



13th Annual BILETA Conference: '*The Changing Jurisdiction*'

Friday, March 27th & Saturday, March 28th, 1998.
Trinity College, Dublin.

The Digital Re-Mastering of Jurisdiction or Opportunity for A New Paradigm for Law ?

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" How vast those Orbs must be, and how inconsiderable this Earth, the Theatre upon which all our mighty designs, all our Navigations and all our Wars are transacted, is when compared to them. A very fit consideration, and matter of Reflection, for those Kings and Princes who sacrifice the Lives of so many People, only to flatter their Ambition in being Masters of some pitiful corner of this small Spot." [1]

The Paper is arranged thus

1. Introduction
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1. Introduction. An Apology for Idlers. Of Mechanists, Technocrats and Others. [2]

When I was a student at Trinity, I remember Dr. Yvonne Scannel describing herself during a contract lecture as being a lawyer of the 'technocratic' genre. I would agree that there is a dichotomy between the technocrats (or the mechanists as I perhaps would refer to them), and the others, in all areas of law, and in all law schools. The designation of the non-technocrats was unclear. [3] Having plied my books diligently, [4] and carried them across the rubicon, it is a pleasure to return with a more speculative agenda, despite the annoyance and irritation that might cause to the mechanistic genre, (wherever they may come from).

The concept of jurisdiction is of key interest to all. In the case of some of the celebrated former teachers at Trinity, the issue of jurisdiction and the limitations of the concept were, and are still, of central importance in the high office they have gained. Kader Asmal, Mary Robinson and Mary McAleese would find aspects of the concept which perhaps cause direct difficulty for them. Kader Asmal, who was in exile in Ireland when he taught international law at Trinity, was a fierce opponent of Apartheid and a proponent of the view, inter alia, that South Africa and nuclear weapons were illegal in international law. [5] Mary Robinson has expressed her sense of the obligation to intervene to protect human rights in certain cases, despite the historic constraints of International law. [6] Mary McAleese, (who opens the Conference) is of course President of the Republic of Ireland, but was born in a different jurisdiction. [7] Thus the issue is not merely one of idle speculation.

2. Lessons from the Origins of the Concept of Jurisdiction. [8]

The fanciful aesthetic, fashioned from reason long afterwards is a typical sanitising, ex-post facto rationalisation, beloved of law. Jurisdiction, is a rough and basic beast at heart. It is the descendant of the basic territoriality that humans and animals exhibit. Despite the contemporary, self-evident rhyme and reason which lawyers and academics will cloak it with, it is not much more sophisticated than a dog at a lamppost. In *2001: A Space Odyssey*, [9] the ancestry of the concept is mirrored by the two groups of apes on either side of the river, baring their teeth and shrieking at each other. Territoriality underpins it. The tooth and claw of military might justifies it. The concept has become complex and refined thanks to the Professor Higgins treatment, but its origin is unmistakable. [10]

Power always resided with those who were stronger physically and, in later times, militarily. Force is ultimately at the basis of all legal systems. Rules not backed up by ultimate force exercisable by the authority of the State are not law. Unfortunately, force without law may predominate, for a time at least. Early Christian Ireland, despite the indigenous system of Brehon law, understood the unfortunate reality of the triumph of force. [11]

“ Bitter is the wind tonight,
White the tresses of the sea;
I have no fear the Vikings hordes
Will sail the seas on such a night.” [12]

The *Institutes of Justinian* of the Roman Empire in the year 533 rested the claim to rule and pass law over the barbarian nations on the ‘valour of their arms’. By then, imperial might could also claim authority from a higher order.

It is axiomatic that all early law gives claim authority from God, the gods or some transcendent force. Whether in polytheistic or monotheistic societies, God was the cornerstone in relation to the first generation concept of jurisdiction. The contiguity between religious/moral and legal rules are clear. At early stages of the development of law, the secular and religious functions were very close, if not indistinguishable. This can be seen in relation to Christianity, Judaism and Islam. The Jewish legal conception of jurisdiction for example, emerged in parallel with basic theological concepts. [13] The *fatwa* issued against Salman Rushdie might be seen as a contemporary Islamic manifestation, in this light. In the Christian context, the right to jurisdiction over the New World was advanced principally by theologians in Spain, from places such as the University of Salamanca. Authority came to the emerging empire from the Holy See, and thus from divine sources. For example, Proposition XV11 advanced by De Las Casas in his treatise which was published in Seville in 1552 stated that,

“The kings of Castile and Leon are true princes, sovereign and universal lords and emperors over many kings. The rights over all the great empire and the universal jurisdiction over all the Indies belong to them by the authority, concession and donation of the said Holy Apostolic See and thus by divine authority. This and no other is the juridical basis upon which all their title is founded and established.” [14]

The ‘divine right of kings’, as articulated by James 1, reflects clearly the divine claim. [15] Ironically, the great and practical advantage of a concept of jurisdiction which ultimately is based on a concept of a universal, transcendent, omnipotent being or beings, is that the resulting legal concept has parallel universality. The theocratic states which exist today, perhaps reflect the true origins of modern States and basic concepts of jurisdiction. [16]

