

**Straight and Crooked Thinking :
The Search for What is Right¹**

**The Birkenhead Lecture 2016
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Gray's Inn, London**

Master Treasurer, Masters of the Bench, Judges, Ladies and
Gentlemen,

1. Lord Birkenhead was to some a controversial figure but he was undoubtedly two things : a good lawyer and he was loyal to this Inn. On his legal prowess, in the July 1900 Law Quarterly Review under the title “*The Rule in Hadley v Baxendale*”², FE Smith, then at Merton College Oxford, wrote an article in respect of which Master Heuston³ has written⁴,

¹ I wish to acknowledge the assistance I have received from the Judicial Assistants of the Hong Kong Court of Final Appeal : Mr Franklin Koo BA (Toronto), LLB (London), LLB (City University of Hong Kong), Solicitor; Mr Sean Li BBA (Hong Kong), LLB (Hong Kong), Barrister; Mr Victor Lui BSocSc. (Hong Kong), LLB (Hong Kong), LLM (Cantab), Barrister.

² (1900)16 LQR 275.

³ Prof R F V Heuston was influential in teaching of constitutional and tort law, and was also an Honorary Bencher of Gray's Inn.

“No other Lord Chancellor, or indeed Law Lord, is known to have contributed to this scholarly quarterly at such a youthful age”. The promise of youth developed into a very sound lawyer. I draw attention in this context to his speech in the important case of *The Volute*⁵, one of the landmark cases in admiralty law which substantially influenced the general law relating to contributory negligence.

2. Lord Birkenhead’s love of Gray’s Inn (he became the Treasurer) can be summed up in a passage written by his son in a biography of FE Smith⁶ and this incidentally reflected my own reasons for joining the Inn back in 1975 :-

“It was the smallest of the Inns of Court; it was the most intimate and it breathed into FE from its

⁴ *The Lives of the Lord Chancellors 1885-1940* (OUP 1964) at Pg. 357.

⁵ [1922] 1AC 129.

⁶ Birkenhead : *Frederick Edwin, Earl of Birkenhead Vol. 1* (1933) at Pg. 81.

beautiful timbered hall the mellow enchantment of Elizabethan England”.

3. I have now paid my homage to the Inn which I thank profoundly for the invitation to speak this evening and to the person in whose name I dedicate this talk. I must now deliver it.

4. This Inn of Court is the living embodiment of much of what the World respects about the English legal system and I mean by this the common law. The common law is the system of law which governs a number of jurisdictions around the World. In my home, Hong Kong, the common law is the system that is constitutionally prescribed as the legal system applicable to this Special Administrative Region of the People’s Republic of China. Hong Kong’s constitution, the

Basic Law⁷ which reflects (as the Preamble states) the basic policies of the PRC regarding Hong Kong, expressly provides for the application of the common law.⁸

5. The common law, in its objective of arriving at just outcomes to legal disputes (put simply, law is justice) requires not only firm and clear decisions but, equally important, compelling reasons for such decisions. Ultimately, the main yardstick for determining the correctness of a decision is the coherence and cogency of the reasoning in support. Another way of putting this is that the common law requires judgments to be made on a principled basis. As lawyers, we have all come across judgments and decisions which have sometimes surprised us not just in their outcome, but also in their reasoning. We are surprised because of the importance of

⁷ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China promulgated on 4 April 1990 and applicable as from 1 July 1997 upon the resumption of sovereignty by the People's Republic of China over Hong Kong.

⁸ See in particular Articles 8 and 81 of the Basic Law. Article 81 states that the "judicial system previously practised in Hong Kong shall be maintained".

reasoning as an integral component of the administration of justice in a common law system. It is one of its primary characteristics.

6. Before I develop this theme a little more, I ought first to explain the title of the lecture. It is far from original because it is taken directly from a well-known book which was first published in 1930 under the authorship of Robert Thouless.⁹ *Straight and Crooked Thinking* found its way into the recommended reading list when I first embarked on my legal studies over 40 years ago at Birmingham University. It was to prove to be one of the most influential books in my legal career because it underlined the necessity of proper reasoning in order to convince. My priorities as to whom to convince have evolved over the years from judges before whom I appeared to now the general public who have to be

⁹ Now into its 5th edition authored by Mr Thouless' grandson, Mr C R Thouless.

convinced of the work of the courts. The aim of this book was to put at the forefront the need for proper reasoning in order to arrive at a justifiable result. Proper reasoning can be defined as straight thinking and improper reasoning, crooked thinking.

7. In Mr Thouless' book, instances of straight and crooked thinking are identified. The analysis and examples of crooked thinking are the more interesting : faulty logic, emotive language, flattery as a means to help persuade, playing on people's psychology and prejudices etc. In this lecture, I look at this in the legal context. I hope to be able to point to instances of what I will call crooked thinking, not in the sense of dishonesty or bad faith, but the use of legal tools of the trade in a tenuous and ultimately unconvincing way in order to arrive at certain legal outcomes. These outcomes may have seemed right in the age they were made but in

modern times would be regarded as wholly unacceptable. There are of course countless instances of straight thinking and these of course comprise the vast majority of legal decisions, but the occasions in which Homer nodded are the more interesting.

