60 YEARS OF LEGAL SCHOLARSHIP IN THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY

CATHERINE REDGWELL*

I. INTRODUCTION

This issue of the Quarterly marks 60 years of its publication, since 1958 under the auspices of the British Institute of International and Comparative Law. To mark the occasion the editorial board has taken the opportunity to reflect on the contribution the Quarterly has made in the key areas of legal scholarship represented in its pages (and accordingly in the composition of the editorial board), namely, public international law, private international law, comparative law, EU law and human rights law.

The first edition of the Quarterly in January 1952 marked the coming together of the *Journal of Comparative Legislation* and the *International Law Quarterly* and its contents reflect this marriage of international and comparative law with articles on the definition of aggression, expropriation and nationalization in Hungary, Bulgaria and Roumania, and foreign investment laws in countries of the far East and Asia – topics which would not noticeably look out of place in 2012. Yet there have been profound political and economic changes since 1952 reflected in these pages, with the move from post-war reconstruction and tensions to the emergence of the EU, the end of the Cold War, the dissolution of the Soviet Union, and the impacts of globalization and the rise of human rights protection. Fast forward to 2012 and it is readily apparent that these profound changes are reflected in these pages with articles unimaginable in 1952, such as exploring jurisdiction in employment matters under Brussels I, EU competition enforcement, and African countries in the world trading system.

In approaching the task of assessing the contribution of the Quarterly to legal scholarship in these various fields, it would be invidious to seek to identify the 'best' articles in the Quarterly over its 60 year history. This is so even if a fool-proof methodology could be applied. One yardstick since the digitization of the Quarterly is the number of hits for articles – yet one of the most frequently visited article in the Quarterly remains a rather dated, but doubtless enticingly-named article, useful for first year law students writing essays on mistake in the law of contract. Mindful of these pitfalls, each contribution below seeks to provide a flavour of the range of scholarship in each broad subject area reflected in these pages, and against a backdrop of

* Joint General Editor and Chair of the ICLQ Editorial Board; Professor of International Law and Vice Dean (International), University College London.

[*ICLQ* vol 61, January 2012 pp 1–26] doi:10.1017/S0020589311000753

developments within the field.[1] In so doing it is possible to identify contributions which have, over time, served qualitatively to emerge as standard points of reference in their field.

What emerges from a qualitative assessment of the contribution of the Quarterly to legal scholarship, and where it has carved out a distinctive niche — even in the area of EU law as Jo Shaw observes in her editorial below — is in the ability to break out of disciplinary silos. It is a 'quasi-generalist' journal in an increasingly specialized and fragmented publishing world, with contributions crossing disciplinary boundaries. Thus Paula Giliker notes the rise of EU law a fruitful source of comparison in addition to traditional common and civil law systems in the evolution of comparative law scholarship, while Robert McCorquodale observes the influence in the human rights sphere of intersections with other substantive areas such as international investment law. This crossing of disciplinary boundaries is noted by James Fawcett both positively – eg with comparative private international law an enduring theme across the 60 years – and negatively, observing 'the stultifying effect of the ever increasing Europeanization of private international law' after the 1970s.

Another theme is 'standing the test of time': James Fawcett singles out contributions on 'the intractable problem of choice of law and mixed tort and contract claims' while Malcolm Evans notes recurring themes related to the 'building blocks' of public international law such as the law of treaties and issues of jurisdiction and immunities, and continued interest in the establishment, operation and evolution of international organizations. Equally enduring themes have been the evolution of the law of the sea and – regrettably – the law on the use of force.

One of the most striking impressions left by a review of the first 60 years of publishing within the Quarterly is, however, the rise and rise of human rights. As Robert McCorquodale notes, this was from a slow start – the history of human rights scholarship in terms of direct treatment of the subject dates only from 1967 in the Quarterly – yet today virtually every issue contains substantive direct treatment of human rights which permeates other contributions within the public international law field, such as international humanitarian law, and also extends to understanding the development of other areas such as international criminal law, comparative human rights and private international law.

With the increasing fragmentation in legal publishing, the Quarterly remains a generalist journal – it is not a specialist EU, human rights, international or comparative journal. Rather, as Jo Shaw observes below: 'Its unique selling point . . . is its status as a quasi-generalist journal which challenges the disciplinary boundaries within legal studies and asserts the continuing and

[1] Electronic sampler issues of articles across the years organized by broad subject areas (public and private international law, EU law, human rights, and comparative law) are available at <http://journals.cambridge.org/iclq>.

multi-facetted nature of the challenge to domestic legal orders which comes from outwith their territorial and jurisdictional boundaries.'

60 YEARS OF PUBLIC INTERNATIONAL LAW IN THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY

MALCOLM EVANS*

The list of contributors to the Quarterly over the last 60 years reads like a veritable 'whose who' of international lawyers. There is scarcely a leading figure who has not been published in its pages – and it would be invidious in the extreme to seek to list the most prominent among them. It is sufficient to say that the Quarterly has been fortunate in publishing contributions by leading judicial figures, both national and international, academics, legal advisors and other practitioners from a significant variety of jurisdictional and disciplinary perspectives. It is the variety of approach, as much as it is the variety of personalities, which gives such a distinctive flavour to the manner in which the discipline of international law has been engaged with in its pages across the years. The purpose of this short comment is to celebrate that diversity by highlighting and reflecting upon the evolving foci of the contributions themselves, as the pages of the journal offer a panorama over time to a changing legal landscape.

Well, perhaps. The most notable thing which emerges from a review of the articles published over the last 60 years is the enduring significance of certain key issues which are returned to time and again; perhaps from different conceptual perspectives and sometimes in different language but easily recognizable nevertheless. As will be seen shortly, whilst some of these enduring issues might be expected, others might come as something of a surprise. A second point to emerge, and a point not unrelated to this, is the extent to which certain key judgments of the International Court of Justice (ICJ) have not only shaped the development of the law on the particular issue in hand but have also shaped the agendas of what is to be engaged with.

A prime example concerns the law of treaties, and in particular the question of reservations to treaties. In 1953, the Quarterly carried the seminal article by Sir Gerald Fitzmaurice (then Second Legal Advisor to the Foreign Office) 'Reservations to Multilateral Treaties',[2] which surveyed the 'prevailing anarchy' following the consideration of the topic by the ICJ in its Reservations to the Genocide Convention Advisory Opinion of 1951[3] and by the International Law Commission at the request of the UN General Assembly. In 1964, the general topic was returned to by Judge David Anderson (then Assistant Legal

* Member of Editorial Board, International and Comparative Law Quarterly; Professor of Public International Law, University of Bristol.

[2] (1953) 2 ICLQ 1.

[3] ICJ, *Reports of Judgments, Advisory Opinions and Orders*, 1951, p 29.

https://doi.org/10.1017/S0020589311000753 Published online by Cambridge University Press

Advisor at the Foreign and Commonwealth Office) in 'Reservations to Multilateral Conventions: A Re-examination',[4] and then in 1970 by Sir Ian Sinclair (then Legal Counsellor at the Foreign and Commonwealth Office) in the 'Vienna Convention on the Law of Treaties',[5] in which this was the first of his three treaty issues of note on which he chose to focus. The issue of reservations has continued to be explored from an increasing variety of perspectives, with their application to human rights treaties becoming a particular focus of attention – for example, in 1984 by Pierre Henri-Imbert in 'Reservations to the European Convention on Human Rights before the European Commission: the Temeltasch Case',[6] in 1990 by Susan Marks in 'Reservations Unhinged: the 'Belilos' Case before the European Convention on Human Rights'[7] and in 1997 by Catherine Redgwell in 'Reservations to Treaties and Human Rights Committee General Comment No. 24(52)'.[8]

The law of treaties more generally has, of course, had a high profile in the pages of the Quarterly. In his article, Sinclair identified two other key aspects of the Vienna Convention on the Law of Treaties as being particularly worthy of note. The first was treaty interpretation, a topic previously explored generically in 1963 by Sinclair himself in 'The Principles of Treaty Interpretation and their Application by the English Courts',[9] and a topic which has formed a central element of many contributions across the life of the Quarterly. The other issue raised by Sinclair was 'the concept of *jus cogens* as invalidating a treaty', the scope and impact of which remains keenly contested in the pages of the Quarterly. However, rather than focussing on the invalidity of treaties, consideration of *jus cogens* has focussed on rather different questions, and in particular the relationship with forms of immunity – as exemplified by Lorna McGregor's 2006 piece on 'State Immunity and Jus Cogens',[10] one of a series of comments on the 2004 UN Convention on the Jurisdictional Immunities of States and their Property.[11]

