Murray Edwards College
*founded as New Hall*
University of Cambridge

# "Reasons and Context in Comparative law"
# Workshop to mark John Bell's retirement

19-20 September 2019
Murray Edwards College, Fellows' Drawing Room

## Thursday 19 September

**11:00 TEA AND COFFEE**

**11:20 WELCOME**

**11:25 – 13:10 SESSION 1. PUBLIC LAW**
Chair: **Alison Young, University of Cambridge**
**John Adenitire**, **Queen Mary University**
'*The Case for Replacing Religion in Law'*
**Sophie Boyron, University of Birmingham**
'*The introduction of mediation in French administrative courts: A model approach for legislative reform?'*
**Yseult Marique, University of Essex**,
*'The* préfet *and French administrative culture'*

**13:10 LUNCH**

**13:55-15:40 SESSION 2. JUDICIARIES**
Chair: **Trevor Allan, University of Cambridge**
**Mitchel Lasser, Cornell University**
'*The Logic and Illogic of Crisis in European Judicial Appointments Reform'*
**Elaine Mak, Utrecht University**
'*European judicial cultures'*
***Sophie Turenne,* University of Cambridge**
*'Judicial independence in a comparative perspective'*

**15:40-16:00 COFFEE BREAK**

**16:00-17:45 SESSION 3. PRIVATE LAW**
Chair: **Simon Whittaker, University of Oxford**
**Jean-Sébastien Borghetti, University of Paris II**
'*Change of circumstances and impossibility to perform: a tale of conflicting contractual remedies'*
**Ciara Kennefick, University of Oxford**
'*Continuous and Apparent' Problems with Easements: The French Dimensions of a Famous Transplant into English Law'*
**Solène Rowan,** Australian National University

*'Contractual Interpretation in England and France'*

**19:00 DRINKS**

**LAUNCH OF MARKESINIS'S GERMAN LAW OF TORTS (5TH EDITION) BY BELL AND JANSSEN**

**19:30 DINNER (FELLOWS' DRAWING ROOM)**

## Friday 20 September

**9:00-10:45 SESSION 1. EUROPEAN LEGAL DEVELOPMENTS**

Chair: **Colm McGrath, Kings' College London**

**Matt Dyson, University of Oxford**
*'Roundabout Law'*
**David Ibbetson, University of Cambridge**
*'Unjust[ified] unrichment'*
**Joanna McCunn, University of Bristol**
*'An art obscured with difficult cases'? William Fulbecke and legal interpretation'*

**10:45 – 11:15 COFFEE BREAK**

**11:15-13:00 SESSION 2. PRIVATE LAW**

Chair: **Stelios Tofaris, University of Cambridge**

**Christian Banfi, University of Chile**
*'A comparative reflection on Chilean economic torts'*
**Paula Giliker, University of Bristol**
*'Examining Vicarious liability comparatively: a risky business?'*
**André Janssen, Radboud University**
'*The German Supreme Court and the Use of Comparative Law: The Example of Tort Law'*

**13:00 – 14.30 LUNCH AND END OF WORKSHOP**

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CELS Centre for EUROPEAN LEGAL STUDIES

# Session 1

**John Adenitire**

Queen Mary University

## The Case for Replacing Religion in Law

Religion is ubiquitous in law. All major international human rights treaties and bills of rights provide for its protection. This paper argues that this should not be the case and that the law should no longer recognise religion as a legal category. This is because '[t]he ability to define religion is the power to deny freedom of religion'.[1] Legal definitions of religion necessarily unfairly exclude those who self-identify as religious and sometimes unfairly include those who self-identify as non-religious. Religion is an interpretative concept: its meaning, in and outside of the law, depends on the best value judgment of what it should mean.[2] But religion serves different values for different people in different places and times; so it is unjust for a judge to impose on others what she takes to be the value of religion to her.

