The Wilberforce Lecture 1997

THE FUTURE OF THE COMMON LAW

LORD GOFF OF CHIEVELEY

IT IS the greatest honour for me to be invited to give the Wilberforce Lecture this year, on Lord Wilberforce's ninetieth birthday. In my generation, he has provided an inspiration for us all—an example which we may strive, but never succeed, to emulate. His brilliant intellect, the modernity of his outlook, his capacity to look beyond the immediate problem to the more fundamental issues, his readiness to innovate—all coupled with a disarming informality of address—make him at the same time one of the most profound lawyers, and one of the most attractive men, of his generation. It is a privilege for me to have known him. I am his admiring, but still struggling, disciple.

I have chosen for today's Lecture a subject which is worthy of Lord Wilberforce—the Future of the Common Law. You will notice that my choice of subject assumes that the common law indeed has a future. This has been questioned. For his Inaugural Lecture in Cambridge last year, Professor Jack Beatson chose as his subject—"Has the Common Law a Future?"—and then revealed one of his nightmares to be that we will end up as the Louisiana, or the Quebec, of Europe. In 1983, Lord Scarman went even further, claiming that "the Common Law is delightful but it is now of marginal importance". You may be relieved to discover that I take a less pessimistic view.

The scale of the subject is matched only by its importance. Let us not forget that the common law is common not only to England, Wales and Ireland and—dare I say it—to a substantial extent to my native land, Scotland. It is also the legal system which the people of these islands share with a third of the population of the world. But the importance of the common law lies not only in its vast geographical spread, but in its fundamental attributes which I shall try to identify with you this evening.

Historically, the importance of the common law lay in the fact that, in a world elsewhere subject to tyrannical regimes, the common law came to be identified with the rule of law, together with its prerequisite, the independence of the judiciary. In the old days the prerogative writ of *habeas corpus* was the principal weapon available to the judges in upholding the rule of law, by protecting the freedom of the individual from executive oppression.

Times have, of course, changed. Since the end of the Second World War, and especially since the collapse of the communist dictatorships in Eastern Europe, tyranny has been in retreat. The rule of law is now accepted as the basis of democracy throughout a large part of the world.

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And nowadays, in many countries, the rule of law is upheld not only by independent judges, but also through the medium of entrenched constitutional rights. Let us not however forget that these rights find their origin in the English Bill of Rights of 1688, and their first developed form in the Constitution of another common law country, the United States of America; nor let us forget that common lawyers from this country played a significant part in drafting the European Convention on Human Rights, which came into existence with the purpose of preventing any repetition of the horrors of Nazi Germany.

Today we live in a different world from that of even fifty years ago. Our country must now be seen no longer as the apex of an immense Empire, but as an increasingly integral part of the European Community; and the British Empire itself has fragmented into a Commonwealth of 53 independent States. It will however be one of my themes this evening that the common law persists as perhaps the most enduring link between these independent States. Another theme will be that the common law possesses its own unique virtues which should ensure its continued existence as one of the major legal systems of the world.

To address these themes, however, I must first identify what I mean by the common law. When I speak tonight of the common law, I shall not primarily be referring to the rules or principles of substantive law applied in common law countries. My reading, and my own personal experience, combine to pursuade me that the major differences between the common law and what we may broadly call the civil law are to be found rather in the form than in the substance of our law, and still more in our judicial system and our procedure as seen in its broadest sense, together with our methods of legal reasoning. It is in areas such as these that the truly distinctive features of the common law are to be found. And when we consider the future of the common law we should be asking ourselves, in particular, how far these characteristics of the common law are likely to survive in the future.

But before I address this question, I wish first briefly to consider two external influences—European law and comparative law. I shall for present purposes put on one side the European Convention on Human Rights, though it now appears possible that before long this may be adopted as part of our law; but it is too large a subject to be accommodated within the confines of a Lecture such as this. I intend to refer rather to European law as derived from the Treaty of Rome. Lord Denning, a patriotic defender of the common law of England, saw European law as an invader, even a potential conqueror, travelling up the rivers and estuaries of England, like the Anglo-Saxons and the Danes many centuries ago. Are his fears likely to be justified? In the foreseeable future, I do not think so.

