

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

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

Interviewer: Lesley Dingle. Her questions are in **bold type**.
Sir Christopher's answers are in normal type.
Comments added by LD, [*in italics*]. Footnotes added by LD.

73. Professor Forsyth, this is our fourth interview in which we will try to present an overview of your scholarly work. In the CV that you kindly sent me, you listed 11 books and 88 journal articles. The articles were written over five decades and cover the period 1975 to 2017, which is 42 years of endeavour. So, I did a rough count of the journal articles and estimate that 42 were on Southern African topics and 46 on UK topics; there was a roughly equal split in your geographical jurisdictional area of interest over your career. However, there was not an equal split in the time you spent in these two jurisdictions because you spent 11 years in South Africa and 39 years at the University of Cambridge, in other words, your interest was split half and half, even though you spent three times as much time in UK academic institutions.

As with other scholars, I've had to be very selective in what I've read and have concentrated our discussion on the three books of which you were the sole author. I hope this will encapsulate many of the very important points that you have contributed to the two jurisdictions during your career. As for your journal articles, four of the papers you've already commented upon in your previous interviews, your 1975, 'Some Aspects of Robbery' and the *Lex Causae* piece, these were your first two articles. Then your two important articles in your 1980 'Human Rights and Ideology,' in which you mention your reading of Karl Popper² and your views on Marxism; and your 1981, 'The Judicial Process, Positivism and Civil Liberty.'

To keep our discussion focused, I've looked at your 1981 book, *Private International Law*, written while you were at UCT; your 1985, *In Danger for their Talents*, which was on a South African topic, although written in Cambridge as your PhD thesis and, finally, your 2014 edition of Wade's famous book, *Administrative Law* which, of course, deals with English law.

Could we start our discussion today with your 1985, *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-1980*, published in 1985 by Juta, based on your PhD thesis, which you wrote while at Caius

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

² Sir Karl Raimund Popper, FRS FBA (1902-1994), Austrian-British philosopher, academic and social commentator.



under the supervision of Colin Turpin³, another South African émigré?

You state in the preface, Professor Forsyth, page seven, that you are, and I quote, “An unashamed positivist and that a positivist lawyer does not approve of a morally abhorrent law any more than a physician approves of cancer; he simply recognises the law’s existence.” You go on to say that, and I quote, “The remedy for it lies in changing the law, not adopting jurisprudential theories that deny the force of law to that abhorrent norm.” I wonder if you could enlarge on this topic?

Well, I think it puts the point quite well, really. Law is a phenomenon, a social phenomenon that one needs an explanation for, some other way of identifying it and it seems to me that the idea that you look at the sources of law and you apply reason to the sources of law and that enables you to draw a conclusion as to what the law is on a particular point, is a pretty fair way of going about it. What lies behind this, of course, is something I have touched on in earlier interviews, the climbs up Table Mountain that I undertook with my friend Johann Schiller and he was much influenced by the Vienna Circle, having come from Vienna himself, and it was almost an article of faith to him that positivism is an epistemology not a theory of law, meaning that it’s a way of acquiring knowledge of the law; it’s not a way of finding out what the good law is or what you would like the law to be.

Positivism is a theory of knowledge, not a theory of law. I think that is essentially right and I’ve never felt much temptation to waver from it because what’s the alternative? I mean, you could object to that on all sorts of grounds to an abhorrent law but, ultimately, you have to engage with it. You can’t say to the South African policeman who’s just arrested you for a breach of the Pass Laws, “The Pass Laws are morally abhorrent, they’re not law.” It’s not going to help you in the slightest. It’s misleading to suggest that there is some more subtle, sophisticated jurisprudential theory that will allow you to escape from that dilemma. So that’s really why I’m an unashamed positivist; that doesn’t mean to say that I don’t think that a great deal of law in every society, but particularly in South Africa, is not unjust and should have been changed and you can make whatever criticisms you want of the law and you’d probably find I agreed with them, but that’s not a jurisprudential criticism that I would accept.

