

Should the law be certain?

The Oxford Shrieval lecture

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1. A year ago, my colleague, Lord Brown, asked: “Are Juries a good idea?”. He answered his own question: “The jury is out”. Most people would give a more definite answer to mine. The law should be certain, so that it can be easily enforced and so that people can know where they stand. We expect that of Parliament when it frames statute law, and of judges when they expound the common law. We expect it in our relations with authority, and in our relations with each other.
2. The first speaker in this series was Lord Bingham. He was senior Law Lord (with whom I had the privilege of working for three years) and High Steward of Oxford University, as well as a great advocate of a UK Supreme Court. Just before his too early death, he published a celebrated book on *The Rule of Law* (Allen Lane, 2010). He took this as its first specific element:

“The law must be accessible and so far as possible intelligible, clear and predictable”.

These are characteristics which are the essence of certainty. They link with his second element:

“Questions of legal right and liability should ordinarily be resolved by the application of the law and not the exercise of discretion”.

Again, the idea of certainty.

3. In fields where English common law has had worldwide influence, you find the same theme. In his Shrieval lecture, Lord Bingham quoted Lord Mansfield, who in *Vallejo v Wheeler* (1774) 1 Cowp 143, 153 said that

“in all mercantile transactions the great object should be certainty. And therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon”.

Lord Bingham himself started a judgment in *Golden Straight Corporation v Nippon YKK (The “Golden Victory”)* [2007] UKHL 12, para 1 by saying that

“the quality of certainty [is] a traditional strength and major selling point of English commercial law”.

It is on this basis that many English lawyers today resist moves at a European Union level towards an optional restatement of the law of contract (under the Common Frame of Reference project). This is in terms which would make every aspect (formation, interpretation and performance) subject to a general duty of good faith and fair dealing. It sounds good, but English lawyers are nothing if not diligent and ingenious. It could I think make the law very uncertain. English law prefers to give effect to the reasonable expectations of ordinary individuals or businessmen by clear rules. Examples are the rules governing misrepresentation, mistake, undue influence, failure to cooperate or non-performance.

4. The theme of certainty is not confined to commercial law. In public law, there is “a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public”: *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, per Laws LJ. The principle of certainty also precludes retrospective changes in the law. The law must be certain at the time when the subject has to act by reference to it.
5. The European Convention on Human Rights incorporates requirements that any restrictions on the freedoms which it enunciates must be “in accordance with” or “prescribed by law”. In short, they must be subject to the accessibility, intelligibility, clarity and predictability of which Lord Bingham spoke.

6. The EU's Court of Justice likewise espouses certainty in its jurisprudence, saying:

“the principles of legitimate expectation and assurance of legal certainty are part of the legal order of the Community” (*Deutsche Milchkontor GmbH v Germany* (Joined Cases 205-215/82))

A belief in certainty also underlies that Court's insistence that all judgments must appear unanimous. Any dissent is hidden behind a wall which precludes public disclosure of the judges' deliberations. How different the common law! We rejoice in judges' general freedom to express their own opinions, concurring or dissenting. But, paradoxically, we too invoke certainty. We criticise the European Court's committee style approach as tending to lead to obscure compromises, and we laud the common law approach as more transparent. In fairness, however, one must accept that five differently reasoned judgments in the Supreme Court can also lead to doubt!

7. Legal certainty and legitimate expectation are, as the Court of Justice implied, related. If the law is certain, citizens know what to expect. However, there are situations where the law itself is clear, but a citizen is misled, e.g. by a public authority, about its content or effect. The citizen may then be entitled to rely upon the law as it has been presented, rather than the law as it actually is. On analysis, this is a manifestation of the principle of certainty under another guise. The pre-condition to a legitimate expectation of this kind is that the inaccurate presentation by the authority should itself have been clear – that is, certain in its content. The authority, which ought to know the law, is bound by its own specially created law. In private law situations, the position used to be different. A person was entitled to rely on an inaccurate representation of *fact*, but people were generally expected to know the *law* for themselves (save of course where they were positively seeking advice on it from a lawyer). In modern times, the courts have taken a more realistic approach, e.g. allowing the recovery of monies paid under a mistake of law: *Kleinwort Benson Ltd v Lincoln CC*. [1992] 2 AC 349.
8. The ideal of legal certainty has long shaped views of the judicial role. According to what is called the “declaratory” view of the common law, in its most traditional guise, the common law has never changed. The judges have

merely revealed it from time to time. In the late 17th century, Sir William Blackstone, first Vinerian Professor of English law in Oxford, and later a colleague of Lord Mansfield on the bench, argued that the common law was rooted in Saxon law. This idea no doubt appeals to the High Sheriff, whose office is likewise rooted, and I must challenge it cautiously. My old College, Univ, across the High still enjoys the benefits of a Royal Visitor, and this on the strength of a claim to foundation by King Alfred. The claim only emerged and was accepted in the reign of Richard II, and was exposed as a forgery 300 years later - though, happily, that has not affected the Visitorship. But, however the common law may be dated, Blackstone saw the judges as mere mediators. He described them as “oracles” – without, I think, intending any undertone of Delphic obscurity.