That there will be some diminution of sovereignty seems inevitable. We are likely, too, to see some change coming in our public law—though poss-

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ibly more through influence than by direct applicability. But what about our private law? I doubt if this will in the foreseeable future be affected to any marked degree by European law in its strict sense. No doubt, changes will come, and no doubt these will increasingly be stimulated by external influences—notably through the increasing importance of comparative law, a topic to which I will turn in a moment, and ultimately perhaps through the movement towards harmonisation of European national laws. Some limited changes may also come through Community directives. Perhaps, for example, we shall see a European initiative to cut through the jungle of national limitation periods.

Moreover, as Lord Denning may have forgotten, tides tend to go out as well as come in; and the European Court of Justice is itself open to influence from national laws, including our own common law. An example of this is the concept of legal professional privilege, which has been accepted by the European Court as a limit on disclosure which is justifiable in the public interest. But we in our turn have been influenced by the European concept of legitimate expectation, now recognised in our public law; and some think that we may yet find ourselves adopting the European principle of proportionality, though Lord Hoffmann in his John Maurice Kelly Memorial Lecture of 1996 concludes that proportionality is not a new principle but another and sometimes better way of explaining how we apply our existing principles. This two-way trade in influence must surely be regarded as fruitful. While never letting our critical guard down, we should welcome rather than reject these new ideas.

This is also true of the procedures of the European Court of Justice, from which we can learn even if we are unlikely to adopt them. Indeed, as one leading English practitioner in the Court has told me, in some respects the European Court is like a common law court, in which common lawyers can be more at home than continental lawyers. We are seeing the Court developing principles of European law, as common lawyers do, as they move away from the text of the Treaties; State liability provides an example of such a development. A doctrine of precedent is beginning to develop, not all that different from our own. And common law advocates are very welcome, with their readiness to face up to difficulties rather than pretend that they do not exist.

Comparative law is however a very different matter. This remarkable subject is, I believe, still in its infancy, as scholars struggle to develop and harness it so as to bring its influence more effectively to bear on national laws. Despite the remarkable work that has already been done, the essential texts have yet to appear; for if they are to be truly effective, they cannot just be interpretations of one legal system to another—difficult though that exercise is, because of the problem of matching different concepts. In the end, they have to be works of synthesis, which compare and select in a Darwinian exercise of the survival of the fittest. This summer we shall see

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the publication in this country of a truly pioneering work, the first volume of Professor Christian von Bar's great enterprise to produce a European law of torts, already published in German and now to be published in English by the Oxford University Press. This remarkable work, inspired by a romantic reminiscence of the reception into Germany of Roman law, and financed to a significant degree by Professor von Bar's brilliant achievement as the first lawyer to win the Leibniz Prize, should educate us all about the possible shape which our law of obligations may adopt in the years to come.

We must not allow ourselves to be deterred by aspirations such as these. Comparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow. We must welcome, rather than fear, its influence. It may be—I do not know—that we in this country will show ourselves as ready, if not more ready, to learn from it, compared with our brother and sister judges and lawyers on the Continent of Europe.

Even so, I do not see the European initiative for the harmonisation of national laws proceeding at any great speed. There may be progress in certain selected areas; but there are few major countries in Europe which will be very ready to abandon the identity of their own cherished systems of law. Of course there will be some symptoms of movement; for example the Netherlands, having recently adopted its new and much admired Civil Code, has taken advantage of its current Presidency of the European Union to launch a movement towards unification. I myself doubt whether this ambitious initiative will progress very far; we are perhaps more likely to see further international developments on the lines of the Vienna Sales Convention or the Uncitral Model Arbitration Law.

It is against this background that I turn, belatedly, to identify the distinctive features of the common law. I propose as I do so to refer by way of comparison to German law. This is partly because I have a nodding acquaintance with it; partly because I hold it in great respect; but mostly because the German legal system is, in most of its attributes, diametrically opposed to our own. In particular it is, to an astonishing degree, dominated by their distinguished professors. I have recently been reading Professor Wieacker's remarkable History of Private Law in Europe, translated by Tony Weir, in which the common law is accorded as much significance as we would attribute to the law of the Channel Islands. The intellectual tradition is superb; the history is astonishing. Yet I cannot help feeling a sense of relief that we, with out simple, practical, island story, do not have to live under the shadow of this massive incubus of learning. It is, after all, the end product which counts. I turn therefore to the common law.

If we look to the form of the common law, the distinctive feature remains to this day that it is a case law system, in which judge-made law is not only a source of law, but an important source of law. In this respect,

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there is a profound contrast with civil law systems, which are basically codified with the result that, in theory at least, legislation is the only source of law.

