

## **The Historian as Judge**

### **Lord Sumption**

**Rolls Building, 6 October 2016**

I am told that this evening is part of a series training sessions for Upper Tribunal judges. My first reaction when David Allen asked me to talk about the Historian as Judge was to wonder how a talk on this subject could possibly contribute to the work of judges in the immigration and asylum and administrative appeals chambers. On reflection, however, perhaps I was looking at it too narrowly. Since my theme is the value of the historical method to the work of a judge, it may be that I do have a contribution to make after all. I can at least tell you something about my own experience, and suggest some broader lessons. Forty years ago, I left my history fellowship at Magdalen College, Oxford, in order to become a barrister. I would like to be able to tell you that I was moved by a thirst for justice in an imperfect world and a conviction that this was the best way that I could help fellow citizens. Actually, my reasons were rather vulgar. I wanted to be able to pay my grocery bills, with perhaps a bit more left over than an academic salary could offer. Since then, I have thought of better reasons. But retrospective rationalisation should never be trusted, as I quickly discovered in my new profession.

At any rate, I have never had any occasion to regret the decision. The law has of course paid my grocery bills. But, more than that, it has left me with enough control over my own life to be able to continue my interest in historical scholarship. One of the shameful things about the current Research Assessment Framework for universities is that it makes it difficult for a professional academic to write a work of any substance. The emphasis on

quantity rather than quality means in order to sustain the financial viability of his department, he must have a regular output of published work. This means that the time available for research and writing tends to be consumed by the production of annual articles for peer-reviewed periodicals, which boost the department's research score without necessarily adding much to the sum of human understanding. A distinguished academic historian pointed out in a review of my most recent volume that it was only by leaving the pressures of academic life for the presumably less pressured environment of the law that I had been able to write a work of historical scholarship on the scale of my history of the Hundred Years War. This idea aroused some hilarity among my friends. But actually the reviewer was not far from the truth.

Intellectually, the change from academic history to law was less of a jolt than I had expected. The study of common law is an intensely historical process. Like any system of customary law dependent mainly on precedent, it is based on judicial decisions about the legal implications of a very large number of tiny human stories. One could of course view these stories in the abstract, as if they were intellectual exercises written for a moot or a professional examination. But that would deprive them of much of their interest as well as of their poetry and their humanity. They are also accidental fragments of English history. As sources of law, they are completely different from the written codes that provide the basis of judicial decision-making in civil law countries. The French civil code originated in a deliberate attempt by Napoleon's jurists to efface the social values of the pre-revolutionary past. The result was, and is, a document which achieves an almost total degree of intellectual abstraction. It could be the law of almost any country on earth. Indeed it is the law of quite a lot of countries on earth, having been adopted with minimal variants

in many places which have few cultural or historic connections with France. By comparison, the sources of English law could not have originated anywhere but England. This is due to the intense humanity of English law, something that makes its study at the same time fascinating and enjoyable.

Like most of my colleagues on the Supreme Court, I have been much exercised during the past year by the legal implications of British military operations in Iraq and Afghanistan. The case-law on the subject is like a precis of the history of British foreign policy over four centuries. It includes decisions about the Anglo-Danish trade wars of the seventeenth century, the depredations of the East India Company to which Edmund Burke devoted some of his greatest Parliamentary speeches, the ill-fated British occupation of Buenos Aires in 1806, the role of British mercenaries in the Portuguese civil wars of the 1830's, the forcible suppression of the West African slave trade by the Royal Navy, the scramble for African colonies at the end of the nineteenth century, the Jameson Raid and British interventions in Cyprus in the 1960s. And not only English history. There are also insights into the revolutions of 1830 in Germany, the civil wars of Venezuela and Mexico at the end of the nineteenth century and some of the more brutal incidents of the Russian revolution.