So I think we may come back to some of these points at a later stage, but that’s about all I want to say about that statement in my preface to ‘In Danger for their Talents’. It seems to me that it correctly expressed my point of view and the point of view that I defended in the 1981 article that I wrote criticising John Dugard’s⁴ theory of positivism. Perhaps I should go into that a little here. John Dugard wrote a very influential article in which he demonstrated that the South African judges denied that they had judicial choice. They took the view that parliament laid down the law and it was simply the judges’ task loyally to apply that law without regard to its moral qualities at all. That’s the point of view that Dugard criticises and he – and David Dyzenhaus⁵ would fall into this category too - criticises me, and others who agree with me, as denying judicial choice and seeking to castigate positivism as being a bad theory because it allows you to believe that the judicial process is purely mechanical and there’s no such thing as judicial choice. That is completely to misunderstand my point of view, which is that the judges have a considerable degree of choice and we, in fact, praise

³ Colin C. Turpin, (1928-2019), Emeritus Reader in Public Law, University of Cambridge, (1992-95), Clare College.

⁴ Christopher John Robert Dugard, (b.1936-), Professor of Public International Law, University of Leiden (1998-). Professor of Law, University of Witwatersrand (1975-1990), Goodhart Professor, Cambridge (1995-96).

⁵ David Dyzenhaus, (1957-) Professor of Law, University of Toronto (1998-), Goodhart Visiting Professor (2014-15).



John Dugard for, in his article, having shown that quite clearly by consideration of particular cases and so forth, that often the judges have a choice in applying the law, if the law is ambiguous and they've got to choose one of several possible interpretations. It's absolutely right and it's wrong of the South African judges to say that they had no choice, that their task is simply to apply the law as laid by parliament. That's unrealistic and an incorrect picture of the judicial process in South Africa in the apartheid years, but it's not my point of view. My point of view is quite clear – and I think this is crystal clear if you look at the writings – it's that there is very often a choice and the judges make a choice; they make selections of what interpretation of the law they're going to apply.

The whole purpose of my thesis was to look at the way they exercise those choices by analysing it closely, arguing about it, reasoning about it, is to look at the law and to show that judges had a choice. The whole point of my book is to look at those choices and see what conclusions you can reach. The conclusions that I reached, they seem quite mild now, but were that during the course of the apartheid years the judges became increasingly pro-executive in the choices that they made. That is a fact which I don't think is has been seriously challenged now; the judges and scholars no longer, suggest they weren't pro-executive. They recognised that there was a growth in pro-executive attitude. This was controversial at the time in orthodox legal circles in South Africa at the time I put it forward.

I also link that, although the theory is less well-established, I also link that with the idea that this is to do with the growth of the number of judges from Pretoria. It's quite phenomenal, when you look at the performance of the Appellate Division over time, you find that in the mid-sixties to the seventies the number of judges appointed to the Appellate Division, (an executive appointment by the Prime Minister, later State President, the appointments of judges to the Appellate Division seemed to come predominantly from judges who were sitting in Pretoria. Pretoria is, uncontroversially I would have thought, one of the most conservative parts of the country in those days and [also the seat of the executive], and what's more, Pretoria had an all-white Bar until, I think, well into the 1980s, but they had actually had a rule precluding black barristers, black advocates from practising in Pretoria and all of this leads to a great engine of pro-executive decision making in South Africa. That's really what I'm trying to say in my book, 'In Danger for their Talents', that it says two, sort of, not contradictory things but, sort of, slightly divergent things, that the judges had a choice; it was the question of they had to do what parliament laid down, they had a choice, but they didn't exercise those choices as best they might.

74. Thank you. In Chapter 5, which you call, 'Summing up and a little theory', you summarised the conclusions from your thesis in relation to Professor Wacks's⁶ idea about judges resigning and Professor Dugard questions the utility of this, while you, yourself, disagreed with the theory that the judges should resign. On page 236 you say, No good case can be made for mass resignation. Resignation "may salve a few judicial consciences [and] please a few academics." But little else because, as you state, "Most judicial work is in criminal trials rather than political and security issues."

Yes. This is, again, a question of laws as a phenomenon in apartheid South Africa. Even in apartheid South Africa the vast majority of legal business was not concerned with apartheid. The Supreme Court had relatively little to do with national security and terrorism and the pass laws and the various offensive aspects of the legal system. A typical South African purely judging other provincial divisions would spend most of his time doing

⁶ Raymond Wacks, Emeritus Professor of Law and Legal Theory at the University of Hong Kong, Professor of Public Law and Head, Law University of Natal in Durban.



criminal work. Obviously some of the cases were political cases but much of the cases were serious criminal work in which the accused person deserved a fair trial, whether it's a question of robbery or murder or burglary or any serious crime of that nature, the accused person should have a fair trial and, without wanting to be misunderstood and suggesting that the South African trials were uniformly fair, such deficiencies as there were in those trials would have come from lack of decent representation because the legal aid system was so rudimentary and things of that kind, not from a lack of impartiality on the part of the judges.