Of course, this statement has at once to be heavily qualified. For in England, and I imagine in all common law countries, many substantial areas of our law are indeed codified. One glance through any encyclopaedia such as Halsbury's Laws of England reveals this to be so, as topic after topic is found to have its basis solely in statute. Then if we turn to the laws of civil law countries such as France or Germany, we find substantial areas of the law in which the statutory origin has long since been overlaid by a mass of case law. This is particularly true of the law of civil wrongs. In France, the law of delict is derived from a few fragile sentences in the Code Civile. In the German Civil Code (the BGB), nearly a century younger than the French Code Civile, the law of delict is more systematic and developed. Yet as we read the German cases (many of which are now, thanks to Basil Markesinis, made available to us in translation) we can see the German judges struggling, as we have done, from case to case, with the same problems that have beset our courts.

Even so, the differences between the common law system and the codified systems of the civil law remain significant. First and foremost, there is a point of principle at stake: for in the common law countries, unlike most civil law countries, case law is, independent of statute, of itself a source of law. Of course in all common law countries, since the age of reform in the nineteenth century, the legislature has provided the prime source of law. But in England today, the centre—by which I mean the law of obligations—is still occupied by judge-made law. The point is however not so much a quantitative one, as a point of principle. In common law countries, judge-made law remains an independent source of law. Here indeed is one of the distinctive features of the common law.

How far are things likely to stay this way? It is hard to say; but in England there is likely to be change. First, we may well see a Criminal Code in place on the statute book within the next ten years or so. For many years, the Law Commission has been working at this task and much dedicated labour has been devoted to it. There is no doubt that a well-drawn Criminal Code could provide great advantages. My real worry is that, when our codifiers grapple with the basic concepts of our criminal law, they tend—perhaps like many of us—to entertain fixed ideas about the definition of these concepts which they are prepared to defend through thick and thin. A remarkable example of this occurred when the Select Committee of the House of Lords on the law of Murder in England and Scotland was persuaded to adopt the bizarre conclusion that the definition of the mental element for murder should be different in our countries. The Scots were able to point to a simple definition, which embraced not only intent to kill but also a form of recklessness—not caring whether you kill

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or not—which works perfectly well in practice. The English definition, founded upon intent to kill or to cause serious bodily injury, is well-known to be open to criticism and to be capable of injustice; but it seems that nothing can persuade English academic opinion to depart from it. The result is that the identical killing can be murder in Gretna Green and manslaughter in Carlisle and, astonishingly, vice versa. This is scarcely a satisfactory state of affairs.

Another project which is strongly supported by some of my academic friends is a Commercial Code. I have little doubt that the principal inspiration for this project is to be found in the Uniform Commercial Code of the United States; but the main impetus for that Code lay in conflicting laws in a federal jurisdiction, a problem from which we do not suffer. Moreover we seem to get on pretty well without one. Our Commercial Court in London is the only truly international commercial court in the world. London's position as the principal financial and commercial centre in the world appears to be gaining strength as the years go by. This is particularly true of financial services in all their multifarious forms, together with shipping, insurance and the commodity trades. As a result, an enormous number of these transactions are governed by English law. Every substantial shipowner in the world is likely to have a copy of *Scrutton on Charterparties* on his bookshelf, and not just for decoration. Indeed books such as this, and *Bowstead on Agency* or *Dicey's Conflict of Laws*, with their series of lapidary propositions accompanied by a substantial text, combine the benefit of a continuously updated, though informal, code with the rich tapestry of case law which provides such valuable guidance for the busy lawyer or businessman. Perhaps even more significantly, English law and practice are being spread all over the world as the great international firms of solicitors in the City of London, of which our hosts tonight provide the most remarkable example, are opening new offices in many countries. Since English commercial law seems to be so widely used, and English commercial lawyers seem to be so widely consulted, why worry about a commercial code? Moreover, if the McGregor draft contract code of the 1960's provides a precedent, our modern codifiers are likely to forget the example of Sir MacKenzie Chalmers and to attempt to improve on our present law. This could prove very controversial. One fashionable proposal is to follow the American example and introduce an overriding obligation of good faith; but there are lawyers who believe that this would in all likelihood do more harm than good.