The issue of immunities from jurisdiction has itself been a major topic across the life of the Quarterly, and its consideration of State Immunity charts the development from absolute to restrictive immunity, as well as the difficulties that flow from this. Notable contributions to the debate include: in the 'age of absolutism', the 1957 article by Lord Wedderburn, 'Sovereign Immunity of

[4] (1964) 13 ICLQ 450.
[5] (1970) 19 ICLQ 47.
[6] (1984) 33 ICLQ 558.
[7] (1990) 39 ICLQ 300.
[8] (1997) 46 ICLQ 390.
[9] (1963) 12 ICLQ 508.
[10] (2006) 55 ICLQ 437.
[11] General Assembly Resolution 59/38 United Nations Convention on Jurisdictional Immunities of States and Their Property A/RES/59/38 (16 Dec 2004). See also in that issue, 'The 2005 UN Convention on State Immunity in Perspective' (2006) 55 ICLQ 395; H Fox, 'In Defence of State Immunity: Why the UN: Convention on State Immunity is Important' (2006) 55 ICLQ 399; R Gardiner, 'UN Convention on State Immunity: Form and Function' (2006) 55 ICLQ 407; CK Hall, 'UN Convention on State Immunity: the Need for a Human Rights Protocol' (2006) 55 ICLQ 411; A Dickinson, 'Status of Forces under the UN Convention on State Immunity' (2006) 55 ICLQ 427.

Foreign Public Corporations';[12] in the era of the restrictive approach, the 1982 article by Muthucumaraswamy Sornarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity',[13] reflecting on the implications of the US Foreign Sovereign Immunities Act and the UK State Immunity Act; and by FA Mann, 'A New Aspect of the Restrictive Theory of Sovereign Immunity'[14] commenting on the 'great case of *I° Congresso*'. This all culminates with the consideration given to the 2005 UN Convention, mentioned previously. Diplomatic and consular immunities have also received coverage across the life of the Quarterly: indeed, the first two volumes charted moves towards placing the topic on the agenda of the International Law Commission,[15] and its product in 1961 by DHN Johnson in 'The United Nations Conference on Diplomatic Intercourse and Immunities' and in 1962 by K Simmonds in 'The "rationale" of Diplomatic Immunity'.[16] The Convention was further considered in the 1966 article by Yoram Dinstein 'Diplomatic Immunity from Jurisdiction "Ratione Materiae" '[17] and has continued to attract attention.[18] Of late, that attention has tended to be coupled with, and rather eclipsed by, the emerging interest in the scope of Head of State immunity in the light of the 1989 judgments of the House of Lord in the *Pinochet* case.[19]

Other issues which have spanned the life of the journal include an interest in the establishment, operation and evolution of international organizations.[20] The UN has obviously been the subject of ongoing interest – with Egon Schwelb exploring 'Charter Review and Charter Amendments – Recent Developments' in 1958[21] and the Council of Europe,[22] the Organization of American

[12] (1957) 6 ICLQ 290.
[13] (1982) 31 ICLQ 661.
[14] (1982) 31 ICLQ 573.
[15] M Brandon, 'Report on Diplomatic Immunity by an Inter-Departmental Committee on State Immunities' (1951) 1 ICLQ 660 and 'Diplomatic Intercourse and Immunities as a Priority Topic for Codification by the International Law Commission' (1952) 2 ICLQ 268.
[16] (1961) 10 ICLQ 597 and (1962) 11 ICLQ 1204, respectively.
[17] (1966) 15 ICLQ 76.
[18] See, for example, S Davidson, D Freestone, V Lowe and C Warbrick, 'Treaties, Extradition and Diplomatic Immunity: Some Recent Developments' (1986) 35 ICLQ 425 and J Brown, 'Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations' (1988) 37 ICLQ 53.
[19] See C Warbrick, D McGoldrick and H Fox, 'The First 'Pinochet' Case: Immunity of a Former Head of State' (1999) 48 ICLQ 207; C Warbrick, C Barker and D McGoldrick, 'The Future of Former Head of State Immunity after 'ex Parte Pinochet' (1999) 48 ICLQ 937; C Warbrick, D McGoldrick and E Denza, 'Ex parte Pinochet: Lacuna or Leap?' (1999) 48 ICLQ 949; C Warbrick, D McGoldrick, H Fox, 'The Pinochet Case No. 3' (1999) 48 ICLQ 687.
[20] Fascinatingly, the very first part of the ICLQ carried a section entitled 'International Organisation' (1951) 1 ICLQ 71 – which was in some ways a precursor to the current developments sections found in the Quarterly today – and which looked at (a) a decree by the Icelandic Aethling concerning 'conservation of continental shelf fisheries; (b) the treaty constituting the European Coal and Steel Communities (c) the Security Council and the Suez Canal and (d) the Anglo-Iranian Oil Co. Proceedings. There are several PhD theses waiting to be written on what this tells us about international law then and now.
[21] (1958) 7 ICLQ 303.
[22] The early years of the Council of Europe were the subject of a series of articles by AH Robertson in (1954) 3 ICLQ 235 and 404 and its later activities form the basis of many contributions.

States,[23] the African Union[24] and ASEAN[25] all finding reflection in its pages. The law of international organizations has also been of enduring interest.

If there is one subject which stands out above all others for the manner in which its evolution is reflected in the pages of the Quarterly, it is the law of the sea. The first volume in 1952 carried an analysis by DHN Johnson of the *Anglo-Norwegian Fisheries case*,[26] and almost every other ICJ decision bearing upon the law of the sea has been subject to scrutiny, as has the progressive development of the subject. Thus in 1954 the Quarterly carried an article by L Frederick Goldie on the establishment of the Australian continental shelf[27] (shortly after that concept was first acknowledged, whilst in the following year, 1955, an article by Shigeru Oda (later Judge of the ICJ) considered the 'Territorial Sea and Natural Resources').[28] The issue of 'Submarine Boundaries' was addressed by David Padwa in 1960.[29] Meanwhile, 'The Preparation of the 1958 Geneva Conference on the Law of the Sea' was explored by DHN Johnson in 1959,[30] as were 'Some Results of the Geneva Conference on the Law of the Sea' by Sir Gerald Fitzmaurice.[31] In 1960 Sir Derek Bowett considered 'The Second UN Conference on the Law of the Sea'[32] and subsequent contributions continued to look at evolving approaches to ocean governance. These include 'The Concept of the Contiguous Zone' by Shigeru Oda in 1962[33] and, presaging further developments, in 1971 'The International Seabed Area' by F Auburn,[34] in 1973 'The Patrimonial Sea' by Doliver Nelson (who later was appointed a Judge at the International Tribunal on the Law of the Sea)[35] and in 1977, 'The Exclusive Economic Zone as a Concept in International Law', by JC Phillips.[36] Judge David Anderson considered the 'Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea'[37] whilst, looking to the future, in 2005 Alan Boyle was to reflect on 'Further Development of the Law of the Sea Convention: Mechanisms for Change'[38] having previously contributed an influential piece on 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction'.[39]

There are at least two other themes which, predictably, have featured across the years – and which in a sense still sum up the central tensions of the international legal system – that of resolving tensions through the mechanisms

[23] See AH Robertson, 'Revision of the Charter of the Organisation of American States' (1968) 17 ICLQ 346.
[24] See, for example, K Magliveras and G Naldi, 'The African Union—A New Dawn for Africa?' (2002) 51 ICLQ 415.
[25] See for example D Seah, 'The ASEAN Charter' (2009) 58 ICLQ 1997.
[26] (1952) 1 ICLQ 145.
[27] LFE Goldie, 'Australia's Continental Shelf: Legislation and Proclamations' (1954) 3 ICLQ 535.
[28] (1955) 4 ICLQ 415.
[29] (1960) 9 ICLQ 628.
[30] (1959) 8 ICLQ 122.
[31] (1959) 8 ICLQ 73.
[32] (1960) 9 ICLQ 415.
[33] (1962) 11 ICLQ 131.
[34] (1972) 21 ICLQ 173.
[35] (1973) 22 ICLQ 668.
[36] (1977) 26 ICLQ 585.
[37] (1995) 44 ICLQ 313.
[38] (2005) 54 ICLQ 563.
[39] (1997) 46 ICLQ 37.

