Conversations with Professor Tony Jolowicz
by
Lesley Dingle[1] and Daniel Bates[2]

Third Interview: Published Works

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Between January and April 2009 Professor Jolowicz was interviewed three times at his home at Barrington, near Cambridge to record his reminiscences of over sixty years of an illustrious academic career, the majority of which was spent in the Faculty of Law at 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 three interviews for use in a database of citations made across the Eminent Scholars Archive to personalities mentioned therein.

Interviewer: Lesley Dingle, **her questions and topics are in bold type**
Professor Jolowicz's answers are in normal type.
Comments added by LD, *in italics*.
All footnotes added by LD.

218. Professor Jolowicz, in the first two interviews we talked about your early life and your academic career; we didn't pay any attention to your published work. In this third interview perhaps we can look, in some detail, at aspects of the content and the circumstances of the books that you have written and some of your contributions to festschriften. The first three works that I have selected were written while you were a lecturer, during the period 1959 to '72, and you mentioned in previous interviews how time consuming teaching at Cambridge was - the supervisions and the resultant large numbers of essays, so I found myself wondering where you had the time to be so productive in those early years?

I was young, I suppose. I don't want to brag about it, I mean, when I was doing *Winfield* regularly, I was often up until 3 o'clock in the morning. I mean, I could in those days, work late at night, I can't today.

219. Well, starting with *Winfield and Jolowicz*[3] on tort. There were three editions with which you were involved.

Is that all?

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[3] Jolowicz, J. A. & Ellis Lewis, T. 1963. *Winfield on Tort*. (7th Edit, 8th Edit 1967). London, Sweet & Maxwell, 819pp.

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220. I'll check on that. I have looked at the seventh, eighth and ninth - they were all highly praised by the reviewers. I wondered what the circumstances were that drew you into revising Professor Winfield's[4] book?

I was asked to do it actually. One or two of the senior people here, I think principally Glanville Williams[5], asked whether I would consider doing it. And Ellis Lewis[6] was still around of course, he was part editor. I think the question here was about why was Professor Winfield so inspiring to me. It was a very famous book and he was a very great tort man. It was called *Winfield and Jolowicz* because partly I asked for something like that because I didn't really leave an awful lot in it, compared to the earlier editions where there seemed to be quite a lot. I tried once or twice quite hard to try and keep in a particularly good phrase or good sentence, and one in particular I recall in the libel section is, "If you have said a man did not have the manners fit for a pig, you did not make an adequate apology by saying he did", and I worked quite hard to keep that in.

But the order and method is, I think, to a substantial extent, different in my editions from the original, but he was a very great man. It was the first sort of really modern book - the earlier tort books for students were *Salmond*[7] mainly, which was rather old fashioned. It was intended for students, there's no question about that. And one of the simple technical ideas I'd had, I didn't want people to have to refer forward, they should be able to read the book in sequence. The footnote that says "See post page 4,073" is to be avoided. There may be some, I don't know but I don't think so. It was really flexible. Dear old Ellis Lewis. You've heard of him probably?

221. Yes.

When he was taking part in the things he got terribly fussy, he was a lovely man. The nearest thing to a saint, I think, I've ever met, but he used to fuss. He became - distressed - was too strong a word. He found… oh, I don't know, say a Nova Scotia case that he couldn't reconcile with an Australian state. I said we're not going to fiddle around with that… the Australian judge took a different approach to the Nova Scotia judgement. It's not a thing you waste time on. Sort of writing a book for young English lawyers primarily.

222. He became immersed in detail.

Yes too much. I had worked in the Common Law side of things, contract and tort and places like that in my early practice, when I was a youngster. Losses, that kind of thing you know, mainly industrial accident cases I'd been doing which comes in tort and the statutory liabilities, Factories Acts, that sort of thing. And I found myself teaching - and there were awful subjects in those days called the English Legal System, which was boring to the n-th degree. I mean, you knew how many judges in the King's Bench Division there were, or you didn't; it didn't matter very much. I was quite pleased to have a good solid job to do, and I did it for a number of years, I can't remember how many.

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[4] 1878-1953. Professor Sir Percy Henry Winfield, Rouse Ball Professor in English Law University Cambridge 1928-1943.

[5] See Q69.

[6] 1900-1978. T. Ellis Lewis, Librarian, Squire Law Library 1931-1968.

[7] E.g. *The Law of Torts: Sir John Salmond*. 8th edition. By W. T. S. Stallybrass, London: Sweet & Maxwell, Ltd. 1934. 712 pp.

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I haven't got the latest edition I don't think. [*looks for books*]. A fairly recent edition... What have we got here? This is the 13th edition by Rogers[8]**.** Fifteenth...

No, it is only three, you're quite right. Ellis Lewis and me; that was Ellis Lewis. It is only three, yes, '63, '67 and '71 and then it was Rogers'. So you're quite… sorry you're quite right.

223. Well for the 7th edition there was a review by P M Bromley[9]. And he said that the responsibility for 700 pages of that text - i.e. most of the book, was yours alone. His concluding remark, and I quote is, "Would one be guilty of impiety oneself if one were to suggest that in their capable hands, this is indeed the best edition that has yet appeared". Do you feel yourself, Professor Jolowicz, that you had improved upon the original work rather that merely updating it?

I would hope so certainly, because we rewrote a great deal, I mean the order of the book is completely changed, and that's why I asked for my name…Winfield and Jolowicz suggests that it is a collaboration. But I was saying, and you picked it up, was that it was not a collaboration.

224. For the 9th edition, one of the reviewers, Margaret Vennell[10] from New Zealand, understood why you paid relatively little attention to the Woodhouse Commission and the 1971 legislation of accident liability, and you told me that you wrote a very important article in the *Cambridge Law Journal* in 1968[11] which touched on this.