8. I have already mentioned the importance of a principled approach to decision-making. A principled approach is always and indeed the only approach. It is in contrast to adopting a random – or worse arbitrary – approach.¹⁰

9. So why is the existence of clear and fully reasoned judgments of such importance under the common law? To start with, they demonstrate the adherence of the courts and

¹⁰ All of you will recall from your law study days that cases were never to be decided according to the length of the “Chancellor’s foot”. This is a reference to the criticism made of the courts of equity in the 17th century when it was perceived that the Lord Chancellor was arbitrary in the way cases were decided. John Selden, the 17th century jurist and philosopher, referred to the Chancellor’s foot being “long, short or indifferent” depending on who occupied the office (Selden’s Table Talk writings, 1689).

judges to the law and her spirit. They also manifest the adherence to the Judicial Oath taken by judges.¹¹ It is important that there is adherence to the law and the spirit of the law. In any society governed by the rule of law, one finds the existence of laws that fully respect the rights of the individual and the existence of an independent judiciary enforcing such laws. One of the empirical indicators of the existence of the rule of law is the transparency of the legal system and a fully reasoned judgment enables anyone (not restricted to the parties to the relevant legal proceedings) to see that there has been this adherence to the law and her spirit. Without proper reasoning in judgments for everyone to see, all sorts of unfortunate speculation arises as to what might have generated the result. And this, as we have seen with a

¹¹ The Judicial Oath taken by me, in the same format as other Hong Kong judges, is in the following terms :-

“I swear that, in the Office of the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region of the People’s Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China, serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.”

This Oath is similar to and combines the Oath of Allegiance and the Judicial Oath taken by English judges.

number of jurisdictions, significantly undermine the rule of law and public confidence in the legal system in these places.

10. The doctrine of precedent, as I have mentioned that characteristic which is often used as the prime example whenever one is asked to define the common law, has as its foundation the properly reasoned judgment, for it is the reasoning of judgments that is utilised in future cases. The doctrine of precedent encourages consistency, promotes certainty and constitutes the opposite of the arbitrary application of the law. It is, however, important in order for the system of precedent to operate properly that bad precedents are not created because bad precedents, like good precedents, also last. Not everyone is convinced by the doctrine of *stare decisis* and it is of course not applicable in civil law jurisdictions. Jeremy Bentham spoke cynically of it when he said that acting by precedent was “acting without

reason, to the declared exclusion of reason and thereby in declared opposition to reason”¹² He must have had in mind instances of crooked thinking in judgments.

11. And so we come back to the necessity of proper reasoning in arriving at decisions. Bad precedents are created when bad reasoning is employed. Where such precedents exist, this will have the effect of either preventing the development of the law or, worse still, damaging the fabric of the law. Where the law is no longer regarded as fulfilling its primary function of the protection of rights, society really ceases to be governed by the rule of law. Of the importance of the rule of law, I can illustrate this by making reference to a scene from a play I studied for my “O” Levels over 45 years ago, *A Man for All Seasons*.¹³ As you will know, this was a

¹² Bentham : *Constitutional Code : For the Use of All Nations and All Governments Professing Liberal Opinions* (1830).

¹³ By Robert Bolt.

play written about Sir Thomas More, who was Chancellor in England during the reign of Henry VIII. Sir Thomas More was a member of Lincoln's Inn¹⁴ and was called by Erasmus, the Dutch humanist and theologian, "omnium horarum homo" – a man for all seasons.

12. In this scene, More is conversing with his future son-in-law, William Roper, who is trying to persuade Sir Thomas to arrest Richard Rich, whose perjury against Sir Thomas would eventually lead to his being sentenced to death. Sir Thomas insists he cannot do this since Rich has broken no law. He says that even the devil should be free until he broke the law. Roper is exasperated with the idea even the devil should be given the benefit of the law. Sir Thomas says to him :-

¹⁴ Admitted in 1496.

“What would you do? Cut a great road through the law to get after the Devil? ... And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country is planted thick with laws from coast to coast, Man’s laws, not God’s, and if you cut them down – and you’re just the man to do it – do you really think you could stand upright in the winds that would blow then? Yes, I give the Devil benefit of law, for my own safety’s sake!”

13. I hope so far I have persuaded at least some of you of the importance of the process of reasoning in arriving at decisions. This has of course long been recognised by judges as being essential to the perceived integrity of a judicial decision. A properly reasoned judgment is after all likely to have reached the right result. However, what happens then

when improper reasoning is employed? Here, the usual result is that a bad decision has been made and injustice results. One may ask rhetorically at this juncture : so why should improper reasoning have been employed in the first place? One answer is that improper reasoning is employed in order to achieve what is perceived to be justice; in other words the school of “the ends justify the means”. Another answer is to say that the judge has not intended to employ faulty reasoning – the “mistake by inadvertence” school. Yet another explanation is, I suppose, what sometimes occurs when the judge has simply made no attempt to reason like a lawyer ought to; here, this is not so much a case of faulty reasoning as non-reasoning at all. I can illustrate this by a reference to the case of *The Republic of Bolivia v Philip Morris Companies Inc.*¹⁵ There, the issue was whether proceedings begun in Texas should instead be transferred to be heard in

¹⁵ 39 F. Supp. 2d 1008 (1999).