I have however to admit that this complacent view was rather undermined when, a few years ago, we received an informal approach from an Eastern European country that it might for the future adopt English commercial law. This flattering proposal however ran up against two insuperable objections—the first was that nobody knew precisely what English commercial law consisted of, and the second was that nobody knew where

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to find it. In contrast, every civil law country has its own commercial code which their lawyers and businessmen carry around, as Australian marsupials transport their young, in their pockets. Of course, their commercial law is different from ours. For the English, the characteristic commercial contract is a contract for the carriage of goods by sea. For the Germans, Professor Hein Kötz assures us, it is a contract for the sale of land. English commercial law reflects in our decided cases a vast experience of what we think of as truly commercial transactions, not to be found in the laws of other European countries. When I was a commercial silk, I used to find myself advising foreign arbitration tribunals, even foreign corporations, about the English law on particular topics, though they were working under some other system of law. But in the every day world, the German or Dutch commercial lawyer will consult the code in his pocket.

In recent years, however, I have come to entertain new thoughts about codification for an entirely different reason. I have, in my work, to give considerable attention to the legal systems of some of the less affluent common law jurisdictions. This happens partly through my judicial work as a member of the Judicial Committee of the Privy Council, where we still hear appeals from a number of the island states of the West Indies, and also from Mauritius; but also through my extra-judicial work as Chairman of the British Institute of International and Comparative Law, one of whose functions is to run, on behalf of the Commonwealth, the Commonwealth Legal Advisory Service which provides advice and assistance to many of the less developed common law countries, especially those in Africa. When these countries became independent, they were provided with Constitutions on the Westminster Model, but they were not provided with support for keeping their systems of law, both substantive and procedural, up to date. I have learned how very expensive an effective system of justice is in modern conditions, and how very difficult it is to maintain one on slender resources. I have therefore come to look with some envy on the French, who introduced the Code Napoleon to their colonies as part of their mission to spread the inestimable benefit of French culture throughout the world. Nowadays, they still have only to make available to their former colonies amendments to their Codes, to keep them up to date. Moreover lawyers in Paris are as competent as the local lawyers to give advice on the laws of these countries. Should we therefore be promoting codification, or perhaps a series of Restatements on the American model, for the benefit of the smaller common law countries all over the world? I have however to recognise that a project on this scale would be an immense undertaking, perhaps beyond our available resources.

Do considerations such as these point to a new emphasis on codification in our law? And should we worry if they do? My German friends try to reassure me. "Don't worry", they say. "The differences in our substantive laws can be much exaggerated. We regard our Code as our common law,

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from which we develop new principles from time to time, just as you do in your case law system." Certainly, the German judges have done remarkable things. For example, when the BGB was being prepared towards the end of the nineteenth century, the German authorities decided that it should contain no principle of vicarious liability, because the adoption of such a principle would handicap Germany in its race to overtake England's industrial might. This not very attractive reasoning was, in fact, false; and it has fallen to the German judges to conjure such a principle out of the sky. Another striking example is the development by the German judges, many years ago, of a tort of invasion of privacy—something which we have not achieved to this day in our common law system nearly a century later. Most remarkable of all, the German judges have exploited the principle of good faith embodied in Article 242 of the BGB to create a whole equity, and so to mitigate the rigours of the Code; the comparison with the Chancellor's equity in England has proved too strong to be ignored. Perhaps the most famous decision under Article 242 is the decision of the Reichsgericht in 1923 (RGZ 107, 78, 86), during the period of hyperinflation in Germany, to revalorise mortgages in terms of the value of money at the time of their creation—a decision of such strength that it must take the breath away from even the most adventurous common lawyer. The moral of this remarkable development is that, where justice requires, ways have to be found to accommodate those cases which cry out for judicial intervention. In codified systems, as in common law systems, the substantive law has to develop in some degree from case to case; and as the world diminishes in size, and as our cultures coalesce, in all countries of the world, despite differences in legal background, the judicial reaction is likely to be similar.

However, if there is to be any significant move towards codification in England, there will have to be a change of heart among our Parliamentary draftsmen. Our German friends tend to criticise the English judges for adopting too strict a method of interpretation when they come to construe statutes. This reminiscence of the past is, I believe, misplaced; and I have been able to persuade Professor Hein Kötz to reconsider the over-critical passage in Zweigert and Kötz's Introduction to Comparative Law—surely the best of all introductions to the subject, happily available to us in Tony Weir's translation. The real trouble is that our draftsmen tend to draw statutes as tightly as possible, to prevent the slightest deviation by the judges from the legislative intention. I believe, though I cannot prove it, that this policy stems directly from the philosophy of Jeremy Bentham, with his determination that all laws should be codified, and the role of the judges, whom he regarded as mere officials, limited to a simple, mechanistic, application of the code. The result is that our Parliamentary draftsmen have developed their own special form of scholarship, from which they are most reluctant to depart. Even today, it is very difficult for us to