of war and through mechanisms of peace. The use of force has been a regrettable but inevitable focus of attention. Some contributions focus on generic issues of particular significance – such as Sir Ian Brownlie's 1958 article on 'International Law and the Activities of Armed Bands'[40] and his 1965 article on 'Some Legal Aspects of the Use of Nuclear Weapons'[41] – both prefiguring issues which later came to dominate international agendas. In 1987, Sir Christopher Greenwood (now Judge of the ICJ) examined 'The Concept of War in Modern International Law',[42] whilst the practice of more recent times has received extensive consideration, including the intervention in Kosovo[43] and, of course, the use of force against Iraq, for example, by Vaughan Lowe, 'The Iraq Crisis, What Now',[44] and by Sir Adam Roberts in 'The End of Occupation, Iraq 2004'.[45]

The peaceful settlement of disputes has been a prominent – if not dominant – feature of the Quarterly, as is attested both by the number of articles exploring particular cases – too numerous to mention – and to the establishment of its section on the jurisprudence of international tribunals, an annual feature since the mid 1990s. Moreover, it has carried numerous seminal contributions reflecting on the role and function of the international judiciary, including in more recent years those by Judge Sir Robert Jennings, 'An International Lawyer Takes Stock and The Judiciary, International and National, and the Development of International Law',[46] and Judge Rosalyn Higgins, inter alia, in 2001, 'Respecting Sovereign States and Running a Tight Courtroom'[47] and in 2006, 'A Babel of Judicial Voices – Ruminations from the Bench'.[48]

There are also a number of issues which tend to be thought of as being of more contemporary in origin but which have in fact figured extensively in contributions to the Quarterly over the years. One example is the international response to terrorism, which understandably has had a high profile in the ten years following the terrorist attacks in America on 11 September 2001, as exemplified by Michael Byer's 2002 piece on 'Terrorism, The use of Force and International Law After 11 September'[49] and Judge Gilbert Guillaume's 2004 piece 'Terrorism and International Law'.[50] However it was also the subject of interest in light of the adoption of the 1970 Hague Convention on Aircraft Hijacking[51] and the ILC's work on internationally protected persons,[52] whilst

[40] (1958) 7 ICLQ 712.
[41] (1965) 14 ICLQ 437.
[42] (1987) 36 ICLQ 283.
[43] See, for example, the examination of the issues in (2000) 49 ICLQ 876.
[44] (2003) 52 ICLQ 859.
[45] (2005) 54 ICLQ 27.
[46] (1996) 45 ICLQ 1.
[47] (2001) 50 ICLQ 121.
[48] (2006) 55 ICLQ 791.
[49] (2002) 51 ICLQ 401.
[50] (2004) 53 ICLQ 537.
[51] See S Shubber, 'Aircraft Hijacking under the Hague Convention 1970 – A New Regime' (1973) 22 ICLQ 687.
[52] See C Rozakis, 'Terrorism and the Internationally Protected Persons in the Light of the ILC's Draft Articles' (1974) 23 ICLQ 32 and Sir Michael Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents' (1974) 23 ICLQ 791.

in 1989 Antonio Cassese offered an overview exploration of 'The International Community's "Legal" Response to Terrorism'.[53] A further issue of long-standing concern has been the criminal responsibility of individuals for violations of international law. It was in 1964 that John Bridge first considered 'The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law'[54] whilst Judge Kenneth Keith has recently explored 'The International Court of Justice and Criminal Justice'.[55]

As might be expected, during the course of its first 60 years the material published in the Quarterly also reflects the ebb and flow of the concerns of the international community. So it was that in 1956 Wilfred Jenks published 'International Law and Space Activity',[56] during the infancy of the subject and in 1965 that N March Hunnings wrote on 'Pirate Radio Broadcasting in European Waters'.[57] In the early 1970s environmental questions began to feature more prominently, as did issues flowing from the changing configuration of power within the international community – for example, in 1975 by Robin White in 'A New International Economic Order',[58] and issues of, or arising from, both international environment[59] and economic law[60] more generally have become an ever more prominent feature. Elsewhere, one can see critical issues being addressed at turning points in their conceptual development – as, for example, with the issue of self-determination, considered in 1994 by both Martii Koskennienmi in 'National Self Determination Today: Problems of Legal Theory and Practice'[61] and Robert McCorquodale, 'Self-Determination: A Human Rights Approach'.[62]

The most startling impression left by a review of the first 60 years of publishing on public international law within the Quarterly is, however, the rise and rise of human rights. Though many of the earliest contributions addressed what would now be considered to be human rights issues, it was in 1960 that the first focussed piece was carried, by Egon Schwelb, entitled 'International Conventions on Human Rights'.[63] Since then, the development of the area within the pages of the Quarterly is so rich a story as to necessitate consideration in its own right – and so is the subject of separate consideration by Robert McCorquodale below.

Over the years some outstanding articles have addressed themes which perhaps have not gone on to attract the attention which they merit – such as the 1958 article by IC MacGibbon on 'Estoppel in International Law'[64] and by Micheal Akehurst on 'Equity and General Principles of Law'.[65] Nevertheless,

[53] (1989) 38 ICLQ 589.
[54] (1964) 13 ICLQ 1225.
[55] (2010) 59 ICLQ 895.
[56] (1956) 5 ICLQ 99.
[57] (1965) 14 ICLQ 410.
[58] (1975) 24 ICLQ 542.
[59] See, for example, L Rajamani, 'Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime' (2009) 58 ICLQ 803.
[60] See, for example, C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361.
[61] (1994) 43 ICLQ 241.
[62] (1994) 43 ICLQ 857.
[63] (1960) 9 ICLQ 654.
[64] (1958) 7 ICLQ 468.
[65] (1976) 25 ICLQ 601.

there remains a multitude of other major topics which have been considered in depth in the Quarterly and which space precludes further mention – so, for example, much could be made of the manner in which the issues of international personality, of state responsibility and questions concerning the assertion of jurisdiction have been considered within its pages. It is, however, necessary to conclude, but it seems fitting to do so with reference to the 1980 article by Judge RR Baxter, the title of which seems most appropriately to sum up what one finds published in the Quarterly on the subject of international law during its first 60 years – this being 'International Law in her Infinite Variety'.[66]

THE CONTRIBUTION OF THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY TO PRIVATE INTERNATIONAL LAW OVER THE LAST 60 YEARS

James Fawcett*

I. A WHO'S WHO OF PRIVATE INTERNATIONAL LAWYERS

The honour of being the author of the first article on private international law to appear in the International and Comparative Law Quarterly fell to William Latey. His article was entitled 'Problems of Divorce Jurisdiction',[67] which is as relevant a topic now as it was in the early 1950s. Over the next 60 years the Quarterly has contained articles by virtually every leading expert on private international law, not only from Britain but also from other common law jurisdictions. Here can be found articles by Carter, Cheshire, Graveson, Lipstein, Mann and Morris. Moving on to present day experts, we find articles by Briggs, Collins, Fawcett, Hartley, Harris, Hill, McClean, Morse and North. Scots experts have been well represented by, amongst others, Anton, Beaumont, Carruthers, Crawford and McEleavy. It has been common to find contributions from Australian conflicts lawyers: Sykes; Zelman Cowen; Pryles and Nygh. From Canada, there has been Blom, from New Zealand, Webb and, from South Africa, Spiro. The list of contributors from the United States is equally impressive, including Cavers, Ehrenzweig, Hay, Reese and Von Mehren.

II. TRENDS OVER THE YEARS

The articles reflect the development of private international law over the past 60 years and have helped to shape this.

[66] (1980) 29 ICLQ 549.

* Member of Editorial Board, International and Comparative Law Quarterly; Professor of Private International Law, University of Nottingham.

[67] (1952) 1 ICLQ 229.

In the 1950s, nearly all the contributions were on family law aspects of private international law. It is noticeable that a lot of contributors came from Commonwealth countries, the authors writing on the common law of private international law rather than specifically on say Australian private international law. Thus we find Sykes writing on 'The Formal Validity of Marriage'[68] and 'The Essential Validity of Marriage'.[69] Comparative private international law has been a feature of the Quarterly over the decades and so we find Clarence Smith writing on 'Capacity in the Conflict of Laws: A Comparative Study',[70] and Loussouarn on 'The French Draft on Private International Law and the French Conference on Codification of Private International Law'.[71] A piece on the Hague Conventions, public law and public policy appeared in 1959, from Lipstein.[72] Since then the discussion of successive Hague Conventions has been a regular feature of the Quarterly. There is also the start of the fascination with choice of law theory with articles on the doctrine of vested rights in private international,[73] the introduction into English practice of continental theory on the conflict of laws,[74] and the objectivist practice on the proper law of the contract.[75] Many more articles on the proper law were to follow in the 1960s, 70s and through to the 80s.