Well I didn't actually mention it. I was trying to say was that the whole atmosphere of English, and indeed numerous other systems, was that the emphasis is on fault. Which I believed was quite the wrong approach, really. It makes sense that in modern times, it shouldn't depend on fault, which is irrelevant largely, but whose risk was it. And this came to me out of a case, I can't remember the name anymore, in which people were injured, two I think. One was just simply cycling by when one of those manhole covers was blown out of the road and hit him. The gas main had been undermined - lying below the surface and resting on the earth. It was close to a water pipe, a mains water pipe, which had leaked and eroded the earth supporting the gas pipe, which then opened and cracked. The gas escaped, mixed with air, became an explosive mixture and then the theory was that somebody walking by on the street with nails in his boots had created a spark, which ignited this explosive mixture, and blew the manhole out. And no liability, because it was nobody's fault.

I thought this is ridiculous. What you need to decide looking at all the elements of modern personal injury liability more than anything else. You've got employer's liability, so it's not going to be the employer who's at fault in a sense, and it certainly wasn't the victim's fault. But people carry insurances; it's all about the insurance these days. So you want to analyse to see whose risk was it? And you can play with that gas/water thing, you can say as between the victim and the gas company it was a gas explosion, but as between the gas company and the

[8] W. V. Horton Rogers, Professor of Law, University of Leeds, 1977-98.
[9] b. 1932. Professor P.M. Bromley, Emeritus Professor of English Law, University of Manchester.
[10] Margaret A. McGregor Vennell**,** Emeritus Professor of Law, University of Auckland.
[11] Liability for accidents, *Cambridge Law Journal.*

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water company, it was a water leakage risk. It ought to move along in that way, and not play around with notional fault.

That was quite early on. I did actually give it as a lecture at sometime in New Zealand, and I got a lot of stick from the New Zealand Bar of course, who just saw a lot of lovely business going away from their practices. And I think that was, in a way, one of the earliest original notions I had, and in a way it didn't get very far. I mean nobody paid a great deal of attention to it, but it was different from what I was doing when Winfield was trying to say what the law is in a comprehensive way. But it didn't have any influence, like so many things.

225. Professor Jolowicz, why is it that tort has been so popular at Cambridge? There seem to have been so many academics involved in it?

Well, because there's an awful lot of cases, or there were.

226. Would you say it's been a speciality at Cambridge?

No. Because it's not a specialised subject. It's everybody's subject.

227. I see. Why did you stop writing work on tort?

Got bored. As I said earlier, I wanted a change; I wanted to do something else.

228. Is this when you spoke to Professor Hamson?

Yes.

229. And he advised you to go to Mexico?

Well that was really in the way of beginning things. I went off again on those lectures to Mexico. I went a great deal, but I haven't been very recently.

230. Just before we leave tort, you were an important contributor to Clarke and Lindsell and your contribution, although it came at a later stage, for convenience I mention it at this point, did you have a long association with this work?

Two or maybe three editions, but that was divided up into a great many authors, or editors. I did two or three chapters, I can't remember exactly.

231. Parties, vicarious liability, death, remedy by injunction, discharge, and tort

Oh yes something like that yes. But it's all rather ancient history.

232. Still in 1963, we come then to the *Lectures on Jurisprudence*[12]. Which for you must have been quite an important book psychologically and emotionally. There are many references to post- 1954 works and cases in this book. What criteria did you use to include new material?

A very difficult question. I tried to bring up to date what my father had been writing about, and introduce new material where I thought fit. I had a lot of interest in the work of my father because the notes were very complete and the history of that was a background if you like.

[12] Jolowicz H. F. & Jolowicz, J. A. 1963. *Lectures on Jurisprudence*, University of London, Athlone Press, 391pp.

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He had lectured from very full notes and updated them, and the result what he'd done there on manuscripts was almost incomprehensible to anybody, but himself and my mother. I did go to some of his lectures one time on Roman law but not on jurisprudence, he'd said to me, "*You might think of publishing these when I'm gone*", and my mother typed out in a legible form for me, the whole of these notes and I worked on them. I took it as a sort of beginning and as I said in the book somewhere, that I did not include Herbert Hart[13], because in my view that couldn't have been anything to do with him. But with the rest of it, to bring them to a readable book. I didn't divide it up into the arbitrary lecturer's hour. I had tried to do a readable book.

233. Which it is. It's a delightful book.

It got quite a lot of criticism for being too elementary. Modern jurisprudence, has rather stopped being about what other people had said, which that book mainly is. So that's why there's no second edition, I think. Modern jurisprudence teaching doesn't care whether the young men know about Kelsen[14] or whoever, which I think is a mistake.

234. That's what, for me, was so interesting about that book.

Well it is, I suppose, a fairly easy source for the student, to see the ideas of other people. It may be that they're ignored today, but it amounts to history. That's why there's no second edition. But to teach full time jurisprudence - people don't like that sort of thing anymore.

235. Professor Jolowicz, that brings us in a chronological sequence to your book in 1970 *Division and Classification of the Law*[15]. These were presented at a joint seminar of the Society of Public Teachers of Law and the Law Commissions of England and Scotland, in Birmingham in 1969. You edited the book and you wrote two chapters. What was the purpose of this seminar?

I define the part of my story as about people asking the wrong questions. If you want to reform the law, you need to know what you're reforming, and it's no good saying things like contract, tort etc, because they're different everywhere. And I don't know whether this was the example I had in mind at the time, but I'd got deeply involved in this later on in a different context. If you take what we tend to call product liability nowadays, the *Donoghue v Stevenson* case, which here is predominantly tort - you don't have a contractual relationship as a consumer with the manufacturer, because you buy it at a retail store, and then it becomes contract. Well this is in a way is a bit bonkers. In fact in France, until the relatively recent directive, it is a contract, you have a contract. If I offer you a lift in my taxi, which I'm paying for, you have a contract with the taxi driver and any liability to you because the taxi driver crashes the car, is a contract liability. So you can't cope like that. So you say contract, you're excluded here [LD: *UK*], but that's the only way you can get it in France. So I wanted something that made sense, as it's very difficult to do, to classify in such a way that your subject matter of reform related to things on the ground, and not great theories.