One way in which you can see this is in the days of apartheid even when the law was clearly an apartheid level law and to be castigated for that reason, you very seldom found that the accused persons would fail to recognise the jurisdiction of the court. They would still find it worthwhile, precisely because the judges were formally independent; they didn't ring up the Minister of Justice to ask, "How should I decide this case?" Because they were formally independent the people on the hard end of the apartheid laws would generally think that it was worthwhile fighting their case in court instead of turning their back on the court and having nothing to do with the proceedings. They were successful, one can say though not as often as they should have been or whatever, but they were successful in that strategy sufficiently frequently for it to persist as a strategy right to the end.

75. Could we turn now to the book that you wrote while you were at UCT, which appeared about the time you left South Africa to do your PhD and this was your, *Private International Law* published in 1981 by Juta, the first edition. You were a senior lecturer in Roman-Dutch law and 32 years old when it appeared. In the preface, page vii, you said that at the time several independent states within South Africa, with their own legal systems, were coming into existence and that South African courts would soon be facing some difficult problems when or if these systems clashed. Are there any legacies of these in present day South Africa, some 40 years later?

There's not really much legacy in the form of choice of law. There was, for a long time, legacy differences in choice of law in different British colonies making up South Africa. The law might be slightly different between the Cape and Natal and the question would be, "Is your Cape divorce going to be recognised in Natal or vice versa?" So you would have those sorts of questions. Those have practically all disappeared now; the law has become uniform. At the stage that I was writing about then was just the stage at which apartheid was supposedly reaching its ultimate goal in that all South Africa was going to be divided up into independent states and those independent states, being independent, could obviously make the laws differently and so you'd have a problem of which law were you to apply. Take, for instance, driving a car, if you drove a car from somewhere in the northern Gauteng province down to the Western Cape province, you'd probably go through about three or four different South African provinces so if you had an accident in... If you were a car full of people from Johannesburg who left the road in the middle of the Orange Free State and your car was written off, who paid for the damages to the car? Did you use the law of the Free State or did you use the law of Johannesburg, because everybody came from Johannesburg, whatever it might be? So there's theoretically that kind of choice of law issue can still arise but because the law is now uniform in most areas it doesn't arise in that context.

Conflict of laws isn't only concerned with choice of law, it's also concerned with jurisdiction of the courts and there's a great legacy of apartheid in the jurisdiction of the courts in that you see it most clearly in the Ciskei, because when the Ciskei was made independent and the Transkei were made independent they each had established a Supreme Court of the Transkei and the Supreme Court of the Ciskei and they'd also each have



established a Transkei Appeal Court and a Ciskei Appeal Court. So it still is the case in South Africa that if you were litigating somewhere in the part of South Africa that used to be called the Eastern Cape you'd have to decide which court you could litigate in, it was not completely obviously, they don't all have the same... Well, they all have the same jurisdictional rules but the jurisdictional rules would not necessarily be applied in the same way so it might make a difference whether you'd been issued with a summons in Ciskei or Transkei, not just questions of convenience. So that's still quite a legacy. They've started trying to sort out the boundaries of the courts which were left in the new constitution, were left unchanged. They've started trying to work them out but it's still a bit of a mess.

76. Thank you very much. In the main text in the section named, ‘The meaning of the law of country X,’ on page 16 you discuss what effect is to be given to the law of states which are not recognised by the political set-up in the *lex fori*. One line of thought is that no regard should be taken of its laws but you don't agree because you feel that individuals should not depend on the quirks of international politics and you say that decisions should be taken on legal issues rather than political situations, citing East Germany, Rhodesia, and the UK recognising laws in Germany at the end of World War II. What is the situation in South Africa today for unrecognised states, for example Taiwan springs to mind or Kosovo, de facto functioning states but not recognised internationally?