9. Over 200 years later, Lord Esher MR, later Viscount Esher, subscribed to a similar view to Blackstone’s, saying in *Willis & Co v Baddeley* [1892] 2 QB 324, 326:

“This is not a case, as has been suggested, of what is sometimes called judge-made law. There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not been authoritatively laid down that such law is applicable”.

Put in these extreme terms, the declaratory theory, with its natural law overtones, was a useful protective device. It avoided questions about the legitimacy of judges to make the law. The modern press makes us familiar with such questions. It asks repeatedly who these unelected judges are, without pausing to consider whether we might be worse off if judges were elected.

10. A more nuanced view of the common law aligned it with logic, learned study and experience. Much of our present constitutional settlement dates back to the 17th century. Sir Edward Coke CJ’s battles with James I and then Charles I are an essential starting point. In the *Case of Prohibitions* 1607 EWHC 323 (KB) James I tried to support a complaint, made by the Archbishop of Canterbury, that the judges were simply the King’s delegates, and that the King could “take what causes he shall please” to determine them himself.

Coke agreed with James I's claim that he as the King had "reason like the judges, excellent science, and great endowments of nature". This was tactful in relation to a King dubbed by some "the wisest fool in Christendom". But Coke said that that was not enough. The law was different. Cases were not "to be decided by naturall reason but by the artificiall reason and judgment of Law, which requires long study and experience, before that a man can attain to the cognizance of it". The suggestion that the "Law" is something of which judges obtain "cognizance" by hard labour and study remains true to the idea of certainty, and, again, it avoids questions about the role of judges in making the law.

11. An important buttress to the stability of the law is provided by one of the matters which Coke had in mind, that is the power of precedent. In some continental jurisdictions, first instance judges are entitled to follow their "intimate conviction" about the law, if convinced that higher courts have gone wrong. But the doctrine of precedent remains a hall-mark of the common law. Not so very long ago, at a dinner for English legal visitors in Würzburg, I (fondly, if hungrily) remember our hosts displaying their admiration for the doctrine by a 40 minute professorial lecture upon it before the first course. But there is good precedent for admiration for the doctrine. Cato was quoted by Cicero as explaining the strength of Roman institutions by reference to their gradual accretion over generations. Contrasting other systems like those developed "on the personal advice of particular individuals", he said

"For there never was in the world a man so clever as to foresee everything and that even if we could concentrate all brains into the head of one man, it would be impossible for him to provide for everything at one time without having the experience that comes from practice through a long period of history". (quoted by Bruno Leoni, *Freedom and the Law*, Indianapolis: Liberty Press, 3rd Ed., 1991. at p. 88).

When I was an undergraduate in Oxford, the strength of the bonds of precedent was expressed by Viscount Simonds in *Midland Silicones Ltd v Scruttons Ltd*. [1962] AC 446, 467-468, in unremitting remarks aimed at Lord Denning, as follows:

“...heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius.”

This reminds one of the response, variously attributed to Mr Justice Astbury and others: “Reform, reform! Aren’t things bad enough already?”!

12. In relation to legislation, judges have traditionally also been viewed as mediators - receiving their marching orders from and applying the language of the legislation itself. Lord Diplock pithily encapsulated this in *Dupont Steels Ltd v Sirs* [1980] 1 WLR 142, when he said: “Parliament makes the laws, the judiciary interprets them”, though it is right to add he was warning against the detection of fanciful ambiguities in legislation. The idea is expressed in more extreme fashion in article 5 of the French code civil of 15 March 1803: “Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises”. In short, judges must stick to the precise words and not supplement or re-interpret what is written. This was a reaction to the arbitrary abuses of judicial authority before the Revolution. It found a strong supporter in Jeremy Bentham. He thought that his ideal utilitarian state could be achieved by complete codification of English law. This would reduce the judicial role to that of a minor bureaucrat. A similar optimism lay behind the hope expressed by Lord Gardiner, Lord Chancellor when I was at Oxford, that all relevant procedural law could be clearly and accessibly published in a single volume of the rules, without commentary.