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[13] 1907-92. Herbert Lionel Adolphus Hart, Professor of Jurisprudence Oxford University and author of *The Concept of Law*. Developed further the idea of legal positivism.

[14] 1881-1973. Hans Kelsen, Austrian jurist and philosopher, Author of *Pure Theory of Law*, 1934.

[15] Jolowicz, J. A. (Edit.), 1970. *The Divisions and Classifications of the Law*. London, Butterworth.

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I said something about this in various places with the SPTL and when we met with the Law Commission, but it sort of caved in… nothing's come of that…. Nothing at all.

236. I wondered about that.

But quite a lot of people turned up, and it was quite a good, worthwhile thing, even though nothing came out of it. Actually I had forgotten altogether about that and I had to hunt, search this house, trying to find that book.

237. In the conclusions, you mention computers. You said, "They could never take over the whole task of selection of material for a particular purpose and would never become a substitute for a library." Do you think that things have moved far in this direction in the nearly 40 years since you wrote that?

Well I don't know. I certainly very strongly believe that a young law student should know about handling books, and, it's a family reference to this again I'm sorry, my uncle by marriage Martin Wolff[16] coined a phrase, he said "What do you have to learn to do the law? *"diagonal lesen"*, do you know what that…?

238. I don't.

Diagonal lesen is reading the book diagonally down the page. You must learn to do that. And pick up what you… if you were going vroom, vroom. You will find the bit that you want stands out.

239. Interesting.

It was learning diagonal lesen then. I think that that's impossible virtually, and obviously people differ whether you like reading stuff on the screen. I don't.

And the idea of computers, they can make decisions actually, you can feed it a lot, but in answer to your question about general reporters and so on, I'm surprised you didn't know about this sort of thing, it was an entirely different general report, I had some excellent French report in which it's said there's a great deal that can be done whether you've got your complicated plan in law let's say and there's no human feelings about, you can feed in the facts and you can feed in the law and the computer will give you the answer, technical answer, much as it can do sums, but he said, that's no good, it must be human.

To the computer, the word will convey too much. I mean I use the computer, but I write with it. How am I going to put this? The computer, which stores material, is not being a computer, but is invaluable. And I remember Clive Parry saying years and years ago, in the Squire, "We should stop all this expensive and space-occupying thing, of all the *American Reports"*.

240. Did he - how interesting?

Yes, very interesting, stop them [LD: *the American Reports*] … They're not used by the undergraduates and if the research people, their faculty or PhD's want them, they can find it and see what they want and they can get it on the web and print it out.

[16] See Q24.

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241. To some extent he was right.

And you don't need all that space.

242. I **find it that very interesting, very insightful. At this point in the chronology, you became a Reader from 1972 to '76. I wonder whether it's just coincidence that at this point your involvement with tort ceased - once you became a Reader?**

Not really. It was chronology yes, but it wasn't cause and effect I don't think, because the title I chose for my Readership was Common and Comparative law. So I left the common law there. It covered much of the teaching, of course, in the college.

243. In 1975 the book on *Public Interest, Parties and the Active Role of the Judge in Civil Litigation*[17] with Professor Cappelletti[18] **was published, and your contribution was the *Active Role of the Court in Civil Litigation*[19]. A very interesting article, and in his preface to this Professor Hamson said it was, I think, to do with the Ninth Congress of the International Academy of Comparative Law in Teheran. Do you have recollections of attending this conference?**

Of course yes.

244. Was it an exciting place to visit?

Well yes the Congress was in Teheran, but we went to various places as well. Yes, and quite an enjoyable tourist exercise, but one could learn quite quickly, how unpopular the Shah was because of something he did for us. We had a trip to what's the name? The very famous holy place, not Medina, something like that? Which was a 2½-hour jet flight from Teheran to go there for the day, and we could sign on for that for $5, and I think the Shah was showing his generosity to foreigners.

It was one of the academy's regular conferences. And the mystique about general reports and national reports, I did quite a bit of general reports. The organisation, this is the International Academy of Comparative Law. I was once Vice-President, and that has regular conferences in different parts of the world, and it administers them. Then you find the host and you collaborate with the host, and the pattern basically is choosing the subjects. Somebody is appointed the General Reporter on subject X, and the country branches as it were, the English branch, the Danish branch or whatever, is asked to provide a National Reporter who sends his national report to the General Reporter, who does a kind of synthesis and then that goes up for presentation and discussion at the meeting.

245. I wondered about that. In fact was Willi Steiner[20] **not involved as a General Reporter?**

Yes certainly he was, on some bibliographical subject, I can't remember what it was. But he was very much around, and I knew him very well of course.

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[17] Cappelletti, M. & Jolowicz, J. A. Public Interest Parties and the active role of the Judge in Civil Litigation, Dott. A. Giuffrè Editore, Milan.

[18] See Q149.

[19] Jolowicz, J. A. 1975, p.157- 304.

[20] 1918-2003. Assistant Librarian at the Squire Law Library 1959-68.

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246. He was my first friend when I came to Cambridge, he and his wife. Yes, I was very fond of them. Do you have any recollections of Willie?

Yes. I always thought I regretted he was very learned and very able, but he was a little unduly timid, I thought.

247. He was a lovely man.

He was a very nice and gentle man. And really helpful, he'd help anybody.

248. Professor Jolowicz, coming back to this publication. In the preface Professor Hamson mentions the notion of a litigant having his or her day in court, which of course can't happen in the continental systems.

It certainly happens in the criminal cases. They don't have a trial as we do, of course, because in the continental systems and...

249. Professor Hamson[21] was quite scathing about the then new post of the Ombudsman, calling it a "mark of civic indolence", do you have any views on this office?

Well, this is where I very easily find my way into "They don't ask the right questions". That's a question that I asked in this *Cambridge Law Journal* article[22], "What is it for?" Jack was very keen on the old Common Law's adversary style. I had become and ceased to be keen on it.