In the 1960s, a wider range of topics was covered. There were articles on, for example, charitable trusts and the conflict of laws,[76] the Wills Act 1963,[77] and life insurance and the conflict of laws.[78] One of the first articles on jurisdiction, outside the area of family law, appeared.[79] There was a lot of interest in tort choice of law, including: North, 'Contributory Negligence and the Conflict of Laws';[80] Collins, 'Interaction between Contract and Tort in Private International Law';[81] Webb and Brownlie, 'Survival of Actions in Tort and the Conflict of Laws';[82] and Ehrenzweig, 'The not so Proper Law of a Tort: Pandora's Box'.[83] There was continuing interest in the proper law of the contract: Iván Szászy, 'The Proper Law of Labour Contracts';[84] and S Szászy 'Proper Law of the Contract in Trade between Eastern Europe and the West: the Position of East European Socialist States'.[85]

[68] (1953) 2 ICLQ 78.
[69] (1955) 4 ICLQ 59.
[70] (1952) 1 ICLQ 446.
[71] (1956) 5 ICLQ 378.
[72] K Lipstein, 'The Hague Conventions on Private International Law, Public Law and Public Policy' (1959) 8 ICLQ 506.
[73] RD Carswell, 'The Doctrine of Vested Rights in Private International Law' (1959) 8 ICLQ 268.
[74] AE Anton, 'The Introduction into English Practice of Continental Theories on the Conflict of Laws' (1956) 5 ICLQ 534.
[75] EJ Cohn, 'The Objectivist Practice on the Proper Law of Contract' (1957) 6 ICLQ 373.
[76] VTH Delany, 'Charitable Trusts and the Conflict of Laws' (1961) 10 ICLQ 385.
[77] JHC Morris, 'The Wills Act, 1963' (1964) 13 ICLQ 684.
[78] J Unger, 'Life Insurance and the Conflict of Laws' (1964) 13 ICLQ 482.
[79] LI De Winter, 'Excessive Jurisdiction in Private International Law' (1968) 17 ICLQ 706.
[80] (1967) 16 ICLQ 379.
[81] (1967) 16 ICLQ 103.
[82] (1965) 14 ICLQ 1.
[83] (1968) 17 ICLQ 1.
[84] (1968) 17 ICLQ 11.
[85] (1969) 18 ICLQ 103.

The 1970s was a particularly rich decade for articles, before the stultifying effect of the ever increasing Europeanization of private international law was felt. Here we have the blossoming of the discussion of jurisdiction in commercial cases, with: Pryles, 'The Basis of Adjudicatory Competence in Private International Law';[86] Bissett-Johnson, 'The Efficacy of Choice of Jurisdiction Clauses in International Contracts in English and Australian Law';[87] and Kahn-Freund, 'Jurisdiction Agreements: Some Reflections'.[88] Recognition of the practical and theoretical importance of jurisdiction in commercial cases is due in part to the articles and case notes of Lawrence Collins (now Lord Collins), such as: 'Some Aspects of Service out of the Jurisdiction in English Law';[89] and 'Choice of Forum and the Exercise of Judicial Discretion – The Resolution of an Anglo-American Conflict'.[90] Conflict of laws in the commercial sphere generally figured more prominently in the Quarterly: Cohn, 'Commercial Agency Contracts in Private International Law';[91] Thomson, 'International Employment Contracts: the Scottish Approach';[92] and Jaffey, 'Essential Validity of Contracts in the English Conflict of Laws'.[93]

The most memorable issue of the Quarterly for the private international lawyer was in 1977[94] with a whole issue devoted to essays in honour of John Morris , comprising eleven essays by experts from England, the US, Australia and New Zealand: North; Gotlieb; Kahn-Freund; Reese, Nygh; Webb and Auburn; Hancock, Lipstein; D St Kelly; and Cavers. They wrote on a wide variety of topics: contract as a tort defence in the conflict of laws; the incidental question; jurisdiction agreements; the proper law of a tort; New Zealand conflict of laws; policy constructed interest analysis in choice of law; inherent limitations in statutes on the conflict of laws; reform, choice, restriction and prohibition; and the proper law of producer's liability. But what they had in common was the theoretical nature of the discussion and the big themes. You would surely not get that now with so much of writing being concerned with the latest EU development and with American scholars becoming interested in European developments, rather than European scholars being interested in US developments. The shape of things to come was revealed in 1976 with 'Contractual Obligations – The EEC preliminary Draft Convention on Private International Law' by Collins.[95]

The 1980s saw increasing numbers of articles on EC developments by, amongst others: Stone, Kaye and Lipstein on the Brussels Convention[96] and

[86] (1972) 21 ICLQ 61.
[87] (1970) 19 ICLQ 541.
[88] (1977) 26 ICLQ 825.
[89] (1972) 21 ICLQ 656.
[90] (1973) 22 ICLQ 332.
[91] (1973) 22 ICLQ 157.
[92] (1974) 23 ICLQ 458.
[93] (1974) 23 ICLQ 1.
[94] (1977) 26 ICLQ 701–998.
[95] (1976) 25 ICLQ 35.
[96] PA Stone, 'The Civil Jurisdiction and Judgments Act 1982: Some Comments' (1983) 32 ICLQ 477; P Kaye, 'Nationality and the European Convention on the Jurisdiction and Enforcement of Judgments' (1988) 37 ICLQ 268; K Lipstein, 'Enforcement of Judgments under the Jurisdiction and Judgments Convention: Safeguards' (1987) 36 ICLQ 873.

Jaffey and then Williams on the Rome Convention.[97] The Hague Convention on the law applicable to trusts and on their recognition triggered an article by Hayton[98] and there was also 'Choice of law for trusts in Australia and the UK' by Wallace.[99] Memorable articles on theory include Briggs 'What judgments should we recognise today'[100] and one of the last major articles on the proper law appeared, from Dr. Mann.[101] Articles on developments in private international law in other common law jurisdictions, a staple feature of the Quarterly, continued: such as, Handford 'Defamation and the conflict of laws in Australia';[102] and Hay, 'Refining Personal Jurisdiction in the United States'.[103] Samuel wrote on the new Swiss Private International Law Act.[104]

In the 1990s, the increasing importance of the Brussels Convention and its interpretation was recognized by a regular feature on this topic written by Paul Beaumont.[105] Of course, it was not all coverage of EC developments. There were, for example, articles on the Hague Child Abduction Convention by Schuz,[106] on private international law aspects of the Arbitration Act 1996 by Hill,[107] and on policies underlying the enforcement of foreign commercial judgments by Ho.[108] Tort choice of law is always a popular topic and the English statutory rules were discussed by Morse.[109] A memorable piece on comparative conflict of laws was 'Pleading and Proof of Foreign Law: The Major European Systems Compared' by Hartley.[110] In the late 1990s, a current developments in private international law became a regular feature, written by Wendy Kennett and covering not just EC developments.[111]

[97] AJE Jaffey, 'The English Proper Law Doctrine and the EEC Convention' (1984) 33 ICLQ 531; PR Williams, 'The EEC Convention on the Law Applicable to Contractual Obligations' (1986) 35 ICLQ 1.

[98] D Hayton, 'The Hague Convention on the Law Applicable to Trusts and on their Recognition' (1987) 36 ICLQ 260.

[99] (1987) 36 ICLQ 454.

[100] (1987) 36 ICLQ 240.

[101] FA Mann, 'The Proper Law in the Conflict of Laws' (1986) 36 ICLQ 437.

[102] (1983) 32 ICLQ 452.

[103] (1986) 35 ICLQ 32.

[104] A Samuel, 'The New Swiss Private International Law Act' (1988) 37 ICLQ 681.

[105] K Newman and PR Beaumont, 'European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters' (1990) 39 ICLQ 704; PR Beaumont, 'European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters' (1992) 41 ICLQ 206; (1993) 42 ICLQ 728; (1995) 44 ICLQ 218; (1997) 46 ICLQ 205; K Newman and PR Beaumont, 'European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters' (1999) 48 ICLQ 223.

[106] R Schuz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 ICLQ 771.

[107] J Hill, 'Some Private International Law Aspects of the Arbitration Act 1996' (1997) 46 ICLQ 274.

[108] HL Ho, 'Policies Underlying the Enforcement of Foreign Commercial Judgments' (1997) 46 ICLQ 443.