Washington DC. In his judgment stating that Washington DC was the more appropriate venue for trial, a judge of the US District Court for the Southern District of Texas, Galveston Division (no doubt tongue in cheek) said this :-

“..... the Court can hardly imagine why the Republic of Bolivia elected to file suit in the veritable hinterlands of Brazoria County, Texas. The Court seriously doubts whether Brazoria County has ever seen a live Bolivian even on the Discovery Channel.

..... Plaintiff has an embassy in Washington, D.C., and thus a physical presence and governmental representatives there, whereas there isn't even a Bolivian restaurant anywhere near here!.....”

14. *The Republic of Bolivia* case is simply an example of non-reasoning. Of a more dangerous kind are those cases where there has been faulty reasoning – crooked thinking as I have earlier described it – by the employment of well-known legal tools. These are dangerous because faulty reasoning may sometimes be employed to hide a society’s prejudices and to perpetuate such prejudices. The use of such legal tools gives the decision a superficial air of respectability because legal reasoning is seemingly employed. It is in this area of social prejudice on which I want to concentrate. I do so not only because they provide for me the clearest examples of legal crooked thinking, but also provide important lessons to be learnt.

15. Before I embark on this exercise and this will involve a discussion of cases from England and the United States, I want to make it clear that it is not my intention to

disparage the judges responsible for these decisions. Rather, the objective is to point out the dangers of faulty reasoning, chief among such dangers being the continuation of an unfortunate state of affairs.

16. Prejudice provides one of the commonest instances where crooked thinking is utilised. Here a quote from Thouless' book¹⁶ suffices :-

“Education does not in itself save us from this disability. It ought to help us towards freedom from prejudice, but it does not necessarily do so. Learned academics are often as bound by their prejudices as anyone else. Learned persons may defend their most unreasonable prejudices by arguments in a correct logical form, while the uneducated defend

¹⁶ At Pg. 97.

theirs by illogical arguments. The only advantage this gives the learned is the fact that they can marshal formally correct arguments in defence of their errors. This may make these more watertight against opposing arguments and opposing experience. Mastery of the art of thought may simply make unreasonable opinions more unassailable.”

17. Racial prejudice and prejudice against women have plagued societies for a long time. We all of course know now just how unacceptable these prejudices are. The promise – or rather, insistence – on equality is at the forefront of almost any constitutional instrument one has come across.¹⁷ But it was far from being true historically.

¹⁷ For example, Article 25 of Hong Kong’s Basic Law states :-

“All Hong Kong residents shall be equal before the law”.

18. In the United States, the promise of equality was contained in the July 4, 1776 Declaration of Independence.¹⁸

A war was waged to uphold this Declaration. The United States Constitution, coming into force in 1789, was based on the Declaration of Independence. The commonly shared wisdom is now that the Declaration of Independence was the promise for the nation and the Constitution, the fulfillment of that promise. The Preamble of the Constitution proudly declares, “We the people of the United States, in order to establish justice to secure the blessings of liberty do establish this Constitution”

Article 1 of Hong Kong’s Bill of Rights, contained in Hong Kong Bill of Rights Ordinance Cap. 383 (reproducing Articles 2 and 3 of the International Covenant on Civil and Political Rights) states :-

“Entitlement to rights without distinction

- (1) The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- (2) Men and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights.”

¹⁸ “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness”.

19. How could the concept of slavery, therefore, be consistent with these important statements? Hard though it may be to accept this, slavery was for centuries a venerable institution. The great Code of Hammurabi, often referred to as the ancestor of modern law, revered and protected slavery : a man who harboured a fugitive slave on his land would be executed whereas if he returned the slave to his owner, there would be a reward : if a slave was injured, compensation would have to be paid to his owner. Despite Magna Carta, England had for many years a feudal system involving serfdom.

20. Relevant for the purposes of this lecture is the question of how the courts dealt with the issue of slavery and what reasoning they employed.

21. In England, the celebrated case of *R v Knowles ex parte Somersett*¹⁹, a *habeas corpus* action heard by Lord Mansfield in the Court of King's Bench, had decided against slavery as an institution. His reasoning, curiously vague for Lord Mansfield who as we all know was one of the clearest minds in matters involving commercial law, can be interpreted to mean that slavery was illegal on account of it finding no basis in the common law; there was no precedent for it.²⁰

22. The courts of the United States took a different course. The infamous case (the term as used by Justice Sandra Day O'Connor, formerly an Associate Justice of the Supreme Court of the United States) of *Dred Scott v John FA*

¹⁹ (1771-2) 20 State Tr. 1; (1772) 98 ER 499.

²⁰ The absence of precedent is, as we will see again, used by common law courts as a reason for arriving at legal outcomes.