Well, I would argue this was the position in South Africa although the decided cases are not really there to establish it – but I would argue that recognition or non-recognition should not play a part in deciding matters of choice of law. The reason for that is that in private international law we're concerned with private law, concerned with doing justice between individuals and we shouldn't allow that justice to individuals to be determined by the vagaries of political life. I think I used a phrase of that kind.

Take a case, I think it's called *Adams*⁷, of a couple of were living, met and married in Rhodesia, Southern Rhodesia – this is an English case, incidentally, not a South African case – and they left Rhodesia, came to live in England and they wanted to get a divorce. Were they married at all because they'd married under the Rhodesian law which was not to be recognised as coming from a non-state? What is the point of denying justice to those two people simply because you're having a political disagreement with the government of the country which the divorce was granted or whatever the particular set of circumstances might be. So I'm strongly of the view that one should not allow such essentially international law, public international law issues, to come into private international law.

77. That's very interesting. I noted in your book that that particular case referred as well to non-recognition of judges appointed under UDI. It's very interesting. Turning to the review of the first edition by Professor Ellison Kahn⁸ in the *South African Law Journal*, he called your book, ‘An excellent treatise.’ He comments on your verve and your flashes of quiet humour and dry wit and your penetrating thought. In his conclusion he gives your book a first class pass without any hesitation. He did, however, comment, on page 317, that there is little consideration of modern continental views on the theory of private international law. Do you think that's a fair criticism?

I think it's a reasonably fair criticism. I don't know as much about continental theories, modern continental theories as perhaps I should. I know all about the old

⁷ *Adams v Adams*: [1971] P 188

⁸ Ellison Kahn (1921-2007), Professor Law, University of Witwatersrand (1954-75).



continental theories because these are the ones that are ingrained in Roman-Dutch law but the new ones not so much, particularly so, perhaps, in that 1981 edition of the book because that was before the EU had really got started and the EU had really, in the later editions, there are more and more mentions of the European Union and the various approaches to private international law that had been adopted by the European Union.

78. In that regard, coming to your fifth edition of the book, published in 2012 by Juta, you've commented in the preface, on page v, picking up the point you've just made, Professor Forsyth, that, "English law had changed its focus because of EU law." It meant that English law is no longer the first point of comparison for Roman-Dutch law and no longer the leading common law jurisdiction in the field of private international law." You said that for historically-minded lawyers they might shed a small tear. Do you think that this drift will now cease post-Brexit or is it entrenched?

I think it's perhaps a bit too early to tell quite what's going to happen. I think one effect that has certainly happened is that the Hague Conference on Private International Law has become more important to the United Kingdom than had been the case in the past, but I think it's quite likely that a great deal of harmony will be reached by agreement. What was happening in European private international law is that instead of playing interesting games with the particular problems that lurk in private international law, problems of characterisation and *renvoi* and so forth, about which students of private international law wax lyrical and I'm not going to say too much about here, but instead of being concerned with things like that you take a piece of European legislation and you apply it to the entire European Union so that you get uniformity of decision across the European Union. That is something that every conflicts lawyer, I think, should have close to their heart and their purpose, which is to so arrange matters so that you get the same result whether you litigate in one country or the other country. One of the examples I've been giving as we go along, if you were to litigate in Natal you could get one answer and if you were to litigate in the Cape you should get the same answer, so you had uniformity of decision, because that's the great injustice that private international law is really about, is disharmony of decision when people reasonably expect that their affairs are going to be ordered in one way and it turns out that they're going to be ordered in another way. So you get people who are married in one country and not in another, which may be the country in which they want to live; contracts which are enforceable in one place but not in another and so forth and so on and it's to secure that harmony of decision, which is a noble goal and, ultimately, an unachievable goal, but still a goal worth having. This is what private international is really all about in my opinion. That's what the European Union was doing via legislation whereas outside the EU you've got to do it by agreement, agreement to international conventions of one kind or another, in the UK at any rate, if we're outside the EU. So I think things are going to change. I think it will become less... there will be more decision and agreement reached in places like the Hague Conference than in the EU in the future.

79. You said that since the last edition, this was the fourth edition in 2003, both Kurt Lipstein⁹ and Ellison Kahn had sadly died and that you'd learnt a lot from them. I wonder if you could sum up what their inspiration meant to you.