[109] CGJ Morse, 'Torts in Private International Law: A New Statutory Framework' (1996) 45 ICLQ 888.

[110] (1996) 45 ICLQ 271.

[111] W Kennett, 'The Treaty of Amsterdam' (1999) 48 ICLQ 465; 'The Brussels II Convention' (1999) 48 ICLQ 467; 'Jurisdiction' (1999) 48 ICLQ 966; 'Antisuit Injunctions' (1999) 48 ICLQ 969; 'Provisional Measures under the Brussels Convention' (1999) 48 ICLQ 970; 'Recognition of Judgments and Authentic Instruments under the Brussels Convention' (1999) 48 ICLQ 972;

The 2000s saw the relentless process of the Europeanization of private international law continue and articles and shorter pieces to reflect this appeared on the Brussels II Regulation[112] the European payment order and small claims Regulations;[113] and the Rome II Regulation.[114] Especially welcome have been the views of continental writers on EU private international law.[115] Comparative pieces are always popular and none more so when they relate to tort choice of law in Australia, Britain and Canada.[116] The relationship between private and public international law received an overdue visit in an article by Mills.[117] New technology produces new problems and there were three pieces on those posed by the internet, particularly in relation to jurisdiction.[118] In 2004, Peter McEleavy took over the current developments in private international law section, with contributions from himself and others. The private international lawyer has to have an increasing awareness not only of EU law but also of human rights law, on which see Fawcett.[119]

The 2010s has started with contributions on EU private international law: Ní Shúilleabháin on the Brussels IIbis Regulation;[120] Hartley on the voluntary assignment of contractual obligations under the Rome I Regulation[121] and McEleavy on parental responsibility.[122]

III. THE IMPACT OF THE QUARTERLY ON PRIVATE INTERNATIONAL LAW

The impact of a journal on the development of a branch of law can be gauged by its impact on the courts and practitioners, on academic commentators, on

'Recognition of Arbitral Awards' (1999) 48 ICLQ 975; 'A Footnote on the Treaty of Amsterdam' (1999) 48 ICLQ 977.

[112] P McEleavy, 'The Brussels II Regulation: How the European Community has Moved into Family Law' (2002) 51 ICLQ 883.

[113] A Fiorini, 'Facilitating Cross-Border Debt Recovery: The European Payment Order and Small Claims Regulation' (2008) 57 ICLQ 449.

[114] A Chong, 'Choice of Law for Unjust Enrichment: Restitution and the Rome II Regulation' (2008) 57 ICLQ 863; T Hartley, 'Choice of Law for Non-Contractual Liability: Selected Problems under the Rome II Regulation' (2008) 57 ICLQ 899.

[115] See, for example, G Cuniberti, 'The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance and Efficiency' (2008) 57 ICLQ 25.

[116] R Mortensen, 'Homing Devices in Choice of Tort Law: Australian, British, and Canadian Approaches' (2006) 55 ICLQ 839.

[117] A Mills, 'The Private History of International Law' (2006) 55 ICLQ 1.

[118] W Kennett, 'Family Law; Civil and Commercial Matters; the Hague Conventions in the Internet Age' (2000) 49 ICLQ 497; U Kohl, 'Eggs, Jurisdiction, and the Internet' (2002) 51 ICLQ 556; U Kohl, 'Defamation on the Internet – Nice Decision, Shame about the Reasoning L Dow Jones & Co Inc v Gutnick' (2003) 52 ICLQ 1049.

[119] JJ Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007) 56 ICLQ 1.

[120] M Ní Shúilleabháin, 'Ten Years of European Family Law; Retrospective Reflections from a Common Law Perspective' (2010) 59 ICLQ 1021.

[121] TC Hartley, 'Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation' (2011) 60 ICLQ 29.

[122] P McEleavy, 'Luxembourg, Brussels and now the Hague: Congestion in the Promotion of Free Movement in Parental Responsibility Matters' (2010) 59 ICLQ 505.

law reformers and on students. Britain is blessed with a legal profession that is well informed on private international law. The Quarterly has played its part in producing this with its numerous articles, comments and case notes. It has been particularly fortunate to have numerous contributions by Dr Mann and Lawrence Collins, combining great experience of practice with academic excellence.

When private international law was part of the programme of work of the Law Commission in the 1980s and 1990s the summary of the law in its working papers contained frequent references to articles in the Quarterly. The rejection of US governmental interest analysis as the solution to reform of tort choice of law was preceded by citation of an article by Fawcett, which had earlier reached this conclusion.[123]

A good yardstick for the impact of an article is how much it is read it. Since the Quarterly began to appear in digitized form, including all the back issues, it is possible to identify which articles have received the biggest number of visits and had the largest number of downloads. The overall winner with over 3,000 viewings is Rogerson, 'Habitual residence: the new domicile?',[124] followed closely by Mortensen in 'Homing Devices in Choice of Tort Law: Australian, British, and Canadian Approaches'.[125] Other popular articles are by Chong, Hill and Hartley and relate respectively to the Rome II Regulation, interpretation of the Rome Convention and interpretation of the Brussels I Convention and Regulation by the Court of Justice.[126] Recent articles, since digitization began, are likely to obtain the highest number of hits. Only time will tell whether these articles become classics, consulted many years from now. What is perhaps more impressive are those pieces which, although written as long ago as the1970s, are still being consulted now. Two stand out, both on the intractable problem of choice of law and mixed tort and contract claims. They are 'Exemption Clauses, Employment Contracts and the Conflict of Laws' by Lawrence Collins,[127] and 'Contact as a Tort Defence in the Conflict of Laws' by Peter (now Sir Peter) North.[128]

[123] JJ Fawcett, 'Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems?' (1982) 31 ICLQ 150.

[124] (2000) 49 ICLQ 86.

[125] Mortensen (n 116).

[126] Chong (n 114); J Hill, 'Choice Of Law In Contract Under The Rome Convention: The Approach Of The UK Courts' (2004) 53 ICLQ 325; TC Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813.

[127] (1972) 21 ICLQ 320.

[128] (1977) 26 ICLQ 914.

60 YEARS OF COMPARATIVE LAW SCHOLARSHIP IN THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY

PAULA GILIKER*

The first edition of the *International and Comparative Law Quarterly* in January 1952 marked the coming together of the *Journal of Comparative Legislation* and the *International Law Quarterly*. In the 60 years which followed, the Quarterly has published a number of significant articles covering all areas of comparative law, from legal theory to empirical studies of judicial decision-making, moving from traditional Commonwealth or Eurocentric comparisons to studies extending to the Ukraine, China or Latin America. The Quarterly has far exceeded the limited ambitions of Lord Denning in his foreword to the first edition that it would provide especially a focus for Commonwealth legal studies, although comparisons with Australia and Canada in particular have proved a fruitful source for analysis. In this short piece, it is only possible to give an overview of the wealth of comparative law scholarship in the last 60 years and I will confine myself, therefore, to noting three particular trends in the scope and ambition of the articles published in the Quarterly in this period.

I. AN INCREASE OF AMBITION

The index to the first edition of the Quarterly in 1952 presents us with a snapshot of comparative law scholarship in the 1950s: the tensions between the common law and countries within the Soviet orbit,[129] and a discussion of a United Nations Report on foreign investment laws and regulations of the countries of Asia and the Far East.[130] To this is added a specific section entitled 'Comparative Law', in reality an examination of the notion of trust (*Treuhand*) in Swiss law. Sixty years on, comparative lawyers are thinking more broadly. Since the 1950s, comparative law has experienced a new start after the devastation of war and, by 2012, a wealth of scholarship may be found, more diverse and geographically ambitious than its predecessors.[131] Traditional Eurocentric studies of private law rules, whilst still valuable, are now supplemented by research extending to criminal, public and procedural law and

* Member of Editorial Board, International and Comparative Law Quarterly; Professor of Comparative Law, University of Bristol.

[129] J Gutteridge, 'Expropriation and Nationalisation in Hungary, Bulgaria and Roumania' (1952) 1 ICLQ 14.

[130] CH Alexander, 'Foreign Investment Laws and Regulations of the Countries of Asia and the Far East' (1952) 1 ICLQ 29. Notably, the author comments that 'no information was available as to China'.