13. Are there, however, limits to the certainty to which legislators and judges can or should aspire? The infinite circumstances affecting human existence fit uneasily within straitjackets. Certainty can be pushed too far, and, if it is coupled with governmental suspicion of judicial discretion, it can lead to potential injustice. Not long ago, in Mauritius, the government passed

legislation and then a purported constitutional amendment withdrawing bail in all serious drugs cases. The result was certainty, but the effect was remand in custody, commonly for long periods due to the delays in criminal trials. The courts, first in Mauritius and then the Privy Council, struck down the legislation as inconsistent with the constitution. It was inconsistent with the very notion of the separation of powers, which is at the heart of democracy. The freedom of an individual at a time when he is still presumed innocent must ultimately be a matter for judicial, not legislative or executive decision: *Norally v Attorney General* [1986] MR 204; *Khoyratty v The State* [2006] UKPC 13.

14. In this country, by s.2 of the Crime (Sentences) Act 1997, Parliament saw fit to introduce a mandatory life sentence where a person was convicted for a second time of a serious offence – unless there were exceptional circumstances relating to the offence or the offender which justified not imposing such a sentence. The rationale was to protect the public from someone who was a serious danger. But a narrow understanding of exceptional circumstances would have led to the same risk in this country, as under the Mauritian legislation. In *R v Offen* [2001] 1 CAR 372, Lord Woolf CJ avoided the risk. He held, in the light of the Human Rights Convention, that exceptional circumstances existed wherever it could be shown that the offender posed no serious danger.

15. Context is however always important. In *R v Rehman and Wood* [2005] EWCA Crim 2056, there was an apparently similar exception to a requirement to impose a minimum five year sentence for the strict liability offence of possessing a prohibited firearm. But the rationale of this minimum sentence was different. It was not the dangerousness of the offender, but the deterrence of the public from holding weapons which might well fall innocently into wrong hands. The case concerned an experienced, impressive and generally responsible collector who carelessly held in his attic a prohibited weapon inherited from his grandfather. He did not himself pose a threat to safety. But this did not take him outside the rationale of the minimum sentence, which was to limit the availability of weapons that might fall innocently into wrong hands. Lord Woolf held that there were no “exceptional circumstances”.

16. The jury system is another fundamental feature of the common law system witnessing a social preference for virtues other than certainty. If we wanted certainty about the reasons and justification for a decision, we would not choose a jury. Juries can sometimes even be persuaded not to apply the law. Lord Brown noted last year de Toqueville's argument that juries were a bulwark against injustice, whether in the form of unjust laws, or over-zealous prosecutions, or the victimisation of whistle-blowers (most famously the Clive Ponting case) or excessive censorship (*Lady Chatterley's Lover* – where the question posed rhetorically by prosecuting counsel, as to whether it was the kind of book that the jury "would wish your wife or servants to read", no doubt contributed to the jury's intimate conviction that there should be an acquittal). Despite this, it is misguided to prefer the jury system *because* it can give what lawyers might regard as uncertain outcomes. Not only are over 90% of all criminal cases tried by magistrates or judges alone, but comparative law shows many well-functioning examples of purely judge-based systems of criminal trial leading to reasoned judgments, and there is much that may be said in their favour. The real benefit of our system of jury trial is its involvement of ordinary people in the central societal activity of administering justice. That too is of course one of the benefits of a lay magistracy.

17. As to the judicial role, the reality is that judges have an important interpretive role even in relation to legislation and an essential developmental role in relation to the common law. The law is not a science, as are physics and mathematics, at least at the humble level at which I can pretend to any understanding of those subjects. Certainty in the law is highly desirable, but the law must discriminate, sometimes narrowly, between different circumstances. It has in recent years had also, and increasingly, to look to the context and consequences of the language used and decisions reached.

18. Even terms which we use every day in the law and view as hallmarks of certainty prove to rest in sand. Take the concept of knowledge. Oxford connotations come naturally here, and I cannot resist starting with a famous Balliol ditty (about Benjamin Jowett, Master of Balliol from 1870 to 1893):

“How do you do? My name is Jowett

All that there is to know, I know it.
I am the Master of this College,
What I don't know isn't knowledge.”