These are of course the extreme cases. One does not usually turn to the law reports for stories of high adventure. But even the placid ponds of the pre-1875 Chancery Division produced nuggets of historical gold. Indeed, I would say more than nuggets. Much of the law of land tenure, conveyancing and trusts is unique to England and to those countries which have adopted English law. It reflects the preoccupations of the eighteenth and

nineteenth century English aristocracy, whose main purpose was to preserve their family line and its association with particular places and above all with particular houses. Today these considerations have lost almost all of their former significance. But the basic principles of a system created in the very different social world of our ancestors still, even after the statutory reforms of 1925, provides the framework of this area of law. One could make a very similar point about the law of undue influence. It has its origins in a patriarchal society very different from the one in which we live, and perhaps also in a very protestant suspicion of all religious enthusiasm, But it is still with us. One of the best ways of understanding the law in these areas is to read Sir John Habakkuk's remarkable Ford Lectures of 1985, *Marriage, Debt and the Estates System, 1650-1850*. But for those who cannot face 800 pages of social history, however well written, the novels of Jane Austen and Anthony Trollope are a very adequate substitute. *Pride and Prejudice* is in a sense a prolonged commentary on the law of entails, with just enough fantasy to allow for a happy ending. Elizabeth Bennet had too small a marriage portion to hope for good match, but still ended up by marrying the fabulously rich Darcy. In real life she would probably have had to make do with Mr Collins.

I have always found it difficult to resist turning to standard reference books like the Dictionary of National Biography or the old Cambridge Modern History, in order to fill out the details of the older reported cases. The reporters were austere fellows, and most of them are rather spare with detail. There is a rather obscure decision of 1816 which I once cited in court about the construction of a life insurance policy. It tells you nothing about the circumstances of the deceased's demise apart from judicial hints that it was rather discreditable. You have to look up old obituaries in the Inner Temple Library to discover

that he was struck over the head with a pewter pot while celebrating the defeat of Napoleon, in Paris. *Portarlington v Soulby* (1833) is not the sort of case that every practitioner carries about in his mental library. It is about the enforceability of gambling debts. It is perhaps a symptom of the triviality of my mind that I found it fascinating that Lord Portarlington, in addition to being a feckless and unskilful gambler, had been cashiered from the army for arriving five hours late with two days growth of beard at the battle of Waterloo. As it turned out, this was not an entirely useless piece of information. It helped me as Counsel to retain the interest of the Appellate Committee of the House of Lords, when taking them through one of the dryer judgments of Lord Brougham.

You might think that this is just self-indulgence and romanticism. If so, you would be half right, although one should not under-estimate the importance of entertainment as a tool of advocacy or the poetic element in any well-written judgment. There are, however, a number of more fundamental points to be made.

The first is perhaps too obvious to be worth stating. The rationale of a rule of law, and particularly a long-standing rule of law, is not always self-evident. It helps to understand how, historically, it came about. In response to what perceived mischief? Depending on the answer, the rule may be inapplicable, or simply redundant. At least it will be easier to understand. A good example is provided by two recent cases, *Cranford Adjusters v Sagikor* in the Privy Council and *Willers v Joyce* in the Supreme Court. In both of them, we had to consider whether there was a tort of maliciously commencing or conducting civil proceedings, analogous to the well-established tort of malicious criminal prosecution. Opinions were divided, but in both cases the majority thought that there was that the

alleged tort did indeed exist. I am not proposing to go into the details of that argument, especially as I was in the minority in both cases. The point that I want to make about these cases is that it was necessary for us to ask ourselves, among other things, why does there appear to be, in the existing authorities, a distinction between civil and criminal litigation. Is such a distinction justifiable today? These are difficult questions to answer without going back into some rather arcane aspects of English social history: the use of the law courts as a tool of oppression and an instrument of vendetta in the late middle ages, which led to the invention of the tort of conspiracy; and the problems of public order in seventeenth and eighteenth century England, a society with no organised police force or system of public prosecution, which led to the recognition of a tort of malicious criminal prosecution. Now, of course, a simpler way of approaching a question like that would have been to forget the history and proceed straight to the last stage of the inquiry. Never mind what happened in the fifteenth or the eighteenth century. What does justice require now? Ultimately, of course, that is the question that one asks. But in a customary system of law like ours, it cannot be answered without reference to what earlier generations of judges have thought and said about it. The baggage of the past is always with us. Courts cannot ignore authority by which they are bound. Even the Supreme Court cannot approach the law of tort as if Britain were an uninhabited island awaiting its lawgiver, instead of a complex society shaped by a long past.