Does the above entail that the law should no longer protect religion? Yes and no. The paper shows that, at least in the context of public law, most of the protections afforded on the basis of religiosity can be replaced by recourse to non-interpretative concepts which the law already uses such as conscience, belief, association, expression, and so on. On this basis, replacing religion in law with these other concepts entails no loss. However, there may be instances where protections and disabilities afforded on the basis of religiosity cannot be replaced with other legal concepts. Usually, this is because the law gives religion a privileged or disadvantageous status. This sits uneasily with the liberal commitment that religious and non-religious worldviews should be afforded equal treatment.[3] So any losses of unique religious privileges or disadvantages are actually gains for liberal equality.

Part I of the paper sets out the main claims of the paper and sets out how they are to be defended. Part II illustrates, by reference to US, Canadian and UK/ECHR law, the approaches that courts have taken to defining religion. Three approaches are identified: the Objective Criteria Approach; the Hands-Off Approach; and the Functional Approach. Part III sets out the claim that religion is an interpretive concept and uses this view to critique the existing approaches. While there are some merits in all three approaches, in part IV the paper suggests that the law should adopt the Replacement Strategy which entails replacing religion with legal concepts which are not interpretive. That part shows the liberal merits of the replacement strategy.

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[1] *US v Meyers* (1996) 95 F 3d 1475 (Court of Appeals, 10th Circuit) 1489. Per Brorby J., dissenting.

[2] Ronald Dworkin, *Religion Without God* (Harvard University Press 2013).

[3] John Adenitire, 'Conscientious Exemptions in a Liberal State' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019).

**Sophie Boyron**

University of Birmingham

### The introduction of mediation in French administrative courts: A model approach for legislative reform?

French administrative courts had been trying to introduce mediation in their judicial process for decades but any attempt had failed. On 18 November 2016, a statute was adopted to support this introduction. Interestingly, not only did the legislative reform mark the beginning of a long process of acclimatization of mediation in the French administrative courts but more importantly, it is was informed by a mediation pilot in one of the administrative court of first instance. Arguably, this bottom-up approach was particularly appropriate for introducing a tool aiming to deliver a pluralistic system of administrative justice. Still, this unusual experience of legislative reform can help a broader reflection on the process of reform more widely.

**Yseult Marique**

University of Essex

### The préfet and French administrative culture. History, public order and experimentation

In his *French legal cultures* (Butterworths, 2001)*,* Professor Bell explores legal cultures from the perspective of the judges. However, judges are only the tip of the iceberg, in the sense that judicial cultures have their own logics, whilst legal cultures are developed and practiced outside courts to a large extent. Professor Bell drew helpfully the attention on differences across between civil, criminal, constitutional and administrative legal cultures. Yet, the culture of administrative law or better the culture of the administration expands beyond the courtroom. The culture of the administration may indeed result from an interactive cycle between actors, institutional settings, legal and constitutional background and constraints, history, activities and reflection (p. 22). But who are the actors in the first place? Who are the main characters giving the administration its shape and culture?

This paper will explore the *préfet,* a key administrative protagonist in France: unelected, he is the representative of the State (the French Prime Minister) in the *département* and he is in charge of maintaining legality and public order at local level. He is for instance in charge of addressing major catastrophes such as big fires and floodings. Embedded in history, the *préfet* resists all recent territorial organisations. While the French territorial organisation has been spread in continental Europe with the Napoleonic wars leading to administrative transplants, local reorganisation after the WWII has often re-designed the territories and roles such as the *préfet* elsewhere in Europe. In Belgium, for instance, the equivalent of *département* (the so-called "provinces"), have become so symbolic that their suppression is on the agenda. If the situation is markedly different in France, the *yellow vest* movement especially targets *préfets* and some of them have been removed from office as a political safety valve. *Préfets* symbolise French centralisation for the better and the worse.

This paper will analyse how French administrative culture has been shaped by the *préfet*, his role and powers over time. While the *préfet* is a fixture in French administration, room for experimentation and differentiation appeared recently in such a way that the French

administration may look different in the future.[4] But could he disappear or be so strongly reformed that he would become a different institution altogether? At the time when the French administration is in flux and the *Ecole nationale d'administration* may be abolished soon, developing a micro-analysis of a key actor in the French administration sheds light on two distinctive features of French administrative culture, namely power relationships and the quasi absence of institutionalised reflection, although reflection is supposed to be a key step in the shaping and sustaining of a (legal) culture (*French legal cultures,* p. 22).