This at least catches some of the self-confident certainty of the Victorian era, though it probably does not carry the philosophical debate very far. When I was at Oxford I attended one or two seminars led by the famous philosopher, A J Ayer. This was before he became even more famous in the 1980s, aged 77 and a year before his death, for his encounter with Frank Tyson. Tyson was urging unwanted attentions on no less than Naomi Campbell at a party attended by all three. "Do you know who . . . I am?" Tyson asked in disbelief when Ayer urged him to desist: "I'm the heavyweight champion of the world." "And I am the former Wykeham professor of logic," Ayer answered politely. "We are both pre-eminent in our field. I suggest that we talk about this like rational men." Ayer was as charismatic in his seminars, and after his death I had in a judgment to return to one of his themes, by considering what knowledge really involves. It proved to be to be a remarkably uncertain matter, and I concluded that:

“Whether a person has knowledge is for lawyers essentially a jury question. The meaning of knowledge has perplexed philosophers from Plato (and no doubt before) to after A.J. Ayer, and been said by some to be ultimately unanswerable. But . . . knowledge is not to be equated with absolute certainty, itself an ultimately elusive concept. The impossibility of doubt which Descartes found only in the maxim "I think, therefore I exist" is not the criterion of legal knowledge. For practical purposes, knowledge pre-supposes the truth of the matters known, and a firm belief in their truth, as well as sufficient justification for that belief in terms of experience, information and/or reasoning. The element of regression or circularity involved in this description indicates why knowledge is a jury question.”

(Insurance Corp of the Channel Islands v The Royal Hotel Ltd [1997] EWHC 373 (Comm)).

19. Since then, David Edmonds and John Eidinow have published a most entertaining book called Wittgenstein's Poker (Faber and Faber, 2001).

Through a meeting between Wittgenstein and Professor Sir Karl Popper in room H3, King's College, Cambridge in 1946, the book explains the development of philosophical thinking to a focus on linguistic analysis, which was evident at Oxford when I was tutored by the then Lennie Hoffmann, and evident in many speeches of Lord Hoffmann in the judicial House of Lords. Edmonds and Eidinow observe (at p.182) that it is now accepted that it is impossible to treat Cogito ergo sum as the starting point of what we know, because that itself is a statement depending upon what we understand by "thinking" (and indeed "being"). They add that "with this insight, Wittgenstein overturned several hundred years of philosophy and emancipated his followers from the slavery of the search for rock-bottom certainty".

20. And certainty cannot be restored to its perch by the lawyers' habit of invoking apparently independent criteria - as when we say that we judge conduct by the standards of the man on the Clapham omnibus (or Oxford tube) or the reasonable bystander or interpret legislation by identifying the true Parliamentary intention. In the former case, the judge's own instincts are likely to have a role. In the latter, Parliament is an amorphous body and its intention can only be gleaned indirectly. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used." A clear ministerial statement in Hansard may occasionally provide admissible help to resolve a genuine ambiguity. Otherwise, the judges are left to do the best they can.

21. In this regard, a purely literal approach, based on the "natural" meaning of individual words, may lead to absurdity. A purely purposive approach could lead to judicial legislation. The modern approach has been appropriately described as integrated. Rather than seek fruitlessly for an answer on a point about which the legislator may never have thought, courts adopt a contextual approach, seeking to understand the overall structure and aim and to understand individual provisions within that context. But how much weight is given to natural meaning, and how much to context and the good sense of a particular result is, as my other Oxford tutor Professor Guest has written in

Chitty on Contract (28th ed, vol 1, para 12-49), ultimately a matter of balance, to be struck by the exercise of sound judicial discretion.

22. A recent example of modern courts' grappling with such problems is provided by *R (Noone) v The Governor of HMP Drake Hall* [2010] UKSC 30. The Supreme Court was concerned with the inter-relationship of the Criminal Justice Acts 1991 and 1993. The latter introduced new sentencing provisions, relating to such matters as the running of time and early release, designed to supersede the former. However, resources were not present to deal with shorter sentences. So the change was implemented only for sentences over 12 months. The appellant had been sentenced to sentences both of less and of more than 12 months. The question was when he became eligible to be considered for home detention curfew ("HDC"). That depended upon whether the scheme applied was that of the 1991 Act or the 1992 Act or some third scheme. On their face, the transitional provisions appeared to introduce a third scheme which was less favourable to the appellant than if he had been sentenced wholly to sentences over or wholly to sentences less than 12 months. Even that depended on its face on the order in which the sentences were passed by the sentencing judge. In other words, HDC eligibility could depend entirely upon whether sentence was first passed for an offence attracting *more* or *less* than 12 months.

23. When the appellant challenged the position, the High Court rightly held that the Secretary of State could not resolve these problems as a matter of administrative discretion. It would be contrary to the rule of law – contrary to the principles of legal certainty and security - for the executive to alter the effect of a court order. But the High Court held that the anomaly could be cured, for future cases at least, if sentencing courts were to shape their sentencing exercises so as to deal with offences in an order ensuring that offenders received the earliest possible eligibility for HDC. This would mean that, instead of taking the natural course of sentencing first for the more serious offences, the judge should start with the lesser sentences. This too was contrary to constitutional principle. Judges in fixing upon the right sentence do not concern themselves with the implications for eligibility for early release. The Court of Appeal rightly so held, and it could see no way out of the problem. The appellant must simply accept that he was worse off through having sentences of both more and less than 12 months, than he

would have been if his sentences had all have been of *either more or less* than 12 months.