The day in court - I wouldn't go really far in favour of that, really; it's enormously costly. We have to think of the practicalities a bit…

Jack was a remarkable man I remember. He wouldn't grudge his money, giving away money to charity, but I don't think he really cared much about the poor.

The adversary processes, they should be able to fight their corner - yes, of course they should be able to fight their corner, but they don't have to do it by the day in court. And the adversary system is going out… [LD: *AJ looks for an article*] I'm not a terrible enthusiast for the adversarial process …. Woolf's[23] tried to civilise it. Of course the barristers like the chance to show off, and of course there are cases where you think you can do this, if you've got litigants to whom money is no object, it can be quite extraordinary effective.

A case I was in once depended on the correct interpretation of the law in an oil sheikhdom. We had expert witnesses on both sides of course, and the discussion which was the examination and the cross examination (I wasn't doing it, there was a leading Silk there), and the judge, for four days, costing a fortune, and it was absolutely marvellous, it was like attending a seminar with three very intelligent, well briefed people trying to get to the bottom of this. But as there were two rich corporations and they didn't care how much money they spent, and in this country you can't afford to do that. And the other thing is, the adversary principle simply eschews the question of truth - truth is irrelevant. I think to most people that's counter intuitive, isn't it?

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[21] See Q21.
[22] 2008, Civil litigation: what's it for? *Cambridge Law Journal*, 67(3), 508-520.
[23] See Q278.

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So of course you must let people have their say, but not necessarily in a court. The fact is we've had it for years, centuries, nothing else really basically, but the court and the outcomes.

Again my thought is "what's it for, what are you trying to do?" Are you simply, and this is, I think very important, are you simply going about settling disputes? - because you're not. You might have been donkey's years ago - to stop people fighting each other in the streets - but in today's circumstances, everybody's pushing like anything for alternatives to do resolution. The Ombudsman is one.

I think Jack was incensed by the Ombudsman, because it was new in those days. We imported it from Denmark, it's a Danish invention, and in most cases it's all about dispute settlement and nothing else. But you don't need it. Now if you look at the modern literature and what is said all over the place, the dispute settlement aspect is to be done by anything other than the day in court, because it's far too expensive. Everybody's pushing mediation, you can, generally speaking, with a good mediator, get the parties to shake hands and say, "*Nice talking to you old boy, yes we will see to it*." A good mediator would take an hour and a half, to do what it would take a fortnight in court. And at no cost - negligible cost. People have focused on this - that there's nothing to civil litigation other than dispute settlements - and I think it's wrong, myself.

250. What about the situation, Professor Jolowicz, outlined by the two reporters from Poland and Romania. Would you say perhaps that the courts in those instances were serving the interests of the state?

Well I think, you've got to know what you mean by that. I have now, with dispute settlement being largely speaking out of the picture, not entirely of course because it can't be entirely. What are we talking about, the purposes of this… I wouldn't hesitate to accept that this is what it's all about, it's all for the purposes of the state, because the lawmaking, the law clarification, some parts of it, for example, protection is a very good - weak against the strong - these are all state policies. It doesn't have to be bad, just because a lot of it was from communist legislation. If the court… the state is trying to make sure it doesn't have a rebellion, then maybe the policy of the state may be bad, but by the state I don't necessarily mean an all powerful police state. We're very much dependant on the state now, with modern lives.

251. In your report, page 275, you make a very sage remark about "If it is state business the court serves, then this will encourage the state to pass laws to ensure this". Can you see this happening currently in the UK?

Well, no because they don't really know what they're doing!

No, I don't know if I had this in mind when I wrote that, but I think it's very important to know when you're talking there about the purposes of the state. Are these purposes benevolent or not?

252. One thinks of the present state security issues of New Labour.

Well, yes, in short you pick out the state purposes you don't like. I think there's a very important article which refers to civil justice, on civil procedure by the former Chief Justice from New South Wales[24].

[24] See Q282.

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253. Also on the same page, Professor Jolowicz, you say that it's important to minimise the risk that cases may be described by the personal preferences or the prejudices of the individual judges?

That of course is true, and that leads me, if I may, to another thing in here which is not picked up, and I thought it was a rather good piece, the one about the use by the judge of his personal knowledge. It was in 1980 something, I think.

254. Ah I have it, "The use by the judge of his own knowledge, page 275."

That's right. Where do you start and where do you stop? Of course it's important, but there's certain things I try to analyse. And that was a case where I was General Reporter, and I had a lot of national reports on this sort of thing, it's a marvelous illustration, if you'll forgive me. One of the people at the conference got up at the discussion, he said "I'm a judge in Adelaide. I'd like to know everybody's thinking about an actual case which I decided. It was a hot evening and two adjoining houses, people having meals outside, and the plaintiff in this case complains of himself and his guests having been bitten, stung, by a number of bees which flew out from the defendant's beehives and gave them a certain amount of discomfort. And now, this was the case, said the judge "I happen to be an enthusiastic amateur beekeeper and I know that bees don't fly at night, in other words it's clear to me, and this is what I know, that this claim for damages is all made up. What shall I do? There were no expert witnesses and no evidence. Just "My bees didn't fly across", and "Oh yes they did, they stung us". "What should I do?". I said, "I'd find for the defendant".

There's lots of stuff actually, there's a lot of remarks, and you can't exclude it. It's not quite the same as the taking of judicial notice, and I tried to analyse that particular general rule and so on. There are interesting cases where teachers of foreign languages, can they use their own knowledge of the languages? There are a lot of Israeli cases where the Israeli judges had some knowledge of Turkish. They were interpreting the Ottoman law which applied then, and they used their own interpretation. Lord Wilberforce[25], did it - he gave his own personal translation in the judgment of the House of Lords.

If you happen to know French, can you not use it as a judge? It's very difficult to see where you go here.