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persuade our draftsmen to adopt a more open-textured form of draftsmanship designed, like European directives, to do no more than identify the underlying principles. The recent saga of the new Arbitration Law provides ample evidence of this problem. It took many years to produce a new Law in appropriate form, as recommended by Lord Mustill's Committee. For this achievement we are in debt to a number of distinguished lawyers, but especially to Lord Justice Saville.

At all events, the historical fact that common lawyers have been reared on a diet of case law has had a profound effect on our judicial method. Common lawyers tend to proceed by analogy, moving gradually from case to case. We tend to avoid large, abstract, generalisations, preferring limited, temporary, formulations, the principles gradually emerging from concrete cases as they are decided. In other words, we tend to reason *upwards* from the facts of the cases before us, whereas our continental colleagues tend to reason *downwards* from abstract principles embodied in a code. The result is that we tend to think of each case as having a relatively limited effect, a base for future operations as the law develops forwards from case to case—and occasionally backwards if we are modest enough to recognise that perhaps they have gone too far. This method of working can be epitomised in the statement that common lawyers worship at the shrine of the working hypothesis.

Here we arrive at a fundamental attribute of our common culture. This is our so-called pragmatism, not only in the law but in so many things we do. Closely related to it is the well-known American maxim: "If it ain't broke, don't fix it." It is an attribute which we regard with equanimity, if not complacency, though it is not admired by many of our colleagues in Europe, perhaps least of all by the French. It is this fundamental distinction between the English and the continental European cultures which, I believe, lies at the heart of the misunderstandings about the possible creation of a federal Europe. Continental lawyers love to proclaim some great principle, and then knock it into shape afterwards. Instead, the boring British want to find out first whether and, if so, how these great ideas are going to work in practice. This is not at all popular with the propagators of the great ideas.

And yet, once again, we have to recognise that nowadays we cannot always be true to our inherited culture. There is a whole new area of jurisprudence in which we find ourselves acting more like civil lawyers than common lawyers. I speak of the enforcement of fundamental human rights which are recognised under the constitutions of many common law countries. We have to exercise this jurisdiction in the Judicial Committee of the Privy Council, notably on appeals from the island States of the West Indies. Here we find ourselves not so much feeling our way from one case to another, but rather taking a general principle, and then measuring certain factual situations against that yardstick. This we did when, three or

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four years ago, we held on appeal from Jamaica that to execute a man after spending a very long time on death row may amount to cruel and unusual punishment and so infringe his constitutional rights.

I have discussed the exercise of this jurisdiction with some of the judges of the Supreme Court of Canada; and they, perhaps especially the judges from Quebec, have agreed with me that, when they exercise their jurisdiction under the Canadian Charter of Rights and Freedoms, they are acting more like civil lawyers than common lawyers. It is perhaps for this reason that I myself feel a little uneasy when exercising a similar jurisdiction in the Privy Council. I prefer the traditional common law approach to which I am accustomed. I feel happier as I gradually develop the law from one factual situation to another, and see the principles develop as we go along—even occasionally crystallising into a major new reformulation. It is my experience that, when a judge approaches a particular case before him, he tends to have an instinctive feel for the result in that case. This is not mere hunch; it is the fruit of an amalgam—an amalgam of his knowledge of legal principle, his experience as a lawyer, his understanding of the subtle restraints with which all judges should work, his developed sense of justice and his innate sense of humanity, and his common sense. It is a simple fact of life that a combination of these factors provides experienced judges with a strong instinct for the appropriate legal result in any particular case. It is this intuitive feeling which persuades appellate judges, as much as any reasoning from precedents, whether they should simply apply a precedent; or qualify it; or remould it; or depart from it. It is for these reasons that I have elsewhere described the judicial process as an educated reflex to facts.

These observations about the judicial method bring me naturally to another related topic—the status and the function of the common law judge.

