing and more particularly the construction of the remedial works to make the library workable. So I was in all those things but I hope I played a constructive part.

46. In your CV you mention that in 1993 you convened a one-day conference on the Law Commission's working paper on judicial review.

Yes, that's quite interesting. In some ways it was a conference not about the Law Commission's working paper on judicial review but on other matters altogether but it was the decision of M which is a case about a man who'd applied as an asylum seeker and had been turned down and the date of M must have been 1990 or something like that so it shows how long these difficulties over immigration and asylum seekers has been with us. Anyway, M was turned down. He came originally from Zaire and he was ordered to be removed to Zaire. He was on his way to Heathrow Airport to fly out when he changed his lawyers and these new lawyers brought an urgent judicial review saying he must be stopped, must not be removed, and the judge hearing this urgent judicial review said, "I can't possibly decide this matter that just comes before me suddenly this afternoon." He says to counsel for the Home Secretary, "Would you prepared to undertake that M would not be removed until I've had my chance to go into these papers thoroughly and make up my mind?" Counsel for the Home

¹⁵ John Tiley, (1941-2013), Professor of the Law of Taxation (1990-2008), Queens' College Cambridge.

¹⁶ John Rason Spencer, (b.1946-), Professor Emeritus of Law 1995- President of the European Criminal Law Association (UK), Selwyn College.



Secretary said, “Yes, of course.” M would not be removed, gave that undertaking, and in fact M was removed to Zaire, flew out via Paris that evening and M’s lawyers of course were incandescent and the judge was then asked to make an order for the return of M, mandatory interim injunction that M be returned made against the Home Secretary.

I had just stopped being John Laws’s pupil at the time but I think I was in court for the one day, saw some of it. John Laws of course was the Treasury Devil, was acting for the Home Secretary and he persuaded the Home Secretary that in fact you could not make a coercive order such as an interim injunction against a minister of the crown because they partook of the immunity from legal process of the crown and this is what John Laws persuaded the judge. Consequently the judge discharged the injunction and M stayed in Zaire and his subsequent fate is unknown.

47. Fascinating.

So that was the case of M. How did we get onto that, how did we get onto M?

48. This was your Law Commission working paper.

Yes, and M was on its way to the House of Lords and this Law Commission working paper came out which obviously dealt with similar subjects to those dealt with in M but I convened this conference and had I think at least three Law Lords there. One that I remember in particular is Harry Woolf¹⁷, Sir Henry Brooke¹⁸ but he was only Court of Appeal, but there was quite a galaxy of judges there all together and Sir William Wade¹⁹ was given the opportunity to address the conference on why M was wrong and this was the general view at the conference and when it got off I can even remember seeing Bill Wade sitting next to Harry Woolf explaining to Harry Woolf what had gone wrong in M and how it was incompatible with the law to have a minister of the crown not being subject to judicial review.

When the matter got to the House of Lords M was rejected and it was established that an interim mandatory injunction will lie against a minister and he could be found guilty of contempt and theoretically even imprisoned for failure to obey a court order. So that was the M case and the story that lies behind that conference on judicial review²⁰.

49. Very interesting. You initiated and organised two further conferences during your time as lecturer, both on public law, constitutional reform in the UK and judicial review, both of which were published by Hart.

Yes. The first conference, the one on constitutional reform was in 1999, I think. It was just after the Labour government had come in and they obviously had a programme of constitutional reform, the Human Rights Act being perhaps the most prominent element, and so we put on this conference as a way of looking critically at these plans for constitutional reform and I think it was a very successful conference. It certainly had an impact upon the constitutional deliberations subsequently, but I remember particularly it was also the occasion of Bill Wade’s 80th birthday and we presented to him a Festschrift called ‘The Golden

¹⁷ Harry Kenneth Woolf, Baron Woolf of Barnes, PC, FBA (b.1933-), was Master of the Rolls (1996-2000), Lord Chief Justice of England and Wales (2000-05).

¹⁸ Sir Henry Brooke CMG, (1936-2018), Lord Justice of Appeal (1996), vice-president of the Civil Division, Court of Appeal of England and Wales (2003-06).

¹⁹ Sir Henry William Rawson Wade, (1918-2004), Professor of English Law, University of Oxford (1961- 76), Rouse Ball Professor of English Law (1978-82).

²⁰ 2017. “*M v The Home Office* [1992]: Ministers and Injunctions”, in *Landmark Cases in Public Law* (eds) Satvinder Juss, Maurice Sunkin, Hart.