*Sandford*²¹, a decision of the US Supreme Court under Chief Justice Taney, is a classic example of unacceptable legal reasoning which gave rise to the danger of a perception of a lack of judicial independence. There, an African American (Dred Scott) and his family had been assaulted by his alleged master and owner, Sandford. He brought an action in the Federal Courts in St Louis, Missouri in trespass. The issue which eventually made its way to the Supreme Court was whether Dred Scott had the necessary *locus standi* as a US citizen to make a claim against Sandford. Only US citizens could sue.

23. In determining this issue, the Court had to construe the meaning of citizen under the US Constitution. Was Scott a citizen of the United States? Chief Justice Taney regarded it as his obligation to interpret the Constitution in accordance

²¹ (1857) 19 How 393, 60 US 393.

with what its drafters meant. In his judgment (at 405), he said (correctly although as it turned out, somewhat disingenuously), “It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws.” The Supreme Court held that despite the fact that in the course of moving from state to state (Missouri to Illinois to Upper Louisiana back to Missouri), Dred Scott had resided in Wisconsin where slavery had been outlawed (by the Missouri Compromise), he remained a slave when he returned to Missouri. As such, it was felt his status did not enable him to be treated as a citizen of the United States. Chief Justice Taney, in the course of his analysis as to what the framers of the Constitution had in mind, referred to black people as “a subordinate and inferior class of beings”²² and “an inferior order, and altogether unfit to associate with the white race”.²³

²² At Pg. 404-405.

²³ At Pg. 407.

24. These are strong and unacceptable words. This inadequate legal reasoning, devoid of humanity, simply and totally ignored the concept of human rights and dignity, and the spirit of the law. True it is that Chief Justice Taney was associating himself with what he thought were the views of the majority of Americans at the time (although this is debatable²⁴) but even accepting this, he did not display the courage, the vocation and judicial independence that is the hallmark of a judge. By holding the way it did, the Supreme Court laid itself open to the accusation that it had not been truly independent. The (by our standards) outrageous reasoning in *Dred Scott v Sandford* led many people to think of that case as representing an unfortunate chapter in the history of the US Supreme Court and that the Court, for once, did not display the independence for which it is now famous.²⁵

²⁴ See the 69 page dissenting judgment of Justice Benjamin Curtis.

²⁵ In his Pulitzer Prize winning work "The Dred Scott Case: Its Significance in American Law and Politics", the historian the late Professor Don Fehrenbacher of Stanford University said this : "Taney's opinion, carefully read, proved to be a work of unmitigated partisanship, polemical in spirit though judicial in its

As Chief Justice Beverley McLachlin²⁶ has often remarked, courage and conscience are judicial qualities needed in any judiciary.

25. Let us pause a little to examine the reasoning of the Supreme Court in arriving at the decision they did in *Dred Scott*. As Prof Fehrenbacher noted, the judgment was “judicial in its language”. Superficially, I suppose it was. The judgment proceeded as if the question was really just one of constitutional interpretation and the Chief Justice even remarked, as we have seen, that the court was not pronouncing on the justice or injustice or the policy behind the slave laws. That part of the Constitution requiring interpretation was whether African Americans could be

language, and more like an ultimatum than a formula for sectional accommodation. Peace on Taney’s terms resembled the peace implicit in a demand for unconditional surrender.”

²⁶ Chief Justice of Canada, also an Honorary Bencher of Gray’s Inn.

considered citizens because only this category of persons could sue.

26. For me, this is an early example of crooked thinking. It involved the use of legal tools, in this case legal analysis in the form of confining the issue to one of statutory interpretation and also saying (as really no more than camouflage) that the Court was not pronouncing on matters of policy, in order to disguise a blatant disregard for what should have been the correct answer and instead, to reach an answer that reflected the times. It is crooked thinking because the correct answer was not only obvious (by our standards), but the reasoning needed to reach a correct conclusion was also clear : a respect for the concept of equality and liberty, both of which were, as we have seen, inherent in the Declaration of Independence and the United States Constitution itself and of course, common sense. The dissenting opinion of Justice

Benjamin Curtis, to which I have already referred, can be seen in sharp contrast : Scott was a citizen of the United States; he was a citizen because all persons born in the United States were citizens and the fact that he was an African American was irrelevant to this conclusion. Justice Curtis resigned from the Supreme Court after the decision in *Dred Scott*.

27. I have already earlier remarked that where faulty reasoning is employed, a wrong result becomes the consequence and a legal precedent is thereby created having the effect of perpetuating an injustice, often at great cost. The result of *Dred Scott* was that a catalyst was created that led eventually to a Civil War. It was not until the passing of what became known as the Reconstruction Amendments of the United States Constitution – that is, the 13th, 14th and 15th Amendments²⁷ – when slavery was abolished, citizenship was

²⁷ Passed, respectively, in 1865, 1868 and 1870.

given to former slaves and a prohibition against race or colour being a bar to the right to vote was enacted.

28. However, notwithstanding the Reconstruction Amendments, inequality and prejudice persisted. I have just made reference to the 14th Amendment. It contains in its first section what is popularly known as the Equal Protection Clause²⁸ – in other words, the guarantee of equality. It was therefore supremely ironic that this Amendment, forged in the aftermath of the American Civil War in response to the end of slavery, should have given rise to a series of laws enacted in the Southern States which effectively imposed racial segregation – these were known as the Jim Crow Laws.²⁹ Every aspect of life was affected, from the use of public conveniences to those institutions which affect everyone's

²⁸ “... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws.”