# Session 2

**Elaine Mak**

Utrecht University

## The meaning of 'judicial culture' in a transnational context

A central notion for understanding the judicial function in a legal and societal context is that of 'judicial culture'. In the words of John Bell, this notion concerns the "features that shape the way in which the work of a judge is performed and valued within particular legal systems".[1] In this definition, judicial culture encompasses both a set of ideas and a praxis, particular to the legal community, the institutions of government and the wider community. This concept addresses judicial functioning as a whole, i.e. both the primary process of judging and the judicial organisation. Ideas regarding judicial culture are expressed in the moral and social values of a specific community and in the legal rules concerning judicial organisation and the judgment of cases. The praxis that is a part of judicial culture concerns the approaches to judging that have developed over time in a specific legal system. This includes approaches to legal interpretation (the content of the judicial activity) and the handling of court procedures (the context in which judicial decisions are made).

The development of EU law and judicial mechanisms for its application has steered national courts towards a 'transnational' context, in which additional tasks have been added to their function – in particular the role of national courts as EU judges – and in which their work is valued on the basis of fundamental European values, such as democracy and the rule of law, and pluralism and solidarity are predominant social values (Article 2 Treaty on European Union). Moreover, many contemporary judges have knowledge of, and sometimes experience with, the laws of other national systems, which informs their decision-making. These 'top-down' and 'bottom-up' transnational influences on judicial functioning require a rethinking of the notion of judicial culture.

The analysis in this contribution addresses the implications of legal and societal pluralism for the meaning of 'judicial culture' (including the role of boundaries and demos), the relationship between individual and collective consciousness in the shaping of judicial culture (including the role of judicial agency in achieving perpetuation or change), and the constitutional embedding of

[4] Décret n°2017-1845 du 29 décembre 2017 relatif à l'expérimentation territoriale d'un droit de dérogation reconnu au préfet.

planned and spontaneous alignment of judicial cultures (including a reflection on issues of principle and more practical issues). In this way, a theoretical framework will be developed, which can be applied in further research regarding specific aspects of judicial functioning in the EU.


## Mitchel Lasser

Cornell University


### The Logic and Illogic of Crisis in European Judicial Appointments Reform

In 2009 and 2010, the European Court of Justice and the European Court of Human Rights underwent reforms to their respective judicial appointments processes. Though different institutions, with different remits and different modes of judicial appointment, they adopted very similar – and rather remarkable – reforms: each would now make use of an expert panel of judicial notables to vet the candidates proposed to sit in Luxembourg or Strasbourg. Once established, these two vetting panels then followed with actions no less extraordinary: they each immediately took to rejecting a sizable percentage of the judicial candidates proposed by the Member State governments.

What had happened? Why would the Member States of the European Union and of the Council of Europe, which had established judicial appointments processes that all but ensured themselves the unfettered power to designate their preferred judges to the European courts, and who had zealously maintained and exercised that power over the course of some fifty years, suddenly decide to undermine their own capacity to continue to do so?

I have just completed a book manuscript that offers interlocking explanations for these developments. From an intergovernmentalist perspective, the reforms were designed to manage the uncertainty generated by the mass European accession of former Eastern Bloc countries in the post-'89 period. The means chosen was to limit the capacity of those new Member State's governments to appoint judicial flunkies and thereby to control European judicial decisions and policy. From a neo-institutionalist perspective, however, the reforms demonstrate the tendency of institutions to develop their own agendas, to enlist support, and eventually to go their own way. Once established, the new judicial vetting panels developed interests and projects that their creators did not anticipate and have found difficult to contain. Finally, and for the purposes of my proposed book chapter, most importantly, these judicial debates and reforms must be understood from a constructivist perspective: they represent a conceptual reconstruction of the European system of separation of powers that seeks to enhance the authority and legitimacy of the European judiciary.