255. It's a very interesting topic.

And that was one of the articles that I thought might be worth saying something about, but again I'll come back if I may to my original issue - what is the function or purpose of this bit of the exercise? Are we looking at the publication, just making a list or no, clearly not, but what is it we're after? I suppose my sort of general thing these days is why? In my address when I was President of the SPTL, I said we don't ask the right question. What are we trying to do? And if you look at the way in which most countries' civil procedure reforms, it's "how can we do this more cheaply and more quickly", but I ask "why are we doing it?" Nobody ever asks that question. What's this all about? What are we trying to do? And I honestly ask that question - it's ridiculous to reform this and that and the other.

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[25] 1907-2003. Law Lord. Richard Orme Wilberforce.

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256. And this is a sort of a *leitmotif* in your latest publication on civil procedure.

As you see, there are things in that which are based… they're all based, on things from elsewhere, nearly all of them.

257. This is a theme, which you revisit many times in the course of your career.

Professor Jolowicz, you became professor of Comparative Law in 1976, and I have two works from this period, and I was just wondering whether during this time you had more free time for writing or possibly not? First work here is your 1978 contribution to the *New Prospects for Common Law in Europe*[26], and that was edited by your friend, Mauro Cappelletti, and it was under the auspices of the European University Institute at Florence. What was your involvement with the European University Institute?

Zero. That was a conference organised there, and I was just invited to go. And I went.

258. Your piece[27] is very interesting in this work and one of the points you make was on page 237, "That it is unthinkable, unnecessary and undesirable that the law should be the same in the north of Scotland and the south of Sicily." Can you comment on this statement?

Well I suppose I was thinking very largely then in the realm of family law, personal law, and we shouldn't try to synthesise everything so that everything is the same. There's a case for doing it in commerce, but as a generality, no. I don't think there's anything very subtle about that, there're always differences in one part or the other. Let the law reflect it.

259. You criticise the too-detailed legislation that emanates from Brussels.

I was surprised to see that on there [LD: *my question list*]. It's surprising because, on the whole, continental type legislation is much looser.

260. Page 247. Let's see.... 249. This is your discussion... perhaps you can just glance at…

I was looking for it, but I couldn't find my copy of this book. I am very bad at not putting books back in their right place, because they haven't got a right place.

Well I think I was speaking particularly of this instance of revision. Because the continental [LD: *system*] is much more than we are, based on the French concept. You can't expect the draftsman to answer all the questions, that's for the judge. Modern legislation, particularly the kind of regulatory legislation that so many cases hinge on, is infinitely detailed. I don't remember this very well.

There's a famous sort of semi joke about the railway carriage, do you know the story?

Well, you can take an animal on the train, and the story it is presented as a matter of interpretation. The man goes on the train with a tortoise and there is a question as to whether there's to be a charge for this. The railway inspector said "Dogs is dogs and cats is dogs, but this

[26] Cappelletti, M. (Edit.). *New Perspectives for a Common Law of Europe*, European University Institute, Sijthoff, Leyden.

[27] New perspectives of a common law of Europe: some practical aspects and the case for applied comparative law, 237-265.

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tortoise is an insect and goes free". Well, dogs is dogs and cats is dogs; I mean cats count as dogs to be charged for.

261. Is that true Professor Jolowicz, that story?

Well I don't know whether really true ....it's in the jurisprudence book actually.

So you get things like: "It is an offence to dismount from this train, except when it is in motion."

262. In this article, you were quite critical of Lord Denning[28] in his judgment with the stolen whisky case of *Buchanan & Babco*[29]. Did you perhaps not like his approach in general, Professor Jolowicz?

Well he was a naughty man. I mean, in many ways, a lovely man and a very charming and sympathetic sort of man, but he didn't much care for authority. He didn't like it.

263. A free spirit.

He was a bit of a free spirit, yes, I don't want to be too critical, but wandering about too freely. Denning is very easy to criticise… [LD: *AJ turning pages*]. Was it in here?

264. It was page 252 – "Discoursed on this case how interpretation by the Court of Appeal was made perhaps in the spirit of commonality…"

Yes, I do see it might be regarded as critical of Denning, but it wasn't intended to be. It depends where you start from, and Denning didn't like being bound. He was a bit of a, "Do it my way". I think it was Bill Wade[30] who said, "The kind of judge you want once a century, not more than once a century."

265. And one of the other points that comes across in this article, which you alluded to earlier, is the difficulty interpreting in different languages, and how this makes harmonising quite difficult. Do you think the problems have been increased now with 27 languages in the European Union?

Of course it has because the problem of dealing with foreign languages has increased by the number - it isn't quite 27. Everybody's awfully suspicious, and the French are even more suspicious than anybody else.

It mainly arises in a sort of legislative regulatory context. There was something in this case, I can't remember very well, ... it had different meanings in different languages, and it makes it very, very chancy of course with people just sitting down in their private offices and trying to produce a translation. Which is the original? The treaty is negotiated in French, and it does create enormous difficulties of course in the working of it.

I was involved a year ago in the Product Liability Directive from the point of view of the European Commission. I had a lovely job of independent expert, I had power without responsibility, but the French were very difficult. We had one day's meeting in Brussels when

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[28] 1899-1999. Alfred Thompson, Lord Denning of Whitchurch, Master of the Rolls, 1962-1982.

[29] *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, HL

[30] 1918-2004. Sir Henry William Rawson Wade. 1961-76 Professor of English Law, Oxford; 1978-82 Rouse Ball Professor of English Law, Cambridge; 1976-88, Master of Gonville & Caius.

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our own interpreters were not available, because there was some other more important meeting going on. The Chairman, who was a civil legalist himself, proposed that we shouldn't give up the next day, but we should agree that everybody should speak in English or French. The only people who would not agree were the French. And I read afterwards why it was - because the leader of the French delegation didn't speak any English. He wasn't even prepared to listen to English. And what could've happened and where could it have gone, I don't know. He was overruled and we battled on with some rather more junior member of the French delegation who spoke tolerable English, but the leader wasn't able to express it himself.

And you come back to this: can you make use of your own knowledge? Wilberforce, who had a French wife, and he spoke extremely good French, as I say, regularly uses it dealing with French legislation.

266. The next book on the list is your *Judicial Protection of Fundamental Rights under English Law*. This was the second set of Tilburg Lectures[31]. Do you have any recollections of going across to Holland to give your lecture?