[131] See also M Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 AmJCompL 671, commenting on the 50th anniversary of the *American Journal of Comparative Law*.

beyond the confines of the familiar common and civil law divide.[132] As Esin Örücü has stated, there is much to be gained from looking beyond America and Western Europe – the 'extraordinary' should not remain the sole domain of anthropologists, regionalists, or cultural studies proponents alone.[133] Such jurisdictions, whilst more difficult to understand due to their lack of familiarity and cultural differences,[134] are capable of challenging our preconceptions of legal structures and systems. In examining the legal systems of eastern Asia,[135] China,[136] or the South Pacific,[137] therefore, the journal has embraced global comparative law scholarship whilst maintaining its support for more traditional forms of research. The notion of legal transplants may therefore be examined not simply in a European context, but, for example, in terms of Western influences on the reforms in Vietnam to provide a market-based legal framework for its company law.[138] In today's global economy there is a sense, in the words of the late Lord Bingham that 'there is a world elsewhere' which has value to our understanding of law and legal principle generally.[139]

II. EUROPEAN UNION LAW AS A SOURCE OF COMPARISON

The 1952 edition of the Quarterly further contained a section on the Treaty constituting the European Coal and Steel Community. Few would have anticipated at this date that EU law would have the force and content it has today. EU law is, of course, a subject in its own right and indeed the source of many articles in the Quarterly[140] such that their contribution to EU scholarship

[132] Note, in particular, the valuable works of HP Glenn, *Legal traditions of the world: Sustainable diversity in law* (4th ed, OUP 2010); WF Menski, *Comparative law in a global context: The legal systems of Asia and Africa* (2nd ed, CUP 2006).

[133] E Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Martinus Nijhoff Publishers 2004).

[134] Note, for example, the concerns expressed by M van Hoecke and M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 ICLQ 495, 508–509.

[135] See, for example, A Harding, 'Global Doctrine and Local Knowledge: Law in South East Asia' (2002) 51 ICLQ 35 and DC Jayasuriya, 'A Comparative Review of AIDS Legislation in Asia and the Pacific' (1994) 43 ICLQ 391.

[136] See, for example, P Duff and B Yin, 'Criminal Procedure in Contemporary China: Socialist, Civilian or Traditional?' (2010) 59 ICLQ 1099 and KTW Ong, 'A Comparative Study of the Fundamental Elements of Chinese and English Company Law' (1999) 48 ICLQ 66.

[137] See, for example, S Farran, 'Palm Tree Justice? The Role of Comparative Law in the South Pacific' (2009) 58 ICLQ 181 and JG Zorn and JC Care, 'Barava Tru: Judicial Approaches to the Pleading and Proof of Custom in the South Pacific' (2002) 51 ICLQ 611.

[138] J Gillespie, 'Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam' (2002) 51 ICLQ 641.

[139] TH Bingham, '"There is a World Elsewhere": The Changing Perspectives of English Law' (1992) 41 ICLQ 513.

[140] See, for example, J Temple Lang, 'A Constitutional Aspect of Economic Integration: Ireland and the European Common Market' (1963) 12 ICLQ 552; J Schwarze, 'Judicial Review in EC Law—Some Reflections on the Origins and the Actual Legal Situation' (2002) 51 ICLQ

is appropriately the subject of separate consideration by Jo Shaw below. Yet EU law has also proved to be a fruitful source of comparison, providing a third system in addition to more traditional comparisons between common and civil law systems,[141] alternatively a source of tension for the national courts of a Member State.[142] Further, attempts at a European level to formulate harmonized principles of private law, notably in the field of contract law, have encouraged comparative lawyers to consider the merits and challenges presented by the prospect of a European private law. The publication of the Draft Common Frame of Reference, containing principles, definitions and model rules of European private law in 2009[143] and, in August 2011, the final version of a feasibility study on European Contract law[144] have served to energize this area of law, particularly in view of the European Commission's October 2011 proposal for a Regulation on an optional Common European Sales Law.[145] Studies have varied from the doctrinal to a law and economics perspective.[146] Its import extends beyond the EU Member States, providing a new formulation of private law of interest to legal systems in the process of transition or development and even a persuasive source of law.[147] Equally, in giving a voice to conflicting views as to the merits (or otherwise) of European Contract law,[148] the Quarterly has sought to promote debate in this dynamic area of law. Whatever concerns one may have as to the methodology used in the harmonization process,[149] such developments are of interest to comparatists and it is an area in which their contribution is particularly valuable. A further dimension has been identified in terms of European law

17; H Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?' (2009) 58 ICLQ 297.

[141] See M Harker, S Peyer and K Wright, 'Judicial Scrutiny of Merger Decisions in the EU, UK and Germany' (2011) 60 ICLQ 93.

[142] J Bell, 'French Constitutional Council and European law' (2005) 54 ICLQ 735.

[143] C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (OUP 2010).

[144] A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback <http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf>, accessed 18 January 2012 .

[145] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final, Brussels, 11.10.2011.

[146] For example, MA Hogg, 'Promise: The Neglected Obligation in European Private Law' (2010) 59 ICLQ 461; KP Berger, 'Harmonisation of European Contract Law: The Influence of Comparative Law' (2001) 50 ICLQ 877; A Ogus, 'Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' (1999) 48 ICLQ 405.

[147] See R Petrov and P Kalinichenko, 'The Europeanisation of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine' (2011) 60 ICLQ 325.

[148] Compare, for example, the views of Pierre Legrand ('European Legal Systems are not Converging' (1996) 45 ICLQ 52) and Dirk Staudenmayer ('The Commission Communication on European Contract Law and the Future Prospects' (2002) 51 ICLQ 673).

[149] See D Schiek, 'Comparative Law and European Harmonisation – A Match Made in Heaven or Uneasy Bedfellows?' (2010) 21 EBLRev 203 on the tensions between critical comparative law and European harmonisation.

itself; ECJ judge, Koen Lenaerts,[150] noting the central role comparative law plays in the activities of the European Court of Justice and Court of First Instance which, he argues, might be described as a method of interpretation of EU law itself.

III. COMPARATIVE LAW AND LEGAL THEORY

For many years, little attention has been paid to the significance of viewing comparative law as a methodology as much as an exercise in juxtaposition. The importance is, however, unmistakeable – how can we undertake a comparative law exercise without considering how it is to be achieved and why? Nevertheless, as Samuel indicated in 1998, 'comparative lawyers have on the whole been more interested in the details of positive law than in the abstract questions of philosophy and this has meant that most comparatists have all started from similar assumptions about the nature of law itself'.[151] Modern comparative theory has served to challenge the notion of comparative law as confined to a study of legal rules and stressed the need to examine legal systems in a broader context, whilst highlighting the difficulties of achieving a true understanding of non-native legal systems. Growing recognition of the need to complement doctrinal comparative exercises with comparative legal theory, reflecting on comparative law as a scholarly discipline, on its epistemology and methodology,[152] may be seen in a number of articles which critically examine the notion of legal transplants,[153] the importance of legal culture and the potential of legal theory to enable us to solve some of the problems of comparative law,[154] the options and limits of comparative law[155] and the very nature of the harmonization projects discussed above.[156] Such research serves to deepen and enrich our understanding of comparative law and its value should not be underestimated. Whilst there is unlikely to be a consensus as to how one should undertake comparative law research (indeed should there be?),[157] today's comparative lawyers are increasingly aware of the need to question how and why we undertake comparative law research in addition to the benefits of learning from other related disciplines such as anthropology, sociology, history, linguistics, and philosophy.

[150] K Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 ICLQ 873. See also former ECJ judge T Koopmanns, 'Comparative Law and the Courts' (1996) 45 ICLQ 545.

[151] G Samuel, 'Comparative Law and Jurisprudence' (1998) 47 ICLQ 817, 820.

[152] See, for example, M van Hoecke (ed), *Epistemology and methodology of comparative law* (Hart 2004).

[153] E Örücü, 'Law as Transposition' (2002) 51 ICLQ 205.

[154] Van Hoecke and Warrington (n 134).

[155] A Peters and H Schwenke, 'Comparative Law Beyond Post-Modernism' (2000) 49 ICLQ 800.

[156] P Legrand, 'European Legal Systems are not Converging' (1996) ICLQ 52.

[157] See VV Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53 AmJCompL 261.