The Peace of Westphalia, after the 30 Years War (1618-1648), is seen to represent the beginning of the concept of the State as we know it, and the development of fundamentally related ones of jurisdiction and sovereignty. [17] These would ultimately ripen into the principles such as those articulated in the *Montevideo Convention of 1933 on the Rights and Duties of States*. [18] As Shearer indicates, the concepts had a degree of dynamism, thus

“ ‘Sovereignty’ has a much more restricted meaning today than in the eighteenth and nineteenth centuries when, with the emergence of powerful highly nationalised states, few limits on state

autonomy were acknowledged.” [19]

This might arguably be seen to be the second phase of the concept of jurisdiction. At the mid-point of the Thirty Years War, came the trial of Galileo, [20] which reminds us of a number of important currents of the time, including the jurisdiction of Church, the clash between competing religious views, and the struggle between science and religious doctrine. The telescope, which enabled him to make the astronomical discoveries he revealed in *Sidereus Nuncius, The Starry Messenger*, would also help define and defy the boundaries of thought. Looking to the heavens, helped mankind see themselves and their rules in different ways. In one way, the emergent secular concept of jurisdiction was a feeble being, a pale imitation of its previous self, in that it represented a contraction from earlier divinely-authorized regal or imperial justifications for exercise of jurisdiction. During the Middle Ages the Church courts exercised civil jurisdiction. The Reformation began to erode the civil jurisdiction of the Church. In Scotland the point of transfer of jurisdiction was quite clear. As Lynch says

" The Reformation of 1559-60 is seen as the fundamental fact of Scottish history. It marked a decisive rejection of Rome, the Latin mass, papal jurisdiction, sacerdotalism and much else." [21]

The third phase of the concept might be characterised by the reconstruction of the concept for an inter-dependent and increasingly regionalised world, characterised by the development of measures to combat the limitations of a purely national concept of jurisdiction. [22] The fault lines became particularly clear during the course of this century. The base of the State-Territorial-Sovereignty-Jurisdiction square was shaky. The predominant concept is of territorial jurisdiction. The classic definition, also shows the link with State and sovereignty.

“ It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising within these limits.” [23]

The development of transport and communications, inter alia, diluted the effectiveness of territorial-based conceptions and required remedial treatment. This was done with the aid of the ‘subjective’ and ‘objective’ territorial principles. Thus counterfeit and drugs for example, were grafted on as exceptions. [24] Personal and Universal jurisdiction were also essentially exceptional, of which Piracy and War Crimes are the most celebrated examples. International law might even be seen as a product of the need to mitigate the limitations of the concepts of territorial jurisdiction in particular. Cast in a centuries-old mould, produced by a very particular set of historical forces, the mitigations do not suffice.

3. Limitations of the Concept

Jurisdiction as we know it, is perhaps the major consequence of Statehood and the practical manifestation of the politico-legal concept of sovereignty. In many ways it is the grundnorm itself. It is based on relatively static, inert fictions, located in a particular time and place. The shadow of the feudal system falls over the castellated conceptual terrain, ruled by the king, knight and horse. Just as part of the development of the feudal system can be explained by the number of people necessary to help an armoured knight mount, so the second generation concept of jurisdiction might be explained by a fairly local, relatively immobile populace, in the wake of the Thirty Years War. It is unsurprising that the limitations of the concept are revealed when the law tries to deal with things and people that move, or boundaries that in reality are permeable, or contexts where the notional international legal analysis is not co-terminous with the realities of political, military or commercial might. The concept was never calculated to deal with things, people or vessels that moved quickly or indeed moved at all, although it might work well for men and domesticated animals. The traditional, orthodox concept of jurisdiction, a fellow of cannons, carriages, muskets and wigs, is anachronistic in an age of interplanetary travel, mass communications, mass travel, nuclear weapons, cloning and proliferating war. As the world regionalises and globalises in new legal forms, the concept, like coopers, will become less relevant. Likewise, whereas people can be controlled by fear, natural forces would not submit to man’s will. [25] The seas generally defied the structures of empire and statehood and would render the concept of jurisdiction difficult to apply.

The communications age and the digital age, altered the validity of the medieval reality that permeates much legal thinking. The logic of the satellite, conceived by Arthur C. Clarke, had implications for the way the world works and not least for the concept of jurisdiction. [26] The growth of telecommunications, the internet [27] and the emergence of convergence and digitisation are facilitating the growth of the electronic circulatory

network of the globe, which will further accelerate the aspects of intercourse which leaves traditional concepts of jurisdiction far behind. We have a construct which like the dodo was flightless and doomed to extinction. We need a model based on the swallow or wild geese. The concept is clearly unsuitable to deal with

“ whatever’s prized and passes of use, everything that’s fresh and fast flying of us, seems to us sweet of us and swiftly away with, done away with, undone.. [28]

4. Manifestations of the Limitations of the Concept.

The manifestations of the limitations of the concept are many, and will only be briefly indicated here. The major problem occurs where political or strategic interests outweigh strict legal doctrine. War and invasion of other countries, without justification are the simplest example. The international community effectively decides the result after assessing the military balances involved. In particular circumstances, as the celebrated Eichmann cases, the Israeli raid on Entebbe and the fatwa against Rushdie demonstrated, jurisdiction could become secondary to political reality. The Monroe Doctrine of 1823 also provides a useful antidote to inflated lawyerly analyses. The Somalian and Algerian situations, and the doctrines of non-intervention which is related to respect for State jurisdictions, reveal the sorry hypocrisy behind pseudo-legal justifications for intervention in international law.