Well, what Kurt Lipstein taught me in conflict of laws when I was doing the LLB in Cambridge and his, I what I have called the voraciously comparativist approach, is what I

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



took from him, his real enthusiasm for the subject. I sometimes get a bit confused though between him and Sir Otto Kahn-Freund who was the Goodhart Professor when I was reading for the LLB. He also taught us conflict of laws and they would teach our class jointly, so sometimes when I talk about the voraciously comparativist approach I'm not sure whether I got this from Kahn-Freund or whether I got it from Kurt Lipstein. They were both important influences in my development and I'll be forever grateful to their memory.

Ellison Kahn is another great man although he never taught me conflict of laws; he marked my conflict of laws exam paper though and gave it a good mark. I afterwards came to collaborate with Ellison Kahn on a variety of projects which I don't think I should go into now. I got to know him quite well and I would go up and see him in the University of Witwatersrand quite frequently. He was an immensely punctilious man and courteous and I think he was really the doyen of South African legal academics. As Deputy Vice Chancellor of Wits he had run the Wits Law School, for many years.

80. So perhaps we can turn now to your valuable contributions to administrative law in the United Kingdom and your focus on your book, 'Administrative Law', Wade and Forsyth, published in 2014 by OUP. This is the fifth edition, which you've edited, of the classic Wade¹⁰ book that first appeared in 1961. This was written when you were Professor of Public Law and Private International Law at Cambridge. You also did the tenth edition in 2009 while Professor. The two previous editions, the ninth and the eighth were done while you were a Reader. In the preface, page xi, you comment that the number of applications for judicial review leaves students of administration law in constant danger of being overwhelmed by a deluge of decisions. I wonder if, in a nutshell, you could say why you think this has become the case.

Well, I don't think it's a matter of opinion; I think it's a matter of simple fact. There's been a great increase in the number of applications for judicial review. In the early 1980s I think the numbers of cases in any particular year would be in the low thousands and in the 1990s it's perhaps into the high thousands; now, if you count everything, there's a great dispute as to exactly how many it is, but some people suggest it's even up to 50,000. This has happened, I think, partly because judges have been more willing to listen to... The application for judicial review is a two stage procedure in that you have, first of all, the application for permission (or leave) to apply for judicial review and then you've got the application proper. The judges can control the number of applications for judicial review they have to deal with by refusing or granting leave on a more generous or more sparing basis. So the perception has certainly got about amongst potential litigants, take, for example, immigration cases where the disappointed litigant's only possible remedy, their last throw of the dice is to apply for a judicial review before the Upper Tribunal and as the number of immigrants turned away, prospective immigrants turned away grows, so too the number of applications for judicial review increases. I think one also has to mention the Human Rights Act 1998 by imposing the duty to comply with the protected rights on all public authorities, this inevitably means that there will be cases where a human rights point will arise and the vehicle to remedy that is the application for judicial review.

What you see when you get down into the deep statistics is that the judges tend to manipulate the – this is just my impression, I'm not putting this forward as a serious thesis – the judges tend to manipulate the granting of leave in order to ensure that the load of decision, the number of cases that actually comes before an individual judge, tends to remain

¹⁰ Sir Henry William Rawson Wade (1918-2004), Professor of English Law, Oxford (1961-76), Rouse Ball Professor of English Law Cambridge (1978-82).



the same over time. So you've got a, sort of, trade-off between delay and lots of cases being heard. They get traded off. But, yes, I think it's undeniable that there has been a great increase in the number of applications for judicial review and particularly amongst litigants who have human rights points to raise or who are in extremis, such as an immigrant against whom a removal order has been made. They do their best; it's their only way out.

81. Page six of your book on 'The Alliance of Law and Administration', you claim that, "It is false to say that a well-developed administrative law holds back efficient government, however, although public authorities usually discharge duties conscientiously, they do slip up and courts have to intervene where errors are made," and then later, on page 14, you admit that we don't yet have a well-developed system because administrative law is, I quote, "A highly insecure science," and this is why you suggest that a written constitution is being advocated so that courts can be more confident in their constitutional position. Could you comment on this?