24. The Supreme Court addressed the root of the problem. It held that an interpretation of the transitional provisions which led to this result had

“wholly implausible and unacceptable consequences; the draftsman may have failed literally to give effect to his own intentions; he may well (in view of other drafting errors) have been suffering from “Homeric exhaustion”.

On “a purposive construction”, the definition of “custodial sentence” which applied to cases where the sentences were all of less than 12 months could also be applied to the situation where sentences fell either side of 12 months. The anomalies otherwise present were thus avoided and sense made of the transitional provisions.

25. In a similar vein are Lord Nicholls’ comments in *Inco Europe Ltd. v First Choice Distribution* [2000] 1 WLR 586, 592C-D, that it had “long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language” and that “The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words”. He added (p.592E-G) that the latter power was confined to “plain cases of drafting mistakes”, where the court could be

“abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed”.

Any alteration in the literal wording must not, however, “be too big, or too much at variance with the language used” (p.592H).

26. Recent developments have underlined that the context in which courts interpret statutes can include principles and values external to the statute. This has been described as the “principle of legality”. The principle is that the legislator will be assumed not to have intended to take issue with basic principles, unless it has used the clearest language. In *R v Secretary of State for the Home Department, ex p Simms* [1999] AC Lord Hoffmann explained the position:

“The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”

In *ex p Simms*, the basic rights at issue were freedom of expression and of the press. A prisoner was held to have the right to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner's conviction and to publicise his findings in an effort to gain access to justice for the prisoner. Prisoners may be unpopular, as recent Parliamentary attitudes to prisoner votes suggest, but they have certain other fundamental rights affecting their liberty and access to justice. Similarly, in *Bowman v Fels* [2005] EWCA Civ 226 the Court of Appeal held, in the light of the basic right of access to legal representation, that money-laundering offences were inapplicable to information obtained during the course of litigation or when legal advice was being sought.

27. A value-based approach also has wider currency in a European context. That is in the context both of European Union law and of the European

Convention on Human Rights. Under European Union law, domestic legislation must be interpreted as far as possible consistently with European Union law (and, if this is not possible, the legislation is simply invalid). Under s.3(1) of the Human Rights Act domestic legislation must also be interpreted “so far as it is possible to do so...in a way which is compatible with the Convention rights” (although, if this is not possible, the consequence is not invalidity, but a mere declaration of incompatibility, which leaves it up to Parliament to reconsider the position). United Kingdom courts have thus acquired an ability to read legislation up or down, in other words to read in or ignore words, in so far as this is required by European law and so long as to do so would “go with the grain of the legislation”. That was the phrase used by Lord Rodger of Earlsferry, High Steward of this University, whose premature death this year is another cause of sorrow (*Gaidan v Godin-Mendoza* [2004] UKHL 30, para 121).

28. The breadth of the modern interpretive exercise expected of courts in these respects can be a cause of uncertainty. Paradoxically it is uncertainty introduced into domestic legal systems in order to achieve greater consistency with and certainty in the application of European or other fundamental legal principles.

29. In relation to case-law, the limits of certainty are now also apparent. There is no longer any pretence that the common law has been fixed since time immemorial. Even Lord Esher’s immediate predecessor, Sir George Jessel MR, had struck a different note in *re Hallett’s Estate* (1880) 13 Ch D 696, 710. After referring to the modern rules of equity, he went on:

“I intentionally say modern rules, because it must not be forgotten that the rules of the Courts of Equity are not, like the rules of the Common Law, supposed to have been established since time immemorial”.

30. A more realistic view than Lord Esher’s was also given by Lord Reid who said famously in *The Judge as Law maker* that “There was a time when it was thought indecent to suggest that judges make law - they only declare it ...but we do not believe in fairy tales any more”; and again by Lord Goff, another former High Steward here, in *Kleinwort Benson Ltd v Lincoln CC* [1992] 2 AC 349, 377-379. He saw the declaratory theory not as presuming

“the existence of an ideal system of the common law, which the judges from time to time reveal in their decisions”. Rather, it was a pragmatic tool, essential when cases can only come before the court “some time, perhaps some years” after the relevant events occurred, and when “the law must be applied equally to all, and yet be capable of organic change”. Equality of application of the law is itself a facet of certainty and another element of the rule of law, but the reference to organic change highlights the fact that it is not only the role of Parliament, but also of the judges to ensure that the law develops to meet current needs.