In this book chapter, I propose to expand the analytic frame. Viewed from within the ranks of highly placed pan-European jurists, the European judicial appointments reforms are a response to a broader crisis: a crisis in the legitimacy of the judiciary *tout court*. This chapter will examine a jarring example: the recent French decision to criminalize the use of electronically available judicial decisions "to evaluate, analyze, compare or predict the real or supposed professional practices" of French judges.[1] This surprising development represents perhaps the starkest example of the crisis mentality concerning the judiciary. Feeling itself increasingly under threat, the judiciary is grasping anxiously for ways to shore up its authority and legitimacy.

Finally, the chapter will suggest that there is little peculiarly judicial about this judicial crisis. It will argue that the perceived crisis in judicial authority and legitimacy is, at its core, a political crisis: it represents an increasingly evident breakdown in the representative linkages that have long justified the liberal democratic State. On this view, the judiciary's current travails offer but a particularly vivid example of the State's diminishing capacity to secure confidence and allegiance.

# Session 3

**Ciara Kennefick**

University of Oxford

### 'Continuous and Apparent' Problems with Easements: The French Dimensions of a Famous Transplant into English Law

In 1967, AWB Simpson published a landmark article which demonstrated that the concept of 'continuous and apparent' easements, a fundamental part of English law (then and now) on the implication of easements was derived from the French *Code civil* via an English treatise written by Charles Gale in 1839. Simpson justifiably described his contribution as 'a cautionary tale, containing several morals'. However, his account is incomplete principally because he used only English sources. I argue that many more 'morals' emerge from a more extensive comparative and historical analysis of this reception. The roots of the concept of 'continuous and apparent' did not run very deep in the pre-Revolutionary law when it emerged in the *Code civil* in 1804 and, remarkably, it had never before been used for the purposes of implying easements. Unsurprisingly, given these inauspicious origins, the interpretative problems which the concept still cause in English law were already visible in French law in 1839 but, intriguingly, they were omitted in the first and subsequent editions of Gale's treatise. Filling in the gaps left by Simpson reveals much about contemporary and modern private law in England and France and, more generally, it also has significant implications for theoretical thinking about legal transplants in comparative legal scholarship.

**Solène Rowan**

Australian National University

### Contractual Interpretation in England and France

Contract interpretation is at the core of commercial litigation in England. It has dominated judicial debate in English commercial law over the last 30 years with a series of prominent House of Lords and Supreme Court decisions, several containing powerful dissents. These decisions have both enthused commentators and ignited controversy, with an abundance of literature from academics, practitioners and judges writing extra-judicially.

There has been relatively little comparative analysis of contractual interpretation, which is surprising given the extent of the debate on this topic in England. My paper seeks to fill this gap with comparative analysis of some problematic aspects of contractual interpretation in England and France. Comparison with France is particularly topical because French contract law

has recently been through a major reform. The section of the Civil Code on contract law was amended and restructured in its entirety, including the part on interpretation. The new French law of contract came into force by government decree in 2016 and became law in 2018.

My paper describes and analyses the challenges faced by the courts in England. It then turns to how French courts deal with these challenges and the extent to which they have been similarly problematic in France. It shows that English and French law share the same starting point, that is, the court must identify the intention of the parties and give effect to their agreement. They diverge, however, as to how the intention of the parties should be identified. These divergences have resulted in quite different aspects of the law of interpretation attracting the attention of the courts and commentators in the two jurisdictions.

In England, the debate has focused on the relevance of the context and purpose of the contract in the interpretation process and whether they can override the "literal" or "natural and ordinary" meaning of the words used by the parties. In France, these issues have not generated comparable interest. The guidance in the Civil Code and case law has generally been applied without dissension. Instead, the points of contention in France have included the relationship between the subjective and objective approaches to interpretation, whether the parties can contract out of the principles of interpretation, the relationship between interpretation and the implication of terms, and the role of the *contra proferentem* rule.

By analysing the discourse on these various issues in England and France, my paper compares the law of interpretation in the two jurisdictions. It seeks to explain these differences, before concluding that, whilst the two systems share many similarities, they are divided by notable theoretical and practical differences. This is due largely to contrasting policy choices made in each jurisdiction.