The illusory aspect of the nature of frontiers based on national jurisdictions also reveals the subordination of legal principle to other realities. This is revealed when mass movements of people occur, as with the fall of the Berlin Wall or the events in Rwanda. With de-centralised and diffuse wars and growing international crime, the call for an international court becomes difficult to ignore. With the evolution of global environmental problems, the concept of jurisdiction becomes irrelevant. With the development of indigenous rights, new regional communities and world trade institutions, borders are being rubbed from the globe. With the reassessment of legal doctrines such as the terra nullius doctrine in the light of more enlightened analyses, pillars of the construct of jurisdiction are felled. [29] With the clash of competing exercises of extra-territorial jurisdiction, most notably in the area of competition law, regional re-alignments of commercial power will re-define jurisdictions based on commercial clout, and calls for an international antitrust enforcement agency will become very loud. All these factors point to solutions which are global and which will hasten the departure of a full-blooded concept of jurisdiction.

5. The Role of Communications Technology in Exposure of Limitations.

The concept of jurisdiction is important in two senses in relations to communications technology. Firstly, the exposure and creation of limits with the existing concept. Secondly, the sense of cyberspace as a jurisdiction itself. The key point for the argument in this article is that the advent and proliferation of communications technology, and the possible impact on basic legal concepts, provides the necessity for re-examination and the opportunity or occasion for re-assessment of basic paradigms in law. In the book *2001; A Space Odyssey*, the modern sequence of events is commenced by the discovery on the far side of the moon of the giant TMA. The ability to reach the level of technological sophistication necessary to discover the mysteriously hidden crystal, could be seen as representing a pre-planned mechanism of detection of the stage on the learning curve that humanity had reached. When mankind had reached the point of journey and discovery, they had entered a new zone of possibilities, including presumably the know-how of self-annihilation. Cyberspace and digitisation (in a less imaginative, more mundane vein), might be seen as the critical point. More specifically, communications technology and products and services inherently associated with the digital age, have further identified limitations of the concept of jurisdiction. The following are but samples of the summits of the sea-mountains of problems that rise above the ocean. For example,

(a) Civil Liability

In the civil context, for example, the question of defamation on the Internet is a live issue which illustrates jurisdictional complications. Lilian Edwards puts forward the following scenario,

“An individual resident and domiciled in Scotland posts a defamatory comments about a person also resident and domiciled in Scotland, but having a national reputation throughout the UK, to a Usenet newsgroup. The group is read by subscribers in many countries, including England. The defamed party wishes to sue.” [30]

She proceeds to identify the possibility of suing in both Scotland and England. However, the problem arises in relation to the issue of reputation, in that in England in relation to the award of damages, there must be damage in relation to the reputation in that jurisdiction. This example illustrates, how communications technology complicates jurisdictional issues, and how the available modifications of traditional jurisdictional concepts under statute, may have failed to anticipate the complexity of jurisdictional issues beyond the question of the appropriate forum.

(b) Remedies- Spycatcher

In the Spycatcher saga, the futility of injunctions restraining publication in the light of international circulation was an important aspect of the case. [31]

(c) Prejudice in Criminal Cases

The question of pre-trial publicity has been raised as a key issue in the Lockerbie case. [32] As Bonnington identifies, the pervasiveness of communications technology creates fundamental problems, in that the communications do not respect boundaries. [33] The possibility of inappropriate pre-trial publicity is a very real one. Strict approaches, such as in Scotland under the Contempt of Court Act 1981, are rendered unworkable, if there is international public interest in a particular case. [34]

(d) Construct of Copyright

As Mark Davison writes in relation to copyright.

" .. the justification for any rights concerning transmission of copyright material that are based on geography needs to be examined. It may be that the justification no longer exist. If so, the rights based on that justification should be reduced, not extended. Any new rights concerning transmission also should be restricted to the extent which to which they would be based on geography." [35]

6. Parallel Fault Lines in the Legal System.

The limitations of the concept of jurisdiction, and the role of communications technology in the exposure of limitations and per se, parallel general fault lines in the legal system. As jurisdiction is a creature, which like a chameleon reflects its environment, it is necessary to refer briefly to some contours of contemporary problems with legal systems in order to contextualise the reception of communications technology, and to justify the necessity and validity of a new paradigm in law. The principal difficulties are those of expense, delay, inefficiency, exclusion of groups such as women, indigenous people, children and lower socio-economic groups, and the profession itself.

6(a) Expense

The Woolf Report is but one in a succession of reports which deal with the expense of law and lawyers. Popular culture emphasises it, [36] people realise it and Governments are beginning to act