31. As Lord Goff also said, judicial development of the common law is inevitable, or, otherwise, “the common law would be the same now as it was in the reign of King Henry II”. This was a double rejection, one might say, of the Saxon myth. He went on: “it is because of this that the common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live”. In *Kleinwort Benson* itself, this recognition of the inevitability of change led to philosophical discussion about whether there could be said to have been any “mistake”, if a person paid on a well-established legal basis, which everyone including the courts believed to be correct at the time, but which the highest court subsequently decided to over-rule. Schrödinger’s cat aside, as Lord Hoffmann said, facts either exist or not at any particular moment. But the law is rather different. Schrödinger’s cat was the cat contained in a box, whose survival or death was conditioned by whether or not an atomic particle survived or decayed – an apparently unknowable event unless and until the box was opened. Just as this extension of quantum physics into the daily world might suggest that you could only say retrospectively that Schrödinger’s cat was either alive or dead during the period before the box was opened, so Lord Goff’s more pragmatic insight was that the law as it is retrospectively declared must be taken always to have existed in relation to particular facts, so that a payer of money may be said to have made a legal mistake in failing at point A in time to know the law as it would subsequently be declared (quite possibly by being changed) at point B. The declaratory theory of law is here being used not to conceal the law’s changes and development, but as a tool of practical justice.

32. It is now 45 years since the House of Lords also abandoned that other bastion of certainty, precedent, and announced that “it would depart from a previous decision when it appeared right to do so”: Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. That statement is equally applicable to the new Supreme Court: *Austin v Mayor and Burgesses of Southwark BC* [2010] UKSC 28, paras 24-25. Unlike scientific experiment, precedent could never be regarded as a guarantee of correctness. It was never more than an instrument to ensure consistency and equality in the administration of the law. In fact, when it comes to correctness, there is some force in the comment made by Justice Posner in his writings that the more precedents there are on a particular point, the more dubious the force of the point may be. Otherwise there would not have been so many attempts to change or distinguish it! As all law students rapidly discover, a “very distinguished” case is one so often distinguished as to be hardly ever followed.
33. Nevertheless, the pull of consistency remains a strong one. The power conferred by the Practice Direction has been exercised “rarely and sparingly”: *Horton v Sadler* [2007] 1 AC 307, para 29, per Lord Bingham. *Austin* itself concerned previous decisions (including one in the House of Lords) holding that a breach of a deferred possession order brought a tenancy automatically to an end, and converted the tenant into a tolerated trespasser. The Court was unconvinced that these decisions were right or that they should ever have conjured into existence the oxymoron of a tolerated trespasser. But it refrained from over-ruling them, because they were long-standing and had been acted upon, both by landlords and by Parliament which had enacted subsequent legislation to address the problem for the future by a different route.
34. A similar dilemma led to a different outcome in the Privy Council cases of *Cartwright v Superintendent of H M Prison* [2004] 1 WLR 902 and *Gibson v United States of America* [2007] UKPC 52. The USA was seeking the extradition of three men, Gibson, Knowles and Cartwright, from the Bahamas to stand trial on drugs charges in Florida. There was compelling evidence of involvement in a conspiracy involving drugs. Thousands of pounds worth of cocaine was found. A magistrate remanded them in custody pending extradition. But a judge granted habeas corpus, on the basis that

there had been no valid evidence. This was “an astonishing decision”, which no-one suggested could be supported, and it represented a serious failure of the justice system. In an appeal brought by Knowles and Cartwright, the Privy Council held by a majority of 3 to 2 (Lord Hoffmann being a dissident) that an appeal from this decision lay under Bahamian law to the Court of Appeal and then the Privy Council, by way of judicial review. The judge’s decision was validly set aside and Knowles and Cartwright were extradited to the USA.

35. Gibson on the other hand was by this stage at large, and had disappeared. On his subsequent arrest, his case went to the Court of Appeal, with similar result, but on further appeal to the Privy Council it was again argued that there had been no jurisdiction under Bahamian law for the Court of Appeal to hear an appeal against a judge’s grant of habeas corpus. An appeal would only lie at the defendant’s instance against a judge’s refusal of habeas corpus, not at the prosecution’s instance against a judge’s *grant* of habeas corpus.