²⁹ Jim Crow was a character created in the 1830's in a minstrel show. It portrayed African Americans as quite ridiculous caricatures.

lives – marriage³⁰ and education among others. Education was in many ways the worst of all; after all, it is through education that one is able to live a full life and enjoy that fundamental ideal contained in the United States Declaration of Independence, the “Pursuit of Happiness”.³¹

29. We all know now that racial segregation cannot possibly be consistent with the right to equality. In principle, it is the precise opposite of equality in that an artificial barrier – race – is imposed; as a matter of reality, such a system is bound to result in practical differences. But what may seem obvious to you may not be obvious at all to a lot of people, certainly not at the relevant historical time. This somewhat twisted idea of equality (racial segregation) found favour with the United States Supreme Court in the 1896 case

³⁰ For example, a 1911 statute in Nebraska stated that “Marriages are void when one party is a white person and the other is possessed of one-eighth or more negro, Japanese or Chinese blood.”

³¹ This is one of the “inalienable rights” contained in the Declaration : “Life, Liberty and the Pursuit of Happiness”.

of *Plessy v Ferguson*.³² The effect of the decision was to confirm the legal validity of the “separate but equal” doctrine.

In a nutshell, the doctrine was that the constitutional right to equality was not inconsistent with segregation, as long as the facilities available to white people and to other races were the same. This doctrine at its very highest may barely pass a test of logic (and it is certainly a legal fiction) but it could not disguise the real reasons behind its application in practice.

The Court tried to apply logic and reason. However, the judgment of Justice Brown³³ contains a revealing passage:³⁴

“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act [the 1860 Act providing for separate

³² 163 US 537 (1896). This was a case upholding the validity of a Louisiana law providing for segregation in railway carriages.

³³ Justice Henry Billings Brown, a former associate justice of the Supreme Court. He wrote the majority decision, the sole dissenting judgment was from Justice John Marshall Harlan.

³⁴ At Pg. 551.

railway carriages], but solely because the colored race chooses to put that construction upon it.” The decision has of course to be seen in the context of the times.

30. The legal reasoning technique used in *Plessy v Ferguson* was that of logic : segregation did not mean inequality as long as everyone in the segregated groups were equal.³⁵ Like *Dred Scott*, the effect of *Plessy* was to be a millstone around the neck of the United States legal system until the Supreme Court mustered the courage to reverse the decision in the case of *Brown v Board of Education*.³⁶

31. Like the decision in *Dred Scott*, the Supreme Court in *Plessy* employed crooked thinking, this time using the legal tool of logic, usually convincing in most cases, in order not to disturb the then prevalent views of United States society. The

³⁵ The famous “separate but equal” principle.

³⁶ 347 US 483 (1954).

obvious answer was of course there but this use of suspect reasoning had to be employed in an attempt to give an important policy decision of the courts some legal basis and justification. The price that had to be paid was that the United States had to endure more than a generation of seething discontent.

32. By now, you will appreciate that one principal theme of this talk is that when the courts are asked to determine important cases, important consequences follow and the respect that the community will ultimately have in the law will depend on how such important decisions are made. Process and reasoning are, I stress again, all important.

33. The majesty of the English common law has been for me the most influential in all common law jurisdictions, if not in all jurisdictions. English mercantile law is a prime

example. In the area of human rights, however, the English courts have not always been consistent. I have earlier referred to the important case of *Somerset* which helped pave the way to the abolition of slavery. The inconsistency of the courts can be demonstrated by the slow progress regarding the position of women and it is in this area where the reasoning of even the highest courts has been found wanting. I wish to examine a number of decisions, mainly in the early 20th Century, to illustrate this phenomenon. It is a phenomenon because while women could literally rise to the very top and become the Sovereign, yet lower down, they were discriminated against.

34. In this part of my lecture, I wish to acknowledge the talk given by Master Beloff at the Gray's Inn Reading of Gresham College on 25 June 2009.³⁷ I have also been much

³⁷ Michael Beloff QC : “*Sisters-in-Law : The Irresistible Rise of Women in Wigs*”.

assisted by an article “*Women and the Exercise of Public Functions*” by Prof Enid Campbell.³⁸

35. I start with a frosty morning on December 2, 1903. In the Moses Room of the House of Lords (near the Law Lords Corridor) in which there hangs a fresco *Moses bringing down the Tables of Law from Mount Sinai*, Ms Bertha Cave made submissions before a special tribunal consisting of the Lord Chancellor³⁹, the Lord Chief Justice⁴⁰ and five senior judges.⁴¹ As reported in *The Times*⁴², the hearing lasted only five minutes. Ms Cave had sought to be called to Gray’s Inn but she was refused on the basis that only men had hitherto been admitted to practise at the Bar. No woman had ever

³⁸ (1961) 1(2) *Adelaide Law Review* 190. Prof Campbell was an influential constitutional lawyer. She was the first woman professor of law in Australia. After teaching at the University of Tasmania and the University of Sydney, she became Dean of the Faculty of Law at Monash University.