IV. CONCLUSION

The Quarterly continues to provide a forum for comparative law scholarship in all its forms, ranging from internationally renowned and respected professors[158] to younger scholars.[159] Articles range from traditional comparisons focussing on the use of private law rules in common and civil law systems to more diverse and geographically ambitious pieces. Sixty years also marks a move from the post-war tensions (the Cold War) and ambitions (the European Coal and Steel Community and European Economic Community) to the expansion of the EU, the end of the Soviet Union, economic reforms in China and a world in which international travel, study and access to resources continues to expand. The challenge for comparative law scholarship remains: how to provide an insight which not merely states the law, but permits us to understand the law in question, despite our own subjective preconceptions?[160] Or more simply, to take the advice of Lord Bingham in 1992, comparative lawyers, emboldened by their successes so far, should continue to seek more foreign adventures: 'It is, after all, a good deal more exciting than hire purchase and the Rent Acts.'[161]

60 YEARS OF THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY AND EU LAW SCHOLARSHIP: A MISSED OPPORTUNITY?

JO SHAW*

This editorial comment follows a different pathway to those engaging with – for example – the place of comparative law or international law scholarship in the evolution of the Quarterly. These are, of course, areas of law which are titular for the Quarterly itself. EU law[162] scholarship has featured steadily throughout the history of the Quarterly, in particular after the UK joined what was then characterized as the 'Common Market' in 1973, but also ever since

[158] One example of many would be the authoritative article of JA Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 ICLQ 281.

[159] See, for example, TT Arvind, 'The Transplant Effect in Harmonization' (2010) 59 ICLQ 65 who was awarded the 2010 ICLQ Young Scholars prize.

[160] Consider, for example, the seminal works of G Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 HarvIntLJ 411 and W Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to Rats' (1998) 46 AmJCompL 701.

[161] TH Bingham (n 139).

* Member of Editorial Board, International and Comparative Law Quarterly (2009–2011); Salvesen Chair of European Institutions, Dean of Research and Deputy Head, College of Humanities and Social Sciences, University of Edinburgh.

[162] The 'catch all' term EU law is used even when referring to scholarship written at a point when this field was more frequently designated as that of 'Community law', 'EC or EEC law', or even 'Common Market Law'.

the inception of the original 'Communities' in the 1950s. But while there have been some widely read and cited pieces, it cannot be concluded that the body of work on EU law as a whole published in the Quarterly has made the type of foundational contribution which is comparable to scholarship in other areas.

The reciprocal engagement of the Quarterly and EU law scholarship constitutes, thus far, something of a missed opportunity, but there are some grounds for optimism for the future. The apparent disengagement between the Quarterly and the field of EU law scholarship can be approached from several perspectives. Published scholarship in the field of EU law has changed substantially over the decades. This reflects both the increasing breadth of the areas of competence granted to the EU institutions under the evolving EU treaties and also the emergence of a much greater variety of approaches to legal scholarship in law schools in the UK and elsewhere in every field of legal studies. The predominantly doctrinal approach of scholarship on EU law in the earlier years has been complemented with various socio-legal and contextual (law-and-) approaches which seek to marry together most commonly the law and politics of the integration process, but which also engage with literatures in fields as diverse as sociology, geography, philosophy, literature and cultural studies. This outward looking mindset has also been reciprocated by an ever greater interest amongst scholars in other disciplines in law, legal actors and legal effects.

In large measure, of course, this ever more diverse body of scholarship simply reflects the maturing of a legal order which has acquired many new facets over the decades. Many of the new dimensions of the EU as a complex multi-level legal order have invited intellectual enquiry from different perspectives. The Court of Justice is no longer the dominant 'law-maker', or driver of integration, as it was often characterized in the early years. National courts are studied as actors within the EU legal order to an ever greater extent. Turning to the field of policy, the so-called 'governance' approach to many fields of competence, especially those added in more recent years to the treaties such as aspects of labour market policy, or cultural policy, has placed different demands on the role of legal scholars in identifying and interpreting the normative qualities of these softer forms of regulation. The impact of EU law in many areas of what were hitherto thought of as being domains of national sovereignty has demanded an engagement with questions of political philosophy about the character of both the state and the international order, and that unanswerable question of precisely what is the EU? These points about the substantive and intellectual enlargement of the field of EU legal studies have been made elsewhere[163] and hardly need repeating here. But the

[163] Eg, J Shaw, 'The European Union', in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003) 325–352; N Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 581–601; B de Witte, 'European Union Law: A Unified Academic Discipline?' *EUI Working Papers*, RSCAS 2008/34; B de Witte, 'European Law as an Academic Discipline: Unity and Fragmentation' in M Bulterman, L Hancher,

Quarterly's coverage of EU law, much of which has coalesced in recent years around its updating and noting function, with relatively little broader reflective coverage in evidence in the main articles section, has not really reflected this paradigmatic shift in the character of the discipline.

Of course, the reasons for this are bound to be manifold. It might have been thought that EU law is being squeezed out by an overwhelming flood of international law material reflecting the huge growth of interest in many aspects of international law including what some have described as its fragmentation. But from the perspective of having taken a minor editorial role for fewer years than I would have ideally wished, I have gained quickly the insight that there simply is not the pressure from EU law submissions that one might have expected in this era of 'publish or perish'. One contrast that is interesting to note is that books about EU law seem almost overrepresented in the book reviews section, compared to books about other fields. This does reflect the huge surge in book publishing in the field, including large numbers of edited collections.

Equally, the simple fact that the European Union is not directly referred to in the title of the journal could perhaps have a dissuasive effect on scholars who feel they need the recognition factor, in their own field and for career purposes, of publishing in one of the established journals where 'Europe' features in the title. But I find that unconvincing as an explanation, given the pressure also on scholars in UK law schools to publish in more generalist journals and the status of the Quarterly, with its breadth of coverage, as a quasi-generalist journal. Or maybe it is just issues of habit. Scholarly habit is a powerful phenomenon. The Quarterly has never established itself as a primary outlet of choice for EU legal scholars in the UK or elsewhere, and this seems to be largely self-perpetuating with new potential contributors influenced by what they see in the contents list. This inhibiting factor could perhaps be overcome by further deliberate endeavours on the part of the publishers and the editorial team to encourage high quality EU law scholarship submissions, in a wider range of fields and adopting a wider range of approaches than seems to have been the case for the most part in the sixth decade of the Quarterly's existence.

But in one sense, this suggestion would be slightly missing the point. The Quarterly is not a specialist EU law journal with the objective of assessing legal questions from the perspective of European integration as such, and indeed it could not and should not become one. Its unique selling point, as noted above, is its status as a quasi-generalist journal which challenges the disciplinary boundaries within legal studies and asserts the continuing and multi-facetted nature of the challenge to domestic legal orders which comes from outwith their territorial and jurisdictional boundaries. In that sense, it would make sense for the Quarterly to become – to a greater extent than is true

A McDonnell and K Sevenster (eds), *Views of European Law from the Mountain. Liber Amicorum Piet Jan Slot* (Kluwer Law International 2009) 417–428.

at present – an outlet of first resort for top class legal work on the EU as an international actor, on aspects – especially external ones – of the Area of Freedom, Security and Justice and on issues such as enlargement and neighbourhood policy. In addition, thematically, the Quarterly is the natural home for work which blends EU and international law concerns (and indeed sometimes also national law) such as work on environmental law, energy law, the law on financial transactions, human rights, trade policy, consular and diplomatic representation, and the whole area of 'smart sanctions'. The same can be said about the boundaries between EU law and private international law, where the EU has taken an increasing regulatory role, but where insights from international and national law are still crucial to a full understanding of the field, as well as in relation to private law, where the comparative method is as central to understanding the work that the EU, and especially the Commission has done in this domain, as is an understanding of techniques of harmonization available under the EU Treaties. To some extent, indeed, a closer inspection of the contents of the Quarterly reveals that EU law is rather deeply embedded into the DNA of many articles which are not as such 'about Europe', with the result that one should conclude that the Quarterly has much more to say about 'law in Europe', in its widest sense, than it does about EU law narrowly defined. This is as it should be, and it represents not only a perspective on the past and the present of the journal's publishing habits, but also a prospectus for future development.

HUMAN RIGHTS AND THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY

Robert McCorquodale*

> In recent years, the effectiveness of the international treaty as an instrument of the promotion of human rights has been challenged both in the literature of international law and relations and on the political level.[164]

These words are by Egon Schwelb, then Deputy Director of the Division of Human Rights of the United Nations, in the first substantive article published on human rights in the Quarterly. This was in 1960, which was almost ten years after the Quarterly was founded. The publication of articles on human rights in the Quarterly, including some that continued the challenges referred to by Schwelb, began very slowly and it was only midway in its history – from about

* Joint General Editor of the International and Comparative Law Quarterly; Director, British Institute of International and Comparative Law; Professor of International Law and Human Rights, University of Nottingham.