36. All the judges in the second Privy Council case concluded that, faced with the issue for the first time, they would have accepted this argument. They thus faced a dilemma. Should the Privy Council follow its own previous decision, which everyone now thought was wrong? Doing so would mean that all three defendants received the same treatment, the treatment moreover that they should all along have received had the magistrate not gone off the rails. Or should it over-rule its previous decision, and release Mr Gibson? That would lead to a result which should never have arisen, and which had involved a serious miscarriage of justice to his fortuitous and undeserved benefit. I should add that, in the meantime, Bahamian law had been amended to provide expressly for the right of appeal in such cases which was so obviously necessary. So there were no implications for future cases in either of these possible decisions.

37. The four majority members in the second Privy Council case, in an advice given by last year’s lecturer, decided in favour of the latter course. They declined to follow the first Privy Council decision and they therefore released the lucky Mr Gibson. The minority three included not only myself, they also included Lord Hoffmann, who had been one of the minority in the

previous case in thinking that it was wrong. He was now in the minority in thinking that, although it was wrong, it should still in the interests of consistency (and justice) be followed. In our view, the majority in the second Privy Council case of *Gibson* were in effect proposing to perpetuate injustice and a breach of the extradition treaty with the USA, simply on the grounds they thought that the previous decision was wrong, or very wrong, and this “would encourage attempts to revisit cases decided by a narrow majority, which are likely to be the most difficult”. That of course takes one back to Judge Posner’s observation.

38. Let me also go back to Lord Mansfield, who I quoted at the outset in support of certainty. Like all great judges, he could see both sides of the coin. In another famous decision, *Alderson v Temple* (1768) 4 Burr 2235, 2239, he showed a different concern:

“The most desirable object in all judicial determinations, especially in mercantile ones (which ought to be determined upon natural justice, and not upon the niceties of the law) is to do justice”.

39. Lord Mansfield lived in Hampstead, in the grand surroundings of Ken- (or Caen-)wood. In his lifetime, he was assailed both by rioters and by commentators. During the Gordon riots of 1780, his Catholic sympathies and belief in religious tolerance attracted the mob’s attention, and his Lincoln’s Inn Fields house and all his papers were burnt. The mob was only prevented from reaching his Kenwood house by the quick-mindedness of the landlord of the Spaniards Inn (one suspects a tenant of Lord Mansfield), who with the Earl’s steward plied them with wine until troops arrived from London. But he was also assailed by commentators for his reforming zeal as a lawyer, upsetting the settled wisdoms of the common law. One, writing in the *Evening Post* in 1770, under the pseudonym Junius, said that:

“In contempt of the common law of England, you have made it your study to introduce into the court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinions of foreign civilians, are your perpetual

theme; but whoever heard you mention Magna Carta or the Bill of Rights with approbation or respect? By such treacherous arts, the noble simplicity and spirit of our Saxon laws were first corrupted. *[The Saxon myth once again, this time with what reads like an early dose of Euroscepticism.]*

.....

Junius went on:

“Instead of those positive rules by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice.”

So, we have on the one side, Mansfield the protagonist of certainty, and on the other Mansfield the proponent of open-minded equity and substantial justice.

40. Let me take just two more examples of the competing pulls of certainty and practical justice. In beginning, I quoted Lord Bingham’s praise of the virtue of certainty in the case of the *Golden Victory*. But certainty did not in fact prevail. The case concerned a long term time charter of the *Golden Victory* for seven years from late 1998. Each party had the right of cancellation in the event of war or hostilities involving any two or more of the USA, UK and Iraq. The market had fallen and the charter had become expensive for the charterers who were keen to get out of it. They wrongly repudiated the charter after only three years in December 2001. So they rendered themselves liable in damages for loss caused to the owners.

41. At that stage, war and hostilities were no more than a remote possibility, and owners on the face of it had a claim for four years’ difference between the higher charter and the lower market rate. But 15 months into these four years, in March 2003 there occurred the second Gulf War. Had the charter still been on foot, the charterers would thus have been entitled to cancel it free of charge at that point. Were damages to be measured as they appeared at the date of the actual breach in December 2001? In that case the owners would get four years damages. Or could the tribunal look at what actually

happened, in which case it was apparent that the owners had not lost anything after March 2003, and the damages would only run for 15 months?

42. The former result gave certainty – it enabled the owners to pursue their claim from the outset secure in its value, whether the claim was settled or decided before or after the onset of hostilities. But the latter gave an accurate and one might think fairer measure of the actual loss in the light of events as they had occurred and were known when the case was actually decided, which was after March 2003.