Well yes I do. I mean it was a pleasant occasion. I went over with the Joneses here. The year '78 also coincided with the 30th anniversary of Professor Hamson's summer course for foreign lawyers (which were always held here, in Cambridge with dozens of Englishmen - English lawyers and university lecturers).

267. Which we still have today.

Yes of course, and this [LD: *AJ's publication*] was just two people [LD: *AJ and Gareth Jones*] going over to Tilburg.

I remember it quite well, we stayed in a very nice place. One of my reminiscences… this is absolutely nothing to do with anything really I suppose, except I'm pretty ashamed of my own linguistic failings. On the last day of our lectures I did my final one I think at 9 o'clock in the morning, so I'd stop at ten, and Gareth Jones[32] came in, there was to be a final sort of closing session at midday, twelve, and neither I nor Mrs Jones, who was a very good friend, wanted to hear Gareth's last lecture, so we decided we'd go for a walk. There were some very pleasant woods at the back of the Tilburg buildings and we got lost. We were not starving lost - but we could very easily have missed this final session, but what worried me was that I didn't really want it written down as a gone missing with somebody else's wife. Though she was a very charming lady, I knew her well.

And then I saw a man across the way exercising his dog, it was a weekday morning, and I went across to him and said very timidly, I don't speak a word of Dutch (you no doubt do), and I said "Do you speak English?", "Yes of course", and he was charming, very nice and he led us back onto the path, and we got there in time for the closing session, and all was saved. And I thought all of a sudden, if you were in a wood in the middle of a weekday morning, there's absolutely no danger to life and limb, but you'd like some help, and you find one man and you ask him if he speaks your language. Heaven knows if you went into an English wood and said to somebody "Do you speak Dutch?"

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[31] Jolowicz, J. A. 1980. The judicial protection of fundamental rights under English Law. *In*: Willems, J. H. M, (Ed). *The Cambridge-Tilburg Law Lectures, Second Series 1979,* Kluwer, Deventer, 1-47.

[32] b. 1930. Professor Gareth Jones, Downing Professor of the Laws of England 1975-98.

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Of course if I may say so, South Africans don't know what they do speak. I had this marvellous young man, who's dead now, killed in a motor accident, a junior, Oliver Schreiner, he was a research student. He was killed in a traffic accident in Cambridge. I think he was the best PhD candidate I have ever had, but when he first came to see me he wanted a subject, and I said "Tell me do you… can you read any European languages?", "No I don't think so", I said "You can. Of course you can read Flemish". He'd never thought of it.

268. Yes Flemish and Afrikaans are almost identical.

Yes and understood in the whole of Belgium and the whole of the Netherlands.

269. Professor Jolowicz, still on this article, which you wrote. You make the point (page 46 to 47) that English law is better at identifying wrongs and rectifying them than upholding rights. You also quote, and agree with Sir Ivor Jennings[33] who said, "There's no more right to free speech than there is a right to tie up my shoelaces". This is summed in your final very quotable quote, "That it is more profitable to identify and redress the harm done by acts which are forbidden than to speak formally in general terms about rights." Would you say that this has been overtaken by events?

Not entirely no. Particularly if you look at something like the European Human Rights document with all the exceptions. Take Jennings' right to tie your shoelace. If I bend over in the street to tie my shoelace and somebody kicks me in the behind, he's done me a wrong; so that's what it means. And all the stuff in the Human Rights area....I've always been very suspicious of Human Rights and it gets out of hand sometimes, and if you look at the jurisprudence of the European Court of Human Rights you will find not a few cases in which the whole discussion relates to the Human Rights of a corporation. It's taking on a meaning, it's a pejorative term.

I have a preference for the English approach. It starts of course way back in the Middle Ages where, if you will take the case of tying up a shoelace you'll get a kick in the behind, you can complain about that. How do you see that there is in law a right to tie up your shoelaces, if somebody interferes with that right he does you a wrong and you could sue him. I've always found rights very difficult, and it's an argument in favour of a form of oratory to make arguments. It's carried much too far, in my view. It doesn't work - I don't think it works. You've only got to, as I say, look at the language of these rules otherwise and as required in a democratic society. So you're going to judge whether this was okay in a democratic society, so you've got the rights and wrongs, and you can of course, you can enforce rights, but it's very difficult to see how you're going to do it unless there are wrongs somewhere hanging about. I always find that troublesome.

270. You retired in 1993 from your Chair in Comparative Law, but your written productivity hasn't diminished during your years of retirement. Did you find this has been a period in which you have all the time necessary for contemplation and reflection?

Well, I wouldn't be too high minded about that. I'm one of those boring people who have no hobbies. And that's partly, I suppose, why I write a lot of these festschriften, because it's an opportunity to get something published.

[33] Sir William Ivor Jennings, KBE, 1903-1965. Constitutional lawyer. Helped draft constitutions of Ceylon and Malaysia. Master of Trinity Hall, Vice-Chancellor of University of Cambridge.

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271. Also you're contemporaneous with many of the subjects.

Oh yes.

272. Professor Jolowicz, you wrote an interesting piece in the *Civil Justice Quarterly* in 1996 on the Woolf Report and the adversary system[34]. You implied that case management is bound to be, as in France, to search for the truth by judges, so would you welcome legislation, as they have in France, to enshrine this goal in law?

Well it's a very difficult thing to do. The French legislation is putting a burden on the individual. They've got to help in the revelation of the truth, and I don't know that I would welcome legislation, but I would certainly welcome some sort of disappearance of a case like the *Air Canada*[35] in particular which went all the way up to the Lords. Everybody saying the amount of truth produces controversy, and you can't go to the truth, you don't have to, it's not in the business of the truth. Denning says that.

Bingham[36] was the First Instance judge in that case. It was a case between all the major airlines of the world and Heathrow, about the level of landing fees and so on. And the question was whether some documents, which were undoubtedly relevant, should be disclosed by the Government. And Bingham, the First Instance judge said, "Yes, I must see them and decide then whether they should be disclosed" and because it must be better to decide this case in the light of the truth so far as we can get it. No matter which way the benefit of the truth turns out, A or B.