Our civilian friends marvel at the status of the judge in the common law world. This is scarcely surprising when a comparison is made with judges on the Continent of Europe. In England and Wales, there are now just over 1,000 professional judges, of whom 350 are District Judges, and 550 are Circuit Judges sitting in the Crown Court trying criminal cases with juries, and in the County Court adjudicating on the smaller civil claims. There are now nearly 100 High Court Judges; 35 Lords Justices of Appeal in the Court of Appeal; and 12 Law Lords—Lords of Appeal in Ordinary—together with one Lord of Appeal who is certainly not in Ordinary, our much admired colleague Lord Cooke of Thorndon—sitting in the House of Lords and the Privy Council. Moreover our High Court Judges and Circuit Judges nearly always sit alone when trying civil cases. By contrast, in the Federal Republic of Germany, before unification with the East, there were about 11,000 professional judges; now since unification there are about 15,000. In the Federal Supreme Court (the Bundesgericht-

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shof) alone there are 123 judges. Moreover, German judges do not sit alone; the normal tribunal consists of a chamber of three judges. The cost to the State of this judicial apparatus must be great indeed.

But what really startles our continental friends is, as I have said, the status of the common law judge. He or she is, generally speaking, creamed off the top of the practising profession. German judges are, by comparison, appointed straight from the university, where the five-year law degree course is expressly designed for the training of judges, who are much more like civil servants than our judges are.

We common lawyers are so accustomed to the idea of judges being recruited from the ranks of experienced lawyers, that we find it difficult to accept that lawyers recruited straight from the body of university graduates can be competent to perform judicial work; though our German colleagues find it equally difficult to accept that advocates can make competent judges. But for us it is experience, rather than knowledge, that is the name of the game. To us, the essential quality of the ideal judge is wisdom, and that wisdom is seen to be borne of the experience of a human being who has lived in society and learned of its vicissitudes, and of a lawyer who has discovered at first hand how a legal system works. We are all familiar with the fact that there are excellent trial judges who are not particularly good lawyers, but who have the experience, the humanity, and the authority to conduct a very effective trial.

There is surely much to be said for this philosophy. Moreover we think it right to stress not only the independence of the judiciary, but also the independence of the individual judge. We find it very difficult to conceive of the independent judge as part of a civil service. In the appellate courts, the independence of the judge is recognised in the institution of the dissenting judgment. The dissenting judgment is liberation. It has the effect that in our appellate courts each judge is free to speak his own mind, whether he freely joins in a unanimous or majority judgment, or expresses his agreement in his own words, or dissents. Moreover well reasoned dissenting judgments can provide a fruitful source for the subsequent development of the law. But dissenting judgments are not tolerated in most continental jurisdictions, for example Germany or France, where it is thought that they would undermine the authority of the judicial process. It would not be an overstatement to describe the dissenting judgment as anathema in the eyes of most continental lawyers. They regard a judgment as a collegiate decision, reflecting the general view of the judges concerned, and giving rise to no doubt about the applicable law or the result in the particular case before the court. I remember well expounding the virtues of the dissenting judgment to Professor Walter Odersky, the then President of the German Supreme Court, a much admired judge whom I am proud to count among my friends. In response, he gently but firmly exercised his own right of dissent. On a recent visit to the House of Lords

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the Premier President of the Cour de Cassation explained to us that, when his court met to discuss cases, they took the opinions of the members of the court and, working downwards until they found a majority opinion, did not trouble the remaining members for their view. In the House of Lords, the junior member of the Committee speaks first; but if by any chance the younger members of our little group are thinking of adopting the French system in reverse, I should warn them that this may provoke some mild opposition among their elder brethren.

The dissenting judgment is so distinctive a feature of the common law that it is desirable to dwell upon it for a moment. We accept it as the norm, but it has not always been so. In particular, it has not flourished in the shadow of great Chief Justices. Chief Justice Coke found it difficult to tolerate the frequent dissents of a judge called Walmersley; but he was able to exploit his dual position as Chief Justice and law reporter to expunge these tiresome interventions from the record. More significant, perhaps, is what happened during the long reigns of the two greatest Chief Justices of the common law world—Lord Mansfield, and Chief Justice Marshall of the United States. Each presided over his court for over 30 years, and each was concerned to transform the jurisdiction of his court—Lord Mansfield to build a truly modern law and procedure in the place of a system which still reflected its medieval origins, and Chief Justice Marshall to establish the authority of his court as the supreme arbiter of the American Constitution. Neither forbade dissent; but the dominance of each was such that dissent was indeed a rarity. In Chief Justice Marshall's time, it was the Opinion of the Court which became the norm; whole years might pass without a dissenting judgment. During the long period of Lord Mansfield's tenure of office, only ten dissenting judgments are recorded. It is against this background that common lawyers should judge less harshly the exclusion of dissenting judgments in the European Court of Justice, which in this century has been concerned to establish its jurisdiction; though we have to admit that this is entirely due to the French model on which the procedure of the Court is founded, and that the internal compromises on which its unanimity is based have led to judgments whose reasoning is sometimes not altogether easy to follow. Let us also not forget that we, acting in the public interest, do not tolerate dissenting judgments in the Criminal Division of our Court of Appeal.