Yes. First of all, I think, at its heart, there's no conflict between judicial review and good administration. The good administrator wants to be set right on the law as much as the litigant who's been harmed as a result of a legal breach. The good administrator wants to see that decisions are made fairly, after listening to all sides; takes into account different policy perspectives and so forth in making the decisions and there is no necessary conflict there. But, of course, once you get into court; once you have a particular individual who, it's supposed, claimed political asylum, the application for asylum has been turned down, they've disposed of all the appeals and they still don't want to be sent back to the country from which they came, they fall back on judicial review. Of course, they will face a strict opponent in the courts from the Government which takes the view that if you don't hold the line on every one of these cases the whole system will be completely flooded. On the other hand, their counsel who will be finding every possible human rights argument as to why they should not be removed. In that sort of situation there inevitably is a great tension and a conflict, a real fight.

A much better example that just occurs to me would have been the political judicial reviews or the constitutional judicial reviews we had over Brexit, Miller 1 and Miller 2¹¹. Those judicial reviews stood at the heart of political conflict within the country and that was being played out in the courts and there's no doubt that it was very toughly and hard fought and went far beyond individual rights.

82. Thank you. At this point it is germane to look at Elliott¹² and Varuhas's¹³ *Administrative Law: Text and Materials*¹⁴ in which they assess inter alia your work in this field in general. They comment that on page five of your book you introduce the concepts of the red and green light theory a propos the notion *ultra vires*. Your book is said to typify the red light theory aimed at curbing government powers. In their text Elliott and Varuhas, item 1.2.1 say that your stance makes the courts and the public authorities combatants. I wonder if you could comment on this statement?

It's what I was trying to say a moment or two ago that, of course, if your basis of judicial review is the *ultra vires* doctrine then, if you bring an application for judicial review

¹¹ The *Miller* cases: [2017] UKSC 5.

¹² Mark Elliott, Professor of Public Law, Legal Adviser to the House of Lords Select Committee on the Constitution (2015-19).

¹³ Jason N E Varuhas, Professor of Law, University of Melbourne, Co-Director of Studies for the Government Law and Public and International Law on the Melbourne Law Masters.

¹⁴ Elliott & Varuhas *Administrative Law: Text and Materials* (OUP, 2017) 5th Ed.



you are necessarily making an assertion that a particular decision maker has acted outside their powers and that, inevitably, tends to turn it into a contest in that, of course, the decision maker will say, "I'm acting within my powers," and you've got the fight set up there. I think that's inevitable from the nature of our litigation, not necessarily a deep truth there. Bill Wade and I never called ourselves red light theorists or green light theorists; that was a label that was attached to us by Carol Harlow¹⁵ and Richard Rawlins¹⁶, if remember correctly. At its best, the administration and the courts work together and there's no tension between them, but there are these occasions where it does become that kind of tension you've just mentioned.

I mean, it's worth also perhaps making the point at this stage, in the context of those very high profile constitutional judicial reviews where they're really contesting partners, it's the stuff that stands at the cockpit of our political conflict. Those are rare cases of those 10-15,000 cases of judicial reviews that heard each year. The vast majority of them are small scale individuals worried about their planning permission or in a dispute with the Passport Office over why their passport has been delayed or 1,001 matters of that kind which affect the individuals and are obviously very important for the individuals concerned, are not great, big political matters, are often matters of no consequence politically, but of great importance to the individuals concerned.

83. Thank you. Under Section 1.4.1, where they discuss the *ultra vires* doctrine, they say that there are examples where courts enforce principles of good administration which have no clear relationship to a statute or the intentions of Parliament, judicially created standards of public behaviour. They cite, from your 1996 paper, 'Of fig leaves and fairy tales: the *ultra vires* doctrine, the sovereignty of parliament and judicial review', published in the 1996 *Cambridge Law Journal*¹⁷, where you say that judicial creativity also forms the grounds for judicial review. Where do you think the line should be drawn?

For most of the 20th century the *ultra vires* doctrine has been unchallenged as the basis of judicial review. You need something like the *ultra vires* doctrine so that you've got an answer for, shall we say, the rumbustious back bencher in parliament who says to the judge who has intervened in some decision, "Who are you to tell the Minister of Housing that houses must be designed on this basis or that basis? Who are you? Where do you get your authority from?" What's the judge to answer? Where do I get my authority from? The answer used to be clear, and I think still is relatively clear, the answer is, "I get my authority from the law which says that the minister must stay within his powers and the minister has gone outside his powers, therefore his decision is illegal and invalid." That's the picture of the *ultra vires* doctrine. It couldn't really survive the great growth in judicial review when judicial review began to extend to the prerogative and to non-statutory powers as well because if you're talking about somebody that isn't exercising a legal power at all and you're subjecting them to judicial review, you can't really say you've acted beyond your powers if they haven't got any powers to act beyond; they haven't got any legal powers to act beyond.