³⁹ Lord Halsbury LC.

⁴⁰ Lord Alverstone CJ.

⁴¹ Kennedy, Wright, Walton, Farwell and Joyce JJ.

⁴² Of 3 December 1903.

been admitted. The special tribunal agreed. The Lord Chancellor is reported to have reasoned thus : since there was no precedent for women to be admitted to the Bar (no women had ever been admitted to the Inns of Court), Ms Cave's application was rightly rejected. The tribunal presumably had regard to the view of the Inn. A contemporary report⁴³ refers to this :-

“A representative of Gray's Inn has stated that the objection of the Benchers was based on the simple ground that when the Inn was founded the possibility of lady students was never contemplated. The statutes of the Inn, therefore, while containing no definitive bar against women, ignore the sex so absolutely as to leave the Benchers, in their opinion, no power to admit a lady.”

⁴³ See R. Blain Andrus : *Lawyer : A Brief 5,000 Year History* (2009 ABA) at Pg. 403-4 quoting from The British Journal of Nursing 5 December 2003.

36. Three points stand out :-

- (1) The reasoning was weak. To say there was no precedent is perhaps a legal device of last resort to arrive at a conclusion. In order to get to this stage, a court will have (at least ought to have) considered the matter after looking at applicable principles. It does not appear the special tribunal considered Ms Cave's application from the point of view of fairness, equality or even common sense.

- (2) The case was an important one and it was obviously acknowledged to have important repercussions. There is no other explanation for the composition of the special tribunal. It can be inferred then that it was considered that the reasoning behind any decision would be critically evaluated. Yet, no

proper reasoning was revealed. This provides a strong hint as to the correctness of this outcome.

- (3) The trouble with crooked thinking is that it promotes further crooked thinking. It was ominous that, as reported in the extract from *The Times*, Ms Cave said to the press that in the future, if there was any loophole, she would take advantage of it.

37. Ms Cave was not the first woman to seek access to the Inns. As early as 1870, 92 women signed a petition requesting permission to attend a lecture at Lincoln's Inn. The permission was refused without any reason given.

38. *Bertha Cave's Case* and the view of the Inns of Court reflected the times, and they were perhaps therefore not surprising. They were entirely consistent with the way the

courts had all along dealt with the discriminatory practices against women. The reasoning to the effect that women were not included in a profession (the legal profession) which admittedly consisted of men at that stage, was hardly compelling : as I have said, it was neither logical nor was it consistent with common sense. Even statute had made progress in this respect. The Interpretation Act 1856⁴⁴ stated that the use of the masculine in statutes should include the feminine.

39. This statutory clarification did not herald any new era of equality, nor did it prevent the continued use of faulty reasoning. Even before *Bertha Cave's Case*, in *Beresford-Hope v Lady Sandhurst*⁴⁵, the dubious reasoning of the courts was already in existence. In that case, Lady Sandhurst was duly elected to the town council of the

⁴⁴ Also known as Lord Brougham's Act.

⁴⁵ (1889) 13 QBD 79.

London County Council area of Brixton. The unsuccessful rival in the election petitioned against the result on the basis that Lady Sandhurst was disqualified on account of being a woman. The Municipal Corporations Act 1882 provided that “every person shall be qualified to be elected and to be a councilor who is, at the time of election, qualified to elect to the office of councilor”. Lady Sandhurst was a person and she was entitled to elect and insofar as any further doubt remained, Lord Brougham’s Act reinforced her position.

40. The result of the case might appear to be obvious. The language of the statute was clear : if one could vote, one could also be elected.⁴⁶ However, one of the strongest constituted Court of Appeal of that era⁴⁷ held otherwise. A number of devices were used in the reasoning :-

⁴⁶ There is nothing startling about this at all. One is the consequence of the other. For example, Article 27 of Hong Kong’s Basic Law states simply that permanent residents in Hong Kong have the right to vote and stand for election.

⁴⁷ It was a Court of Appeal of six, Lord Coleridge CJ, Lord Esher MR, Cotton, Fry, Lindley and Lopes LJJ.

(1) Logic. Notwithstanding the statutory provision which stated in terms generally that women could be elected if they could vote, in the specific statute under consideration, since there was a provision which expressly stated that women could vote, it must follow that women could only be elected if there was an express specific provision to this effect as well but there was none. This was I would venture to suggest, simply warped logic at its worst, yet it proved to be attractive to all six judges.

(2) Reference to what the common law and constitutional law had always been. This is a variation of the 'since time immemorial approach'. Lord Esher MR put it in these terms : "I take it that by neither the common law nor the constitution of this country from the beginning of the common law

until now can a woman be entitled to exercise any public function.”⁴⁸ In relying on an earlier authority⁴⁹, the Master of the Rolls used another legal technique – the wisdom of another judge (what I would call the ‘Homer factor’) – to refer to Willes J in the following terms, “a more learned judge never lived”.

All this again constituted for me faulty reasoning. And a quite absurd result was created.