Metwand and the Crooked Cord'²¹ or 'The Crooked Cord and the Golden Metwand', really about the role of the rule of law in judicial review and it was published by Oxford and it's been quite an important book too, I think. So that's what I did with that conference.

The subsequent conference on judicial review, 'Judicial Review and the Constitution'²² by Hart is a book that I edited although I contributed a couple of chapters to it as well, and it's essentially about the great debate over the juristic basis of judicial review. I hold into the view that the basis of judicial review is essentially the *ultra vires* doctrine that the law lays down the limits to the powers of the individual civil servant or minister and judicial review is just the process whereby you see whether those powers have been properly lawfully exercised or not. This has been a great cause of debate between those who favour the *ultra vires* doctrine in one or other of its forms and those who would rather say that it's the common law that justifies judicial review. That debate still rages on. Really it's myself and Mark Elliott²³ versus Paul Craig²⁴ mostly.

Anyway, we had a small conference on the juristic basis of judicial review. It was held in St John's where these things were thrashed out and no great conclusion was reached but it was published as a book and it's a book that collects all the relevant articles together so if your lecturer says to you, 'In the constitutional course next week we're going to talk about judicial review and its juristic basis,' you can just take this one book and go away and find all the relevant articles in one place. So it's done quite well, it's a very successful book.

50. Thank you. During this time you also visited Ukraine, this was 1998, as part of a Foreign Office funded party to a workshop on administrative law and I wonder what you learnt about the differences between the UK and Ukrainian views on the subject bearing in mind that at that time it had only been independent of the Russian Empire since 1991?

Yes. I went to do the workshop on administrative law and spent... I think it was in total about ten days in Ukraine. It wasn't the kind of workshop where you could really get to grips with issues because of the difficulties over language. Everything was done with a simultaneous translation but I never find simultaneous translation anything like as good as actually the ability to communicate through using a common language, but I spent many hours listening to learned papers and delivering some comments and papers of my own with a whole team. There were, I think, six of us had been sent out by the Foreign Office all together.

I wish I could tell you that I foresaw in my experience of Ukraine what's happened subsequently but I'm afraid I didn't. It was a strange sense, one of the most obvious things we were aware of is that there was the division between Russian-speaking and Ukrainian-speaking elements of the population and some of the Ukrainian lawyers had been influenced not, it seemed, by Russian law but by French law of all things. They had lots of French ideas about how their administrative law should be developed, but it was right at the beginning of their life as a state and they had a long way to go before they had anything really comprehensive or working properly, but I was impressed by their dedication to want to become part of the Western world rather than the Eastern world.

²¹ 1998. Ed. Forsyth & I Hare. *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade*, OUP.

²² 2000. Ed Forsyth. *Judicial Review and the Constitution*, Hart. Proceedings, conference on the Foundations of Judicial Review, Cambridge, 1999.

²³ Mark Elliott, Professor of Public Law, Legal Adviser to the House of Lords Select Committee on the Constitution (2015-19).

²⁴ Paul Philip Craig, FBA (b.1951-), Professor of English Law of Oxford (1998-2019).



So they argued strongly in favour of the kind of thing that I was talking about in my papers, except for the ones who had been to a university in France or whatever and didn't think that there should be anything less than a pure French system of administrative law, wasn't really on.

It was interesting to be in Ukraine at that time. There was a sense of everything was fluid and practically anything could change and obviously some of the people, particularly in the government of Ukraine, that we met were really quite keen to establish themselves in the Western sphere to escape the call of Russia.

One thing that was clear to me, and I think it's completely non-controversial, is that Ukraine and Russia have been linked together historically for hundreds of years and Russian culture and the Russian church and so forth seems to have started in the Ukraine and then spread to Moscow and St Petersburg, so they are rivals that have been linked together for hundreds of years. We must now wait and see what happens.

51. Indeed. You also went to Malawi in 1998 as an adviser on the planned constitutional reform.

Yes. That was something that I greatly enjoyed doing altogether and I don't want to make this too much of an advertisement about the things that I did but I suppose it is as it is. When they reached independence or rather Malawi underwent a process of constitutional reform in the early 1990s when they'd eventually managed to get rid of Hastings Banda²⁵ who had led Malawi since independence, they had a conference and they threw together a constitution largely based on the South African constitution that just wouldn't work. It was thrown together and illogical in a thousand and one different ways and the choice fell upon me to go out as... I was 'technical adviser' to the Law Commission is my title and we went through the Malawian constitution section by section and there were about 200 sections in the constitution.