What this example illustrates is that it may be necessary to understand the historical background against which past cases were decided in order to ascertain what the law is. But there is more to it than that. A lawyer requires many skills. Knowing the law is only one of them, and not necessarily the most difficult. Among the others, perhaps the most

important is an ability to weigh evidence and to analyse facts. Most litigation depends entirely on fact and not on law at all, except perhaps for a few basic and indisputable propositions. Even when there is a real issue of law, it will usually be found to turn on the correct classification of the facts. The more arcane the facts are, the more valuable it is to have some background knowledge of the kind of conditions that produced them. I can think of few better illustrations than the work of an immigration and asylum judge, in which many of you are engaged. People who leave their homes and friends to seek a new life somewhere entirely new and unfamiliar, do not do so casually. Most of them are propelled by grinding poverty, personal misfortune, political crisis, persecution, or natural disasters. Even economic migration is I suspect a portmanteau term for a complex bundle of motives. To comfortable and secure Englishmen, this is an alien world. I cannot speak from experience, but I would expect that a feel for the social world from which these people come is essential if one is to decide what the facts of these cases are likely to be. It is just one illustration, although quite an important one, of the value of a grasp of history and its methods for the practice of law, whether as an advocate or a judge.

Until relatively modern times all this would have been regarded as a truism. Let me take you back to the origins of the Oxford law faculty in the nineteenth century, another alien world, but one in which these questions were much discussed. At Oxford, a proper undergraduate school of English law did not exist until 1850, although civil law had of course been taught there for centuries. However, for the first 22 years of its existence it was not an independent faculty. It was a joint school with modern history. The experience provoked people to ask what was the value of history to a lawyer. The general opinion was that you could not be a good lawyer without a proper grasp of history. The first Chichele

Professor of Modern History, Montague Burrows, delivering his inaugural lecture in 1862, told his audience that the object of the combined school was to “form the judicial mind for the purpose of dealing in the best manner with all the problems of thought and practical life”. William Stubbs, the Regius Professor of History and perhaps the most influential Oxford historian ever, regarded the study of history as indispensable to a profession founded on the exercise of sound judgment. Historical enquiry, he once said, was an “endless series of courts of appeal, ever ready to reopen closed cases.” The great medievalist John Horace Round had a rather different take on it. The problem with lawyers, he thought, was that they were too respectful of authority. Their vision was “bounded by their books”, whereas the historian was trained to question authority and to work from first principles. Acquaintance with the historical method could only be good for lawyers. But Round eventually concluded that they were incorrigible, and pressed for them to be allowed to go their own way, with their own faculty. That is what eventually happened in 1872. But many people regretted the separation, including at least two of the university’s four law professors. Maine and Holland both told a Royal Commission a few years later that they regretted the creation of a separate school of law, giving substantially the same reasons as Burrows and Stubbs.

After 1872, most would-be lawyers have voted with their feet. Judging by the sample whose careers I have been able to trace, in 1914 the great majority of the English judiciary, High Court and above, had degrees in classics, with history coming a distant second and law a long way behind. Fast forward to 1939, and the picture has hardly changed. It is only comparatively recently that a majority of practising lawyers have had law degrees. It is not, even now, universal in England, as it is in many continental countries. I do not think that



it was an accident that Tom Bingham, one of the great judges of the past century, read history at university and was an avid reader of history all his life. His interest in history unmistakably marked his style, in both his judicial and his extra-judicial pronouncements. Of course, you can know a great deal of history without having studied it at university, if you really set your mind to it. But however it is acquired, I have no doubt that the grasp of the dynamic of human societies through their history makes a better judge. More generally, I would say that it improves the quality of almost every kind of decision-making. If President Woodrow Wilson had been a better historian, I doubt whether Eastern Europe would have suffered the disasters that engulfed it in the two decades after the treaty of Versailles. It can fairly be said that in the thirty years, British foreign policy has been somewhat accident prone. Can this be something to do with the fact that the last Prime Minister with a profound grasp of history was Harold Macmillan?