Even so, the institution of the dissenting judgment in the common law world ensures that our judgments represent the authentic opinion of the judge—at least in those countries in which they are not written by the judges' legal assistants. We, who recognise it, can hear the voice of the individual judge speaking from the page. Our judgments tell the truth—the real reasons for our decisions, expressed, where appropriate, subject to the judge's own qualifications, hesitations and even doubts. Our judgments are not written in code like the French judgments. The House of

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Lords had recently to consider whether a decision of the Cour de la Seine precluded us from holding that a certain course was *acte clair*; this was not easy, because we could not discover the basis of the decision. Nor are our judgments written, as German judgments are, in such abstract terms that ordinary people have difficulty in understanding them. In these circumstances, it is perhaps not surprising that a distinguished Dutch lawyer recently told me how much he liked the English form of judgment, or that I have been assured more than once by knowledgeable continental professors that the House of Lords is the only court whose judgments are cited all over Europe. This is surely evidence to support the view that our judicial system is fundamentally sound, and indeed worthy of respect. We should do everything we can to ensure that it endures into the future. At present, the prognosis seems to be reasonably good. There are, of course, continuing worries that the high level of fees may deter successful silks from accepting judicial preferment; but the status of the judge, the interest of the work, and the quality of our existing judiciary, still encourage new recruits of distinction to join their ranks. If, however, this delicate balance should be upset, it could be disastrous for the whole future of our legal system. Disaster would also befall us if the close and fruitful relationship between our judges and advocates, upon which we all depend, and which is the envy of other legal systems, should be destroyed.

I turn to our procedure, and first to the institution which is widely seen as one of the most characteristic institutions of the common law. I speak, of course, of the jury.

It is a remarkable fact that the jury flourishes more in the new world than in the old, because in the United States there is an entrenched right to a jury trial in civil cases. Surprisingly, the jury is one of the few legal institutions which has been exported to civil law countries. It was adopted in France, first for a time during the French Revolution, and later, more enduringly, during the reign of King Louis Phillippe; though characteristically the French have adapted the jury to suit their own ideas. The Swiss also have adopted jury trial. Argentina is now considering its introduction, and it appears that Spain may also do so. The Japanese tried out trial by jury in the 1920's; but it was not regarded as a success, and they abandoned it in 1942, during the Second World War. Certainly a jury system is unlikely to be consistent with the present conviction rate in Japan, which I understand to be well in excess of 90 per cent. Even so, there are indications that they may be going to have another try. The Russians adopted jury trial under one of the reforming Tsars in the nineteenth century; but the communists, not surprisingly, abandoned it in 1924. Now however, on the direct orders of President Yeltsin, it is being revived. The British Institute of International and Comparative Law has in the past three years been host to three groups of distinguished Russian judges, jurists and court administrators. Their purpose has been not to copy our system but

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to see a living jury system at work, and to learn about it from those who are used to operating it. The visits were a tremendous success. With astonishing speed, the Russians immediately revived their own jury system in a number of regions in their vast country; and last year they reintroduced it in Moscow and St Petersburg. We wish them success in this momentous, and very difficult, enterprise.

We can learn much from the experience of jury trials in France. There are many remarkable differences. For example, the Bench of three magistrates retires with the jury when they deliberate—a hangover, I believe, from the German occupation, when juries were reluctant to convict. The criminal record of the defendant is habitually admitted in evidence. There are no rules of evidence, such as the hearsay rule. But perhaps the most interesting aspect is one which is not yet in force, but is the subject of much discussion in France. This is the question of an appeal from the jury's verdict.

At present in France, as in England, there is no appeal from the jury's verdict as such. This rule is defended in England on the basis that the jury's verdict is sacrosanct, and that this, coupled with the criminal burden of proof, enables the jury to do substantial justice, even on occasion departing from the strict letter of the law.