41. Like other shaky decisions, this way of thinking in important cases (as I mentioned, the composition of the Court of Appeal in *Beresford-Hope* was one of the strongest possible in that period) provided a precedent for other cases to

⁴⁸ At Pg. 95.

⁴⁹ *Chorlton v Lings* (1868-9) LR 4 CP 374 (Willes J).

follow. It is in this context that I would suggest the outcome in *Bertha Cave's Case* came as no surprise.

42. *Bebb v Law Society*⁵⁰ was yet another extraordinary case. Ms Bebb wanted to take the Law Society's qualifying examination to become a solicitor. She was told that if she presented herself to take the examination, she would be barred from entry. The Solicitors Act 1843 did not of course expressly bar women from becoming solicitors (it simply used the term "person") but the Court of Appeal⁵¹ superimposed the requirement that persons could not become solicitors if they were "disqualified". This use of logic can be defended but it was of course not by itself enough to exclude women. The further device that was used by the Court of Appeal was that the common law position that no women had ever been or applied to be a solicitor. As Cozens-Hardy MR said, "There

⁵⁰ [1914] Ch. 286.

⁵¹ Comprising Cozens-Hardy MR, Swinfen Eady and Phillimore LJ.

has been that long uniform and uninterrupted usage which is the foundation of the greater part of the common law of this country, and which we ought, beyond all doubt, to be very loath to depart from”. It is also noteworthy that among the authorities cited against Ms Bebb were *Chorlton v Lings* and *Bertha Cave’s Case*. These cases, or rather their way of thinking had become, in modern parlance, mainstream and moreover had become precedents. And yet, they were wrong. Every legal principle on which each person in this Hall has been educated – principles of equality, fairness and basic justice – was jettisoned in favour of dubious and faulty reasoning (crooked thinking).

43. The House of Lords fared no better. Section 27 of the Representation of the People (Scotland) Act 1868 provided that “every person whose name is for the time being on the register of the general council of [the Universities

of St Andrews and Edinburgh] should be entitled to vote in the election of a member to serve [in Parliament].” In *Nairn v University of St Andrews*⁵², the five plaintiffs were women graduates of the University of Edinburgh and thereby entitled to be registered on the general council of that University. Before the House of Lords, having lost at each level, they represented themselves. The House of Lords regarded the matter as so clear that the respondents’ counsel were not called upon to respond. Notwithstanding evidence that historically women did vote in Parliamentary elections⁵³, the House of Lords nevertheless said that it was “notorious that this right of voting has, in fact, been confined to men. Not only has it been the constant tradition, alike of all the three kingdoms, but it has also been the constant practice, so far as we have knowledge of what has happened from the

⁵² [1909] AC 147.

⁵³ Dismissed as “anomalies [that] may have been overlooked in a confused time” : at 160.

earliest times down to this day.”⁵⁴ This was the use of what I have called the ‘time immemorial’ line of reasoning. The question before the House of Lords was said to be “not difficult”⁵⁵, although three full speeches were necessary to convince. This too is a device in legal reasoning : where no convincing reason can be given, it is then suggested that the point is an obvious or a simple one. This is also a form of crooked thinking.

44. Before moving on to my final example of faulty reasoning, I should perhaps just complete the story regarding women at the Bar. The British Sex Disqualification (Removal) Act 1919 ended much of the discrimination that had existed. The first woman to be called to the Bar was Ivy Williams in 1919. Gray’s Inn began admitting women from December that year. Mary Jones was admitted to read for the Bar on

⁵⁴ At 160 per Lord Loreburn LC.

⁵⁵ At 164 per Lord Robertson.

27 January 1920 although she was never called. The first lady to be called to the Bar at Gray's was Edith Hesling on 13 June 1923. All this had been a very, very long time coming and the courts had perhaps in no small way contributed to this.

45. On 2 May 1939, Rose Heilbron was called to the Bar at Gray's Inn, the youngest woman to be called.⁵⁶ Among her very many achievements, she was the recipient of the Holker Scholarship of this Inn in 1935 and was the first woman Bencher in 1968. She was the Treasurer in 1985. But, if Master Hilary Heilbron will forgive me, the focus of this talk is not on Dame Rose but on one of her cases, the final one I will refer to. Master Rose Heilbron had many famous cases, among them *Sweet v Parsley*⁵⁷, but it is one of her civil cases

⁵⁶ Here, I must acknowledge the biography of Dame Rose Heilbron by Master Hilary Heilbron QC : *Rose Heilbron : The Story of England's First Woman Queen's Counsel and Judge* (Hart Publishing, 2012). It is superbly written, intelligent and touching.

⁵⁷ [1970] AC 132.

which I wish to discuss. It involves the famous cricketer (he captained the West Indies) who devoted much of his public life helping minority groups in England, Lord Learie Constantine.⁵⁸ The facts are vividly described by Hilary Heilbron in her description of what she has called a landmark case⁵⁹ :-

“His fame as a cricketer did not, however, lessen the discrimination and hostility he and his family suffered as a result of being black, emphasising the contrast, as his friend CLR James put it, ‘between his first class status as a cricketer and his third class status as a man’. Learie Constantine became Rose’s client. In July 1943 Learie Constantine was to captain the West Indies side against England at

⁵⁸ Learie Constantine (1901-1971) was knighted in 1962 and became Baron Constantine of Maraval in Trinidad in 1969. He was made an Honorary Bencher of Middle Temple in 1963.