I think that it is permissible to regret the growing tendency of would-be lawyers to devote themselves to the study of law from the age of eighteen. The law is an exclusive and possessive discipline. But its study is not a particularly good training for the handling of evidence, or for acute social observation, or for the exercise of analytical judgments about facts, all of them essential judicial skills. I am not for a moment suggesting, least of all in present company, that law graduates lack these qualities. But I do not think that they derive them from their legal studies. I would also suggest that for those set upon a legal career, the study of a different subject at a formative time of one's life is personally enriching. It is a source of intellectual satisfaction, whatever contribution it may or may not make to one's professional life. Certainly, I have found it so. Over the years, I have made a great many enemies in law faculties up and down the land by suggesting that law should be

offered only as a second degree, as it is in North America. In fact, I would not press this point today. I doubt whether it is realistic, given the limited public funding available for extended study at university. But in an ideal world there would be much to be said for it.

There is, I think, a broader sense in which history supports a judge's role. It is a prodigious source of vicarious experience. We are all, I am sure, familiar with the tired journalistic cliché that judges are out of touch with real life because they are middle class and, by the standards of our society, quite comfortably off. The truth is that everybody is out of touch with real life. This is because real life is too vast and too varied for more than a small part of it to be experienced by any one man or woman. We need several lives, but we are granted only one. This is not just a problem peculiar to judges. It is as true of the noble lord who rules the state as it is of the noble lord who cleans his plate, or the aristocrat who banks at Coutts and the aristocrat who cleans his boots. In the nature of things most experience is vicarious, not personal. History enables us to understand many things about humankind, which we cannot hope to experience personally. Of course, its value would be very limited if we were all that different from our ancestors. But one of the things that one learns from our three millennia of recorded history is that humanity does not really change very much. What changes is not its basic instincts and desires but its capacity for giving effect to them. Indeed, one of the abiding tragedies of mankind is surely that its technical and organisational capacities have expanded so much faster than its moral sensibilities.

One of the most interesting sources which I use for my work as a historian is the French chancery registers of the late middle ages. Several hundred volumes of them sit in the Archives Nationales in Paris. They consist mainly of pardons. In these fascinating documents, one has little potted biographies of tens of thousands of late medieval

criminals, almost all of them poor wretches who for one reason or another had found themselves on the wrong side of life's chances. I met all of these people during the twelve years that I sat a Recorder in London Crown Courts. The accounts of their doings and the assessments of their culpability read exactly like the social enquiry reports prepared for sentencing hearings. At the opposite end of the social scale, the ambitions and activities of courtiers and officials are remarkably like those of dealers and managers in modern investment banking houses. There really is nothing new under the sun.

By the admittedly narrow standards of modern professional life, the bar and the bench are surprisingly varied groups of people. There are, I believe, no longer ex-policemen and ex-merchant seamen at the bar, as there once were. But among the sample of barristers and judges of whom I have some knowledge, I can count a former actor, a concert pianist, a doctor, a chemist, and several accountants, merchant bankers and surveyors, as well as a number of refugees from academic life in disciplines other than law. It may be that a future lecture in this series will be called "The concert pianist as judge". I am by no means unusual in having once done something else, and I am certainly not unique in continuing to do it in tandem with the law. It has enriched my life and made me better at both things. I am often asked how I find the time. The answer is that it is not as difficult as all that. Every well-rounded professional should have room for at least one consuming interest other than the one that earns them their living. It might be DIY. It might be bell ringing. It might be Morris dancing. History is my equivalent.