**Jean-Sébastien Borghetti**

University of Paris II

## Change of circumstances and impossibility to perform: a tale of conflicting contractual remedies

Change of circumstances is a classic topic in comparative contract law. What are the effects, if any, of an unexpected and unforeseen change of the circumstances that surrounded the contract at the time of its conclusion, when this change results in an upsetting of the bargain agreed between the parties? While most legal systems, including England's, have long accepted that a change of circumstances can have an impact on the existence or the content of the contract in at least some cases, French law was until very recently famous for allegedly refusing any encroachment on the binding force of the contract, however extreme the change that had occurred. The 2016 reform of French contract law has put an end to this idiosyncrasy, however. French law seems to have gone from rags to riches in this respect, since there are now no less than three provisions in the *Code civil* which may justify a termination or modification of the contract in the case of a change of circumstances. Of course, this sudden abundance of legislative rules creates a problem of coordination between them. While comparative law may help to solve this problem, the need to articulate these three rules is also an occasion to try and identify the different types of changes of circumstances which may affect a contract. This contribution argues that it is indeed possible to lay down a taxonomy of the various hypotheses of change of

circumstances, based on how the change impacts the financial interest of each party to the contract. This economic viewpoint could be interesting in a comparative perspective, as it is not premised on the conceptual features of any given legal system, and thus raises the prospect of a transsystemic approach to the change of circumstances.

# Session 4

**Joanna McCunn**

University of Bristol

### 'An art obscured with difficult cases'? William Fulbecke and legal interpretation

William Fulbecke, an Elizabethan lawyer and historian, was one of the first Englishmen to turn his hand to comparative law. He also wrote a guidebook for law students, *A Direction or Preparative to the Study of the Law*, first published in 1600.

Alongside general advice for students, the *Direction* included a detailed account of legal interpretation. Fulbecke was writing at a time when interest in interpretation was particularly intense. Nonetheless, Fulbecke's discussion is striking for its unusual length and sophistication.

This paper explores that account, and argues that it was strongly influenced by contemporary continental scholarship. It is well-known that the *Direction* is, as David Ibbetson puts it, 'shot through with civilian learning.' However, Fulbecke's approach to legal interpretation has never been studied in detail.

The paper draws out two of Fulbecke's central concerns: firstly, the relationship between a writer's words and his intentions, and, secondly, the use of circumstances to demonstrate the meaning of words. It analyses Fulbecke's discussion of each issue, comparing them to contemporary accounts both in England and on the continent.

Many of Fulbecke's arguments bear the hallmarks of a continental origin: for example, his distinction between contractual and statutory interpretation, and his use of the rhetorical concept of circumstances. Fulbecke, however, was able to integrate many of these ideas into his account of the common law. This was because civilian theories had long been influential in this area, leaving the two bodies of learning already closely aligned.

This paper argues that unusually direct links can be drawn between Fulbecke's writings on interpretation and ideas current in continental Europe. However, Fulbecke's enterprise was not an isolated one. Rather, continental influences on the English law of interpretation were ubiquitous throughout the early modern period.

# Session 5

**Paula Giliker**

University of Bristol

### Examining vicarious liability comparatively: a risky business?

This paper will examine vicarious liability, that is, strict liability in tort for the tortious acts of others, and the insights one may gain from comparative law research. Vicarious liability is a topic that John has researched and published (and indeed on which he was cited favourably by the UK Supreme Court in *Cox*

*v Ministry of Justice* [2016] UKSC 10. In Cox, Lord Reed (at [31]), summed up John's argument as follows; "what weighed with the courts in *E* and the *Christian brothers* case was that the abusers were placed by the organisations in question, as part of their mission, in a position in which they committed a tort whose commission was a risk inherent in the activities assigned to them."

This paper will analyse the role that risks plays in contemporary vicarious liability discourse from a comparative perspective, from jurisdictions such as France where risk has played a significant role for a number of years, to the UK where, as seen above, its importance is growing, to Australia which continues to resist the lure of risk-based analysis as an explanation and justification for the imposition of vicarious liability. To what extent is risk a satisfactory explanation of vicarious liability? What indeed are the risks of using this criterion as a dominant justification for this doctrine? Is using risk as a justification for vicarious liability a "risky business"?

**Cristian Banfi**

University of Chile

## A comparative reflection on Chilean economic torts

*Please see draft paper in separate document*