⁵⁹ *Rose Heilbron* at 41-42.

Lords in a charity match. He was given leave from his then employment with the Ministry of Labour as Welfare Officer in charge of West Indian technicians and trainees on Merseyside to do so. He had booked hotel accommodation for himself and his wife for four nights at the Imperial Hotel London and had inquired whether there would be any objection to his staying on the grounds of his colour and was told that there was not. When he arrived it was made clear to him that he and his family were not welcome. The manageress explained this to them in the most offensive terms by saying : “We don’t have niggers in this hotel”. When asked why, she replied : “Because of the Americans He can stop the night but if he does not go tomorrow morning, his luggage will be put outside and his door locked”. He was then found

alternative accommodation at the Bedford Hotel.”

46. Learie Constantine was no stranger to controversy. In the 1926 MCC tour of the West Indies, well before the famous Jardine led tour of Australia in 1932-33, the England bowlers began some short pitched bowling at the 49 year old West Indies captain, Harold Austin. Constantine, who was a fast bowler, bowled bouncers at the England Captain, Freddie Calthorpe⁶⁰ but had to stop after he (Constantine) was told by his friend CLR James⁶¹ that if he actually hit Calthorpe, this would be classified as a diplomatic incident.

47. Learie Constantine sued the Imperial Hotel. The case was tried before Birkett J and is reported.⁶² I refer to this case as an example of crooked thinking in that the law was

⁶⁰ (1892-1935), former captain of England and Warwickshire.

⁶¹ CLR James (1901-1989) was a well-known historian and cricket writer, author of *Beyond a Boundary* (Hutchison 1963).

⁶² [1944] 1KB 693.

stretched, many people think, beyond breaking point in order to achieve what was clearly a just result. At that time, there was no race relations legislation and racial inequality was not really at the forefront of constitutional discussions. Rose Heilbron had (ingeniously it must be said) pleaded the case on the basis of that special category of tort which is actionable *per se*.⁶³ Constantine could not prove any damage and so had to resort to finding a parallel with the tort, actionable *per se*, relating to breach of duty by public officers.⁶⁴ This was a real stretch but Birkett J held in favour of the plaintiff.

48. The result was undoubtedly a just one but I refer to it as part of the theme of straight and crooked thinking as another example where reasoning was laboured and

⁶³ It is an essential ingredient of most torts that damage is suffered, and that such damage is not too remote in law. There is however a category of torts which, historically, have been actionable without proof of damage, such as libel and certain categories of slander. This distinction between torts requiring proof of damage and those that do not is now criticized as being of dubious principle : see Clerk and Lindsell on Torts (21st edition) at paragraph 1-51; *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395.

⁶⁴ *Ashby v White* (1703) 2 Ld. Ray. 938.

unconvincing, albeit to arrive at a just result. However, it does provide a pleasant contrast to the unfortunate results of the other instances of crooked thinking.

49. By now, I have tested everyone's patience by the length of this lecture. Perhaps I could be allowed just to give a short conclusion to try to draw a few strands together. The integrity of the common law is critical to its survival and its relevance. This relevance is not confined to the United Kingdom nor only to the confines of this Hall. It is something which we strive to maintain in Hong Kong. Compelling reasoning is an essential part of the common law tradition. The tools of logic, use of precedent, the search for principle and the proper interpretation of constitutions and statutes, are all part of the tools we employ to convince and to arrive at the right answer. Such is the overall respect for the court and what they do that important decisions of the courts provide the

legal basis for much of what goes on in a community. Where, for whatever reason, the same tools are used improperly in faulty or unconvincing reasoning, unfortunately sometimes there is a price to pay. As we have seen, prejudices can then become prolonged and much time passes before wrongs are righted. The answer is to employ straight thinking in the first place. Straight thinking is reasoning based on sound principle, common sense and respect. Straight thinking will lead to the right outcome. Sometimes courage is needed in order to do what is right. The public interest lies in judges arriving at the right decision applying proper reasoning, even if some members of the public (or even the majority of the public) for the time being, think otherwise.

50. As I made clear earlier, the theme of this lecture is not to levy criticism on anything or anybody in particular. It is intended to make a simple point about legal reasoning. For

my exemption clause on liability, I rely on a quote from Mr Alan Greenspan, the economist who served as the Chairman of the Federal Reserve of the United States from 1987-2006 :-

“I guess I should warn you. If I turn out to be particularly clear, you’ve probably misunderstood what I have said.”⁶⁵

51. Masters of the Bench, judges, ladies and gentlemen, I thank Gray’s Inn once again for the honour of delivering the Birkenhead Lecture for 2016. It is one of the greatest honours Gray’s Inn can bestow on one of its members.

Geoffrey Ma

⁶⁵ Speech to the Economic Club of New York, 1988.