So that was a problem and that was essentially the problem that I wrote my 1996 article to combat, in that I pointed out the difficulties of the *ultra vires* doctrine but then I said, "What are you going to do about it otherwise? Well, what's your alternative?" Because, if you start looking around for alternatives, you soon discover that to abandon the

¹⁵ Carol Harlow, QC FBA, Emeritus Professor of law, LSE. Her doctoral thesis was titled *Administrative liability: a comparative study of French and English Law*.

¹⁶ Richard Rawlings, FBA, Professor of Public Law at University College London.

¹⁷ *CLJ*, 122.



ultra vires doctrine is to abandon the sovereignty of Parliament. Do you want to do that? I thought that most people probably didn't want to do that and, anyway, we've got a sovereign Parliament and it's what we've got to live with.

Yes, we're in a mess with it unless and until it's changed. So I put forward the idea that it was perfectly reasonable and quite justifiable to interpret statutes in a way that they were consistent with the principles of the rule of law. There's lots of authority that says you can do this and it's common sense as well. I put forward that theory in my 1996 article and it was about the same time as Mark Elliott was writing his first articles in this area and he had much the same idea but called it modified *ultra vires* doctrine and I like to think that it's a modified *ultra vires* doctrine; I don't think Mark would dissent that that is something which we both [invented]. It's something that I hope is clear in a lot of my articles because I try to write articles that solve problems not make problems. This is trying to solve the problem of finding a justification for judicial review of a particular decision without challenging the sovereignty of Parliament and staying relatively realistic and accurate. That's what we did with the modified *ultra vires* doctrine and I'm not sure the question gets back itself as to sovereignty of Parliament. If Mark and Jason are saying that you get to the end of parliamentary influence and then there's an area where the judge has a free hand to do what they are doing, then I think that is a hidden attack on the sovereignty of Parliament because it's suggesting that there's this area in which Parliament cannot stray. If though, on the other hand, they're saying that it's reasonable to interpret legislation as being consistent with a rule of law, if you can, on the words used, then you've got the modified *ultra vires* doctrine and there's no difference between us at all.

84. Right.

That's really been my life, that article. It went out on a limb a little way, I think, but I think it was quite reasonably argued and it's the first time I had an article that had an international impact in that I got letters from quite a few people all over the world saying they'd enjoyed reading it or whatever.

85. Apropos that article, Sir John Laws's¹⁸ question in 'Supperstone, Goudie and Walker: Judicial Review', at page 97, says that apropos the situation when parliament didn't express a view on discriminatory powers that a body may have used and where, perhaps, fairness becomes an issue, perhaps this is a case, as Elliott and Varuhas say, where the common law could fill the vacuum without contradicting parliament, which again would perhaps be your modified *ultra vires* theory.

Yes. I don't think John Laws would agree but I'm easily reconcilable to lots of these points of view. I wrote another article, called 'Heat and Light'¹⁹ in which I tried to persuade everybody to come under one umbrella, but the people who wanted to base judicial review in the common law or in the principles of good administration or whatever, were reluctant to do that, particularly Paul Craig²⁰. But ultimately the question is, suppose Parliament lays down what the requirements for validity of a certain act are, it says you don't have to have so much natural justice and you're going to have to have so much proper purposes and improper purposes and these are the various things that you must do and you must get right if you want to act validly. You say right, if the judge can come along, if the judicial review judge can

¹⁸ Sir John Grant McKenzie Laws (1945- 2020), The Rt Hon. Lord Justice Laws, a Lord Justice of Appeal (1999-2012).

¹⁹ 2000. "Heat and Light: A Plea for Reconciliation", in Forsyth (ed), *Judicial Review and the Constitution*, Hart.