But the Court of Appeal and the House of Lords solidly said "That's wrong" . There's some very brief, short observations by some of the judges, particularly Edmund-Davies[37] who said to argue that, if the truth be brought in, it gets him nowhere because our system doesn't pay any attention to that.

Well I think it's so counter intuitive - everybody talks as if it's the job of a court to go looking for the truth. You can't have good truth… perfect truth is probably out of reach, but the closest approximation to the truth the judge can find is, I think, a very important thing to get. I wouldn't necessarily like legislation, because you can't be sure you have the truth, but the judges have an obligation. I think one of the tests you can do for that is to say, "if the judge is compelled to give judgment, when he is of the firm opinion that he has not heard adequate evidence which he would regard as being very determinant of the case, so he doesn't think his own decision is right, how can you say he's giving the right decision?"

I coined the phrase of, "The closest possible approximation to the truth", and it will come, I think, without any more ado, with this approach. I don't think we need legislation - legislation would look rather silly unless you say everybody has a duty to help to seek and to reveal the truth.

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[34] The Woolf Report and the adversary system. *Civil Justice Quarterly*, 15, 183.

[35] *Air Canada v. Secretary of State for Trade*, [1982] 2 A. C. 394.

[36] b. 1933. Thomas Henry Bingham, Baron Bingham of Cornhill, Master of the Rolls 1992, Lord Chief Justice of England and Wales 1996.

[37] 1906-1992. Herbert Edmund Davies,. Baron Edmund-Davies of Aberpennar, life peer. Lord Chief Justice of Appeal.

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An article which has this contribution ....[LD: *AJ turning pages*]. *La Vérité et la Justice*[38]. There was a conference about it while I was in Paris [LD: *1976*] - I contributed a piece. But I did write about that also in a different context, under one of the later ones [LD: *AJ turning pages*] ...yes, in that one for Blanc-Jouvan[39].

273. Unfortunately that is missing from the library. I'm going to ask them to buy another copy.

Well, I think I can probably find a copy… there weren't any off prints, come to think of it, because that's one of the troubles with festschriften. The first very personal part of it is in French, but everything else is in English.

274. I will try to get hold of this at some point.

Professor Jolowicz, you also were with van Rhee[40] an editor of a book called *Recourse Against Judgments in the European Union*[41]. And you didn't discuss in your piece, the prospects of the proposed new Supreme Court in the UK. What are your views on this court?

A total waste of money. A total, absolute waste of money. Absurd. It won't make any difference in that respect. It's separate from the House of Lords.

275. I wondered about that. It seems to me that it could probably hear more cases in the House of Lords, perhaps?

Maybe I don't know. It's not going to be a Supreme Court in the sense of any constitutional court - like the Americans. Bingham, I was surprised was very keen on it because if you ask people who know already "is this part of the legislature?" [LD: *The answer is*] "Notionally yes, in practice not". If you ask somebody who needed to know anything about it, you wouldn't know what they were talking about and they'd tell you they don't know which is the highest court in the land, in terms of final appeal. And would they be troubled by the fact that they were notionally committed to the House of Lords? Not in the least. I don't know why Tom Bingham was so keen on it. They won't have any more power than the existing House of Lords.

An immense amount of money's gone into it. It's going to happen later this year [LD: *2009*] I think[42].

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[38] 1989, La vérité et la justice. XXXVIII *Travaux de l'Association Henri Capitant*. Economica, Paris. 779pp. Quatre aspects sont étudiés : la vérité dans le droit des personnes, la vérité et la liberté d'expression, la vérité et la politique, & la vérité et la justice.

[39] 2005. Substantive and procedural justice in civil litigation: a measure of the role of civil litigation. In: *De tous horizons: mélanges Xavier Blanc-Jouvan*, Société de Législation Comparée, Paris.

[40] C. H. van Rhee, Professor of Law University of Maastricht.

[41] 1999. England and Wales. *In* Jolowicz, J. A. & van Rhee, C. H. (Edits), *Recourse against Judgments in the European Union*, The Hague, Kluwer Law International, 83-98.

[38] Opened 1st October 2009. See: www.supremecourt.gov.uk/.../A-guide-to-bringing-a-case-to-The-Supreme-Court.pdf
http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article6855862.ece
http://en.wikipedia.org/wiki/Supreme_Court_of_the_United_Kingdom

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276. Yes.

Madness.

277. We come then to your 2000 book… your latest work *On Civil Procedure*[43] and I wonder what moved to write this. Was it because you had time to look back upon your illustrious career?

I had slightly different ideas about producing a book, what I thought was a very good title *Civil Procedure: A Comparative Introduction.* Trying to use Comparative Law right at the very beginning, but it didn't really work out. I wrote a lot of chapters and I wasn't satisfied with them. And then what I decided in the end to do was to take a number of old ideas, although not all, some of them were original, and the individual chapters or whatever on particular aspects of the law, as expressed in my earlier publication. Some are new, for instance Appeals and Cassation. Nobody knows about cassation in this country, so you can't use words like *cour de cassation*: it is positively not a Court of Appeal. And so everybody gets stuck with this. It's the highest court in France and operates purely on law and facts.

That's come back again [LD: *referring to a manuscript*]. A Mexican friend of mine, whose name escapes me now has got two festschriften and I contributed to the last one that's just come out. Some of these festschriften are so enormous - a Venezuelan a friend of mine has got three volumes about that thick.

278. You commented that Lord Woolf[44] said that his report would usher in a new start to English civil procedure, that's in the Introduction of your work. Why do you think he said it other than, of course, that he believed it?

Well he wanted to get away from the adversarial culture, which has been very costly and very time consuming. I'm afraid it's going down the drain. Did you see yesterday's paper, I put it aside somewhere. His reforms have been torn apart - for ten years a disaster, some people describing them as a disaster.