[164] E Schwelb, 'International Conventions on Human Rights' (1960) 9 ICLQ 654, 655.

volume 31 onwards – that they became a regular feature. Yet by the 60th volume it was often the case that each part of a volume might include at least one article that dealt with human rights issues either directly or indirectly.

Over this 60 year period, there have been many notes, shorter articles, current developments and case notes that refer to human rights, including ones before Schwelb's article. Yet the focus here is on the (longer) articles that offered substantive consideration of international human rights legal issues (as broadly defined). In addition, there have been articles that considered human rights within national legal systems that will not be considered here, and the nature of this task means that the choice of articles considered is necessarily selective.

There are two main themes in this development of human rights literature that can be seen across the 60 years of articles on human rights in the Quarterly: the diversity in the literature on human rights; and the impact of this literature on the rest of the articles in the Quarterly.

I. DIVERSITY OF HUMAN RIGHTS ISSUES

In 1967 the Quarterly published its first article on a specific human right issue: this was an article by David Harris, one of the leading international human rights lawyers, on the right to a fair trial.[165] The rights relating to liberty and fair trials appeared regularly thereafter, especially in regard to the European Convention on Human Rights.[166] Issues relating to torture were well canvassed, particularly by Malcolm Evans[167] and David Hope,[168] with a spread of articles on specific civil, political, economic, social and cultural rights, such as on the right of speech[169] and concerning poverty.[170] In most instances these articles considered both the law and its practical application, as was shown early on with Antônio Cançado Trindade's article on the importance of procedure in human rights matters.[171]

[165] DJ Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 ICLQ 352.

[166] For example, C Kidd, 'Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention on Human Rights' (1987) 36 ICLQ 856; C van Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 ICLQ 757; D van Zyl Smit, 'International Imprisonment' (2005) 54 ICLQ 357; and L Chenwi, 'Fair Trial Rights and their Relation to the Death Penalty in Africa' (2006) 55 ICLQ 609.

[167] M Evans and R Morgan, 'The European Convention for the Prevention of Torture: Operational Practice' (1992) 41 ICLQ 590; M Evans, 'Getting to Grips with Torture' (2002) 51 ICLQ 365. See also C McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 ICLQ 565.

[168] D Hope, 'Torture' (2004) 53 ICLQ 807 – this is currently the most popular downloaded article of the ICLQ.

[169] S Kentridge, 'Freedom of Speech: Is it the Primary Right?' (1996) 45 ICLQ 253.

[170] P Thornberry, 'Poverty, Litigation and Fundamental Rights – A European Perspective' (1980) 29 ICLQ 250.

[171] A Cançado Trindade, 'Exhaustion of Local Remedies under the UN Covenant on Civil and Political Rights and its Optional Protocol' (1979) 28 ICLQ 734.

One area of human rights where the Quarterly has been at the forefront in terms of international impact has been in relation to collective or group rights. In 1976, Yoram Dinstein's article was ground-breaking in its examination of collective rights,[172] and then a series of articles in volume 43 in 1994, on the right of self-determination were transformative in the international legal literature and on practice.[173] Other issues affecting groups, such as genocide, indigenous people and development,[174] have also been well argued and have remained a strength of the Quarterly.

Two areas of international law that have strong human rights elements have also been considered in the Quarterly: refugees and terrorism. In volume 31 in 1983, two articles set the scene – one by Geoffrey Gilbert on refugees[175] and one by Colin Warbrick on terrorism[176] – and these were important for future developments in these fields, including for later articles in the Quarterly.[177] Some of these articles highlighted the cross-fertilization of ideas between human rights issues, such as Alice Edwards' article about torture and refugees.[178]

II. HUMAN RIGHTS AND INTERNATIONAL AND COMPARATIVE LAW

The growth and development of human rights appears to have influenced the development of the literature across all international and comparative law, as seen in the articles published in the Quarterly. Initially, much of this influence was seen in the use of human rights law as one example in an article that was analysing a broader international legal issue, such as Ian Brownlie's article on the individual's role before international tribunals[179] and Natalie Hevener and Steven Mosher's article on general principles of international law

[172] Y Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 ICLQ 102.

[173] A Whelan, 'Wilsonian Self-Determination and the Versailles Settlement' (1994) 43 ICLQ 99; M Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 ICLQ 241; and R McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 ICLQ 857; see also P Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 ICLQ 867 and H Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 ICLQ 537.

[174] G Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 ICLQ 578; A Mason, 'The Rights of Indigenous Peoples in Lands Once Part of the Old Dominions of the Crown' (1997) 46 ICLQ 812; and D McGoldrick, 'Sustainable Development and Human Rights: An Integrated Conception' (1996) 45 ICLQ 796.

[175] G Gilbert, 'Right of Asylum: A Change of Direction' (1983) 32 ICLQ 633.

[176] C Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism' (1983) 32 ICLQ 82.

[177] For example, H Lambert, 'Protection Against *Refoulement* from Europe: Human Rights Law Comes to the Rescue' (1999) 48 ICLQ 515; and J Almquist, 'A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions' (2008) 57 ICLQ 303.

[178] A Edwards, 'The Optional Protocol to the Convention Against Torture and the Detention of Refugees' (2008) 57 ICLQ 789.

[179] I Brownlie, 'The Individual before Tribunals Exercising International Jurisdiction' (1962) 11 ICLQ 701.

and their application to the International Covenant on Civil and Political Rights.[180]

Gradually, the focus shifted to examining directly the impact of human rights on other areas of international law. These included areas such as humanitarian intervention,[181] customary international law,[182] treaties[183] and international humanitarian law,[184] as well as international law more generally.[185] It also extended to understanding the development of international criminal law,[186] comparative human rights,[187] and private international law.[188]

In addition, aspects of human rights have been important in the bringing together of apparently discrete areas of international law. For example, Alan Riley considered human rights in competition law[189] and Bruno Simma cleverly examined the interaction between human rights and foreign investment law,[190] and in so doing made clear that human rights may now bind all parties to any form of international agreement.

III. CONCLUSIONS

After a slow and cautious start, the publication of articles in the Quarterly on human rights issues has become a strong aspect of each volume. This has included articles that analyze closely one particular right and those that draw

[180] N Hevener and S Mosher, 'General Principles of Law and the UN Covenant on Civil and Political Rights' (1978) 27 ICLQ 596.

[181] N Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 ICLQ 321.

[182] A Cunningham, 'The European Convention on Human Rights, Customary International Law and the Constitution' (1994) 43 ICLQ 537.

[183] E Bates, 'Avoiding Legal Obligations created by Human Rights Treaties' (2008) 57 ICLQ 751.

[184] G Van Bueren, 'The International Legal Protection of Children in Armed Conflicts' (1994) 43 ICLQ 809; J Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 ICLQ 55.

[185] For example, A Drzemczewski, 'The *Sui Generis* Nature of the European Convention on Human Rights' (1980) 29 ICLQ 54; L Arbour, 'In Our Name and on Our Behalf' 55 ICLQ 511; and L Wildhaber, 'The European Convention on Human Rights and International Law' (2007) 56 ICLQ 217.

[186] For example, F Hampson, 'The International Criminal Tribunal for the Former Yugoslavia and the Reluctant Witness' (1998) 47 ICLQ 50; R Henham, 'Some Issues for Sentencing in the International Criminal Court' (2003) 52 ICLQ 81; and K Keith, 'The International Court of Justice and Criminal Justice' (2010) 59 ICLQ 895.

[187] See for example, S Neff, 'Human Rights in Africa: Thoughts on the African Charter on Human and Peoples' Rights in the Light of Case Law from Botswana, Lesotho and Swaziland' (1984) 33 ICLQ 331; A Duxbury, 'Rejuvenating the Commonwealth – The Human Rights Remedy' (1997) 46 ICLQ 344; B McLachlin, 'Bills of Rights in Common Law Countries' (2002) 51 ICLQ 197 and I Butler, 'Securing Human Rights in the Face of International Integration' (2011) 60 ICLQ 125.

[188] JJ Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007) 56 ICLQ 1.

[189] A Riley, 'The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation' (2002) 51 ICLQ 55.

[190] B Simma, 'Foreign Investment Arbitration: A Place for Human Rights' (2011) 60 ICLQ 573.

together diverse rights. Further, there has been a distinct influence of human rights issues in many of the other articles that have been published in the Quarterly.

It is clear that the publication by the Quarterly of articles on human rights have been of impressive quality and by scholars of high calibre. It is also evident that they have been very influential internationally and comparatively, which is one reason why the Quarterly remains one of the world's leading journals in this field.