²⁰ Paul Philip Craig, FBA (b. 1951-), Professor of English Law of Oxford (1998-2019).



come along and say there's an extra requirement for validity, there's one that isn't mentioned by Parliament but it's an extra requirement for validity; we require, perhaps, the parties to have legal representation, if that is effective then you have denied Parliament's ability to specify, ultimately, what the requirements for validity are. So you're challenging the supremacy of Parliament.

The supremacy of Parliament is not the only way in which you can run a country; it might not even be the best way for us to run a country but it's what we've got. If we want to change it, we can change it but we can't expect the judges to do it on their own because if the judges were to... because what is at stake here is the final, who has the last word in any dispute over whatever it might be, that's the last word. If we've got a supreme Parliament, Parliament has the last word for good or ill. If we haven't, then it probably means the judges have the last word.

How are you going to get from Parliament having the last word to the judges having the last word without a referendum, a general election, a debate in Parliament, any of these things? Instead, what the critics tend to do is to adopt what I call the smorgasbord approach to these issues and to just take what seems to them to be apt and say, "Well, it would be jolly convenient if adherence to the principles of a good administration was the basis of judicial review, so let's just make it the basis of judicial review." That's the smorgasbord approach; you just pick out what you like and you put it up. It can't be done, not under our constitutional order. I've spent a lot of time pointing that out. Some people may think too long.

86. That is very interesting indeed. So, in summary, could you reminisce on what you believe are your single more important contributions on the advancement of South African Roman-Dutch law and UK administrative law?

So far as South Africa is concerned, I think that we haven't discussed them in this session, but I think my jurisprudential articles about human rights have become the orthodoxy in South Africa, not necessarily because of my articles but the idea that you could have fundamental rights protected by an independent judiciary has become the orthodoxy whereas, in fact, it wasn't the orthodoxy in the early 1980s and I think that's something that I'm quite proud of. As far as private international law is concerned, I'm particularly proud of that book because it's the only book, only general textbook on Roman-Dutch private international law for hundreds of years and it's more than simply an account of the cases; it seeks to put on the cases an approach to the subject that encourages uniformity of decision as much as possible. So I think that may be where I end up having my greatest influence in Southern Africa because the book is cited all over Southern Africa whenever there's a private international law problem, and because it is cited all over South Africa, with no competition or very little competition, it has put that approach to uniformity of decision into the law of Southern Africa in a way that I think is beneficial. I'd put that down as one of my....

As far as administrative law is concerned, Bill Wade was, of course, Master of Caius when I was a PhD student so I got to know him a bit then at college dinners and the like and I would say put forward various views on administrative law and he'd, sort of, nod his head wisely and say he agreed or didn't agree, as the case may be. Then he wrote me a note of congratulations after one of my articles had been published in the *Cambridge Law Journal* so I was very touched by that, very pleased to receive that from a figure like Bill. Then it must have been in 1990 or so, I was sitting in my room in college when the phone went and it was Bill on the other end of the phone and he said he was beginning to prepare for his next edition and would I be prepared to join with him in doing it.

Of course, my life changed at that moment because it's dominated my academic work



ever since, work on the book. There's always work on the book. It's been wonderful for me in many other ways because I benefit from Bill's reputation in a way that perhaps I shouldn't, but wherever I go in the world there's always one of my old students; there's an attorney general or a minister of justice or a chief justice or whatever who has a copy of Wade and Forsyth on their desk and use it regularly. It's particularly of value for people who aren't necessarily right at the cutting edge of administrative law but need to be brought up to speed in a particular area, so I've devoted a lot of my life to that. I can't claim all the credit for it, in fact I can only claim a small part of the credit for it, but I'm very proud of the fact that I've now done three editions of the book on my own since Bill died and the standard still seems to keep up. People still seem to pay attention to it.

Way back in my days in South Africa, when I started turning to law, it was quite a revelation to me that you could have a career in a world of influence rather than power and the way the South African judges, for example, had reformed the law of *mens rea*, an example of a judicial achievement within the existing constitutional framework which greatly improved the law or significantly improved the law, seemed to me that that could be a reasonable way in which you could spend your life. That's what I've ended up doing and being able to do that in two jurisdictions is quite pleasing to me.

87. I can imagine.

I must thank you for these wonderful interviews which throw so much light on the development of South African law and UK administrative law. I'd also like to record my thanks to you and Gillian Charles for your kind hospitality in this wonderful rural setting. Thank you so much, Professor Forsyth.