43. As I say, certainty did not prevail - at least according to the majority of 3 to 2 which decided the case in the House of Lords. The narrowness of the decision illustrates the point that law is not a science. It was once aptly observed that, if a supreme court was itself subject to further appeal, there could be little doubt that many of its decisions would be over-ruled. On the view advanced by Professor Dworkin, the former Professor of Jurisprudence of this university, the law is concerned with basic principles which if identified, understood, evaluated and applied by a judge of Herculean stature would always yield the same ultimate result. But the reality is that no-one is that perfect, and, unless and until such a person is found – and even then how would we know him or her? - I cannot see how it can be possible to say whether there is only one way of identifying, understanding and weighing such principles. But these are dangerous waters for a practitioner, and I must confess that my limited jurisprudence stems originally from the time of Professor Dworkin's predecessor and later adversary, Professor Herbert Hart.

44. My other example of the potential pull between certainty and justice concerns the impact of the fundamental principle that no-one should be entitled to benefit from his own wrong-doing. In the recent planning enforcement case, *Secretary of State for Communities and Local Government v Welwyn Hatfield B.C.* [2010] EWCA Civ 26, the Supreme Court was concerned with a property owner in the Green Belt who obtained planning permission for a barn, but, within the profile of a barn and invisibly to the outside, built a house in which he lived for four years. He was well aware the scheme of the Town and Country Planning Act 1990, section 171B of which provides that, where there has been a breach of planning

control consisting in unauthorised building, no enforcement action may be taken after four years. Could he after four years obtain a certificate that his building was now lawful? Lord Brown's judgment encapsulates the problem (para 72): "the whole object of the statutory scheme, essentially in the interests of clarity and certainty, is to recognise and declare that after a certain time unpermitted development, if not already enforced against, has become immune from enforcement and thus lawful. To import the principle [that a person cannot benefit from his own wrong] into this scheme could be seen as inconsistent with that intention and as compromising the very public interest which the scheme was designed to serve".

45. However, as he went on to say (para 73), that:

"breaches of planning control involve a spectrum of wrongdoing. They range from cases at one end where the developer is simply unaware of the need for development permission to, at the other extreme, those intent on unpermitted development who plot a whole course of deception designed to circumvent planning control and escape enforcement."

I expressed a similar thought when I said some aspects of the owner's behaviour were not, I supposed, uncommon (refraining from giving building regulations notice, not registering for council tax or on the electoral register, giving the council his office address for correspondence and living a low key existence down a track with a locked gate at its end). I was prepared to assume that these alone would not have prevented the owner obtaining a certificate of lawfulness (paras 31 and 44). But the real gravamen of the owner's misbehaviour was the falsely obtained planning permission, which was deception *in* the planning process, directly intended to undermine its regular operation. On that basis, the Court held that the principle that a person cannot benefit from his own wrong took the owner outside the otherwise unequivocal entitlement given by the statutory language.

46. Only one thing is therefore certain. It is that, while as much of it as possible is desirable, certainty is not the ultimate or wholly achievable aim of the law. The answer to my question must be as indefinite as Lord Brown's was last year. The judicial role often involves the identification, evaluation and application of fundamental societal principles, with all the room for

disagreement that this involves. These principles are not or not necessarily the utilitarian principles that Bentham advocated. His thinking remarkably ignores the propensity of majorities to overlook the interests of minorities. Judges have a special role to protect unpopular interests and the interests of the unpopular. The identification, evaluation and weighing of principles which quite often pull in different directions is of the essence of judging, not only when shaping the common law but also when interpreting statute law.

47. That necessarily introduces an element of uncertainty into the law. One person's certainty is another's doubt, one person's preference is rejected by another. We no longer possess the same confidence or faith that led to the natural law thinking of the 17th and earlier centuries. But we live in a liberal democracy, and, unless we have, and judges seek to identify and reflect, some fundamental societal values, the law would be neutered rather than neutral, and it would be unclear what if any stance it should take on any number of issues. That would be an abrogation of role. Oliver Wendell Holmes said, much more pithily than I, in *The Path of the Law*, that "certainty generally is illusion, and repose is not the destiny of man."

48. It cannot of course be for each judge to identify and apply his or her entirely independent value system. Precedent, consistency, analogy and above all an appreciation of the limits of the judicial as opposed to the legislative role all continue to serve as important controls or restraints. The collegial aspect of legal practice can also instil common standards – so long as it is not at the expense of diversity of all kinds at every professional level – though that is another theme. Although the law is not a science, it is a disciplined system to which (as Sir Edward Coke saw) judges must be loyal.

49. May I conclude by saying that although it has required discipline it has also been a great pleasure, to be asked to give this lecture. I never thought to have the privilege of speaking in St Mary the Virgin, which at least we can be sure has Saxon origins, and I thank the High Sheriff and her supporters for all the effort and time that has gone into arranging this event, and for inviting me to take part.