The Law Commission was very diverse. It didn't have only lawyers on it, it had lots of representatives of civic society and so forth on it and so we had these endless meetings going through the constitution article by article. Then, when the endless sessions ended, I would go off and draft the necessary changes that would need to be made in accordance with our recommendations. The first item of business the next day would be to see what I've come up with overnight was in fact what we had agreed the day before. So under the Law Commission I had two trips to Malawi and what was quite nice, I got to know most of the judges and of course there were lots of judges on the Law Commission. It was a rather large and unwieldy body, in addition to the non-lawyers.

I'd never been to Malawi before, but I became quite fascinated by Malawi and I eventually produced a report of the Law Commission on the constitution with two draft bills essentially establishing what needed to be done to make the constitution work better and I think that's the most influential part of what I did in Malawi, or perhaps not, because every time the president of Malawi is elected I like to think that I had a hand in it because I thought up the way in which it's determined when the election has to be and how it is to be conducted but that was only part of my work for Malawi and that was all funded by the EU. They paid for me to go out but subsequently the Malawian government paid for me to go out which I'm really rather proud of because it meant that they wanted my advice. It wasn't being foisted on them through an aid agency or something similar and I did quite a lot of advice for the Malawian government and I wrote, with the assistance of the Solicitor General, a man called

²⁵ Hastings Kamuzu Banda, (?1898-1997), Prime Minister and later president of Nyasaland/Malawi from (1964-94).



Steve Matenje²⁶, who afterwards was ambassador to the United States.

He wrote a book on administrative law for public servants based upon the English publication 'The Judge Over Your Shoulder' and this was the first textbook to be written in Malawi and published in Malawi. It must have come out in about 19... no, probably 2001/2002, something like that, which is something that I enjoyed. I'm a firm believer in the best way of reforming administrative law is to teach your civil servants the principles of good decision-making. This is a song that I have sung on many occasions and I sang it in Malawi from time to time, and as a result of that the Malawi Government arranged for me to go out on three or four occasions to conduct courses on law and the civil servant, judicial review and the civil servant.

It was sort of an annual event. All the permanent secretaries in their departments would gather together in a resort down beside Lake Malawi and I would go and conduct this course on administrative law for civil servants and they asked me to do it three times which was quite a compliment, I thought. Then there was a change of government in Malawi and they decided that the president's brother should be their constitutional adviser and I haven't been to Malawi since. I'd like to go to Malawi again but I haven't been to Malawi since.

52. What a fascinating experience you've had.

Yes.

53. Was it also during this period that you prepared a report to the select Committee on Standards and Privileges, 13th report, following your evidence to the Committee on Standards and Privileges to advise on the reform of their procedures following the Hamilton case?

Yes, I'm afraid it's an example of nepotism. My friend Nigel Fleming²⁷, a prominent barrister, Nigel Fleming QC, was counsel to the inquiry that looked into the Hamilton affair and he suggested that I should give evidence and write the subsequent account of what should have happened, and I did so. There's nothing very startling about the conclusions I reached and mine was not the only voice calling for a fairer procedure, but not finding necessarily that Neil Hamilton had an unblemished record. So I was pleased to do it. I've since given evidence to quite a few select committees. I gave evidence to a select committee on climate change and I can't remember what it was called but something to do with the sovereignty of parliament. I must have done it quite possibly as many as half a dozen times, that I've been down to Westminster and given evidence to select committees.

Apart from Malawi where I think my work was quite influential, I haven't found it particularly useful to give evidence to select committees because you so frequently find that when it's politicians they always have not... I will be accused of being too harsh on politicians, but it is what I think, that they often have the advantage of their party or themselves far too much in mind rather than a stage for a politically acceptable, but well-working solution to the problem. So they split on party lines which is inevitable under our system of government, but it does limit their usefulness.

²⁶ Steve Dick Tennyson Matenje (b.1956-), Malawian civil servant (1980-), Solicitor General and Secretary of Justice, Permanent Representative to UN (2006-), Ambassador to United States, with accreditation to Canada, Mexico, Argentina, and Colombia on a nonresidential basis.

²⁷ Nigel Fleming, QC, deputy High Court judge in England and Wales (Chancery Division) (2003-)



54. Thank you very much. I think this would be a convenient place to break before starting the section on your readership. We can discuss that the next time we meet. So I shall thank you most sincerely, Professor Forsyth, for another fascinating account for which I am extremely grateful and greatly look forward to resuming our conversation.

Right-ho.