Yet I have found our present position is not at all easy to defend to continental European lawyers. To them the work of the Criminal Division of our Court of Appeal, with all its speculations about the possible impact of misdirections by the judge, or the misreception of inadmissible evidence, is incomprehensible; and many cannot understand why the defendant (or indeed the prosecution) should not be entitled to appeal from the jury's verdict as such, as a matter of simple justice.

Of course no system of appeal from a jury's verdict would be possible unless reasons were given for the jury's decision. However about ten or twelve years ago, when I was delivering a lecture in Zurich, I discovered that it had recently been held by the Swiss Cour de Cassation that it was contrary to a citizen's fundamental rights that he should be convicted of a serious criminal offence without reasons being given for the decision. In consequence it was decided in Switzerland that the three presiding judges should retire with the jury and then, when the jury returned, give the reasons for which the jury had reached their verdict. As far as I could make out, no dissatisfaction was then expressed about this new system. Perhaps a similar system will one day be adopted in France. A move in the same direction in this country seems, however, to be unlikely.

I know of no serious proposal that the jury should be abolished in England (as it was in India soon after independence); indeed it is surely inconceivable that any such measure would be passed by Parliament in the foreseeable future. The present policy seems rather to be that the jury system should be pruned of its excesses. But the long fraud trials before

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juries are so phenomenally expensive, and perhaps unpredictable, that it is difficult to believe that this drain on public funds will not one day inevitably lead to the replacement of juries by specialist tribunals along the lines recommended by Lord Roskill many years ago; and common sense tells us that, if that happened, the trials would be greatly shortened and their expense greatly reduced. Subject to that rider, I believe that we can say to ourselves that the jury is fundamentally in good health and likely to survive in England for the foreseeable future.

There is however another aspect of the jury which I wish to stress. This is that, even if the jury were to be abolished in criminal cases, it would still rule us from its grave. This is because it has left so deep a mark on our civil procedure and on our law of evidence. It is surely the jury which was the father of the principle of the single continuous trial—the so-called day (or days) in court—when all the evidence has to be called and the argument presented. This is something which we all tend to take for granted, but stands in stark contrast to continental European systems, in which adjournments are readily and frequently granted to enable the advocates to present, and the judges to consider, different aspects of the case. It is surely the jury which has led to our so-called adversarial system, in which the judge has assumed a less than inquisitorial role in the legal process, leaving it to the advocates to develop their respective cases. It is to the jury that we must attribute our essentially oral procedure, and in particular our system of cross-examination. It is the jury which has prompted the need for our rules of evidence, so technical and restrictive in the eyes of many continental lawyers, in some of whose countries no such rules exist. And it may well be because of the jury that our civil trials are presided over by a single judge.

We are of course about to see the implementation of the greatest revolution in civil procedure in this country in our lifetimes, as Lord Woolf's courageous reforms are implemented. It is no reflection on his remarkable proposals that we did not sooner perceive, at least following the decision of the Court of Appeal in *Ward* v. *James* in 1956, not only that the jury in civil cases was doomed, but also that all the rules which stemmed from its existence were no longer necessary. From that moment, the way was open for reform; but such is our perhaps understandable prejudice in favour of the procedures we know and understand that it was not until the pressures induced by the rise in legal fees and the growth of litigation that reform was seen to be imperative—a movement which had to a considerable extent been anticipated in the Commercial Court where the judges operate in competition with international commercial arbitration.

From what I have said you may have guessed that this doctor's diagnosis is that, in its fundamental attributes, the common law is in a reasonably healthy condition. Our judicial system is sensible and realistic, and thor-

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oughly defensible. Trial by jury is not itself at risk, though likely to be the subject of further reform. The underlying problems of our civil procedure are very serious, but are being tackled at their root. English substantive law is bound to see some changes, though not in any significant degree through the direct influence of European law. We may expect to see some codification of our law; but for my part, I do not fear this. Above all, the fundamental ethos of the common law will, I believe, remain intact. The common law has already fathered the idea of the rule of law, surely the most important legal principle in the world. Its underlying philosophy of pragmatism may be unpopular in some quarters; but it may be justified in practical terms and it is, I believe, inbred into our very being, and shared by us with millions of people throughout the world. It can operate as a brake on unbridled idealism; and surely we can see, from the history of the twentieth century, how necessary such a brake is for the well-being of all nations. Let us therefore continue to worship at the shrine of the working hypothesis, and continue too to contemplate the great idea with all the caution bred of common sense and our long experience.

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