279. That was my next question - you comment in your book that you don't think that a new start to English civil procedure has actually happened -.

Because it's impossible. I know Harry Woolf quite well and he is an extremely nice man. I do think, actually, that the reports he wrote are about as un-scholarly as you can get.

280. You outline the history of the jury system, and you say that juries began to be phased out in 1883 and by 1966 there were...

Civil juries, yes.

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[43] 2000. Cambridge University Press, 425pp.

[44] b. 1933. Harry Kenneth Woolf, Baron Woolf, Master of the Rolls 1996-2000, Lord Chief Justice of England and Wales 2000-05. The Constitutional Reform Act 2005 made him the first Lord Chief Justice to be President of the Courts of England and Wales. Non-permanent judge of the Court of Final Appeal of Hong Kong since 2003. See also Q249.

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281. Right....to be by juries in only exceptional cases. In the United States civil juries are still normal, why have they retained them there?

Because they're all in the state constitutions....which is, of course, not an answer.

282. You also quote in your book on page 388, Sir Peter Middleton[45], who said that civil justice is essentially a resolution of disputes, but you believe the courts have a wider role?

Oh much, much wider. And there's a more recent article: in that one about "what's it for?"[46] . That deals with the Chief Justice of New South Wales[47] and his ideas, and a whole lot more. All sorts of things come in. If you get away from the dispute resolution objective, that seems to be so obvious. I can't understand how people just don't think it's all about how far you go. But it is, I think, a perfectly safe assumption historically, that the development of judicial intervention in dispute settlement was necessary to stop people literally fighting each other. Now, we may have rather too much violence in this country at the moment, be that as it may, but the civil courts do not exist to prevent people fighting each other. It is ridiculous to pretend anything like that.

So what are they for? And there are all sorts of things that come out. And other things are going to come, I think. To assume, as we all do still, that the parties to the litigation are the interested party, that's wrong, very often, not always. If you have a couple of corporations on opposite sides of the commercial litigation, the employees, the shareholders and the customers and all sorts of people may be eventually [*LD: involved*]. We should move in the direction that nobody but the judges take account of their interests.

283. Perhaps Professor Jolowicz, at this point you could perhaps give your thoughts on the academic nature of civil procedure - the philosophical or notional basis. Academically studying civil procedure rather than just understanding the nuts and the bolts?

Well, there's how we got where we are and, it's right back to my question, why? Why civil litigation? Why this that and the other? What purposes is it serving? [LD: *You've got*] to get behind the nuts and bolts. People should understand why, and there's lots of it coming, maybe through the European Union, and Woolf, wretched man, has done quite a lot to destroy the ease of understanding in other non-Common Law countries. We don't have "pleadings" any more, we have "statements of the case". Somebody wrote about doing away with Latin - we shall very soon not be allowed to use the phrase " et cetera ".

And the language usage.... is partly historical, how did we get to where we are, and really what's this all about?

284. I know Professor Lipstein was a very anti the reforms.

Professor Jolowicz, that brings us then to your festschriften, which I hope we can look at as a group. These were written, as you said earlier, more or less when you'd retired, and I assume that this is perhaps the result of the fact that you have to be at a

[45] Former Treasury official. In 1997 Conducted review into the Woolf Report (1966). University of Sheffield Chancellor, Chairman of Barclay's Bank.

[46] 2008, *CLJ*, 67(3), p. 516-517.

[47] b. 1946. The Honourable James Jacob Spigelman A.C. Judicial accountability and performance indicators. (2002) 21 *C.J.Q*. 18, 26.

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certain stage in your life, where you're able to write about colleagues and friends. Could you say a little bit about your friendship with the persons so honoured, starting first with the 1990 festschrift for Professor John Henry Merryman[48]?

Well, yes. I didn't know him very well. He was a very considerable comparative lawyer, American comparative lawyer, and I met him at a number of conferences. I think that's about it.

285. I think you had perhaps more to do with Sir Jack Jacob[49], whom you thanked in the preface to your *Lectures on Jurisprudence*.

Oh I had a great deal to do with him, because he was a pupil of my father's in University College and Poppy was his pupil at the bar. He's not family, but he's very close to family, or was.

286. Gino Gorla[50]?

He was a very considerable Italian. That was a three volume affair. This was a very short little piece about too many precedents[51].

287. Did you know Professor Arthur von Mehren[52]?

Yes. I knew him well, he was over here a good deal.

288. Finally, your contribution to the festschrift for Professor Alice Tay[53].

Yes I wrote that. I had a good deal to do with her when I was President of the Common Law Group of the International Academy.

289. Well Professor Jolowicz, I think that all that remains is for me to thank you very much for yet another fascinating interview. I'm very grateful to you, it's been extremely interesting.

I hope you can make sense of what I've been saying.

290. Most definitely, thank you. I brought this along - it's just a first page in the extract of an article by Michael Taggart[54], and if you are interested I can send you the full article. It's on festshriften. I thought it might be of interest to you.

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[48] b?1920. Emeritus Sweitzer Professor of Law, Stanford Law School. Specialist in Civil Law, Art Law and the protection of cultural property.

[49] 1908-2000. Sir (Jack) Isaac Hai Jacob. Honorary Lecturer in Law, University College London 1959-74. Director, Institute of Advanced Legal Studies, London University 1986-88. Master of the Supreme Court Queen's Bench Division.

[50] 1906-92. Emeritus Professor of Comparative Law at the University of Rome "La Sapienza", & University of Pavia.

[51] Jolowicz, J. A. 1994. Too many precedents. *In*: *Scintillae Iuris, Studi in Memoria di Gino Goria, Part I*, Dott. A. Giuffrè Editore, Milan, 281-289.

[52] See Q149.

[53] 1934-2004. Alice Ehr-Soon Tay. President of the Human Rights and Equal Opportunity Commission (HREOC) 1998- 2003, Challis Professor of Jurisprudence at Sydney from 1975.

[54] Professor of Law, Faculty of Law, The University of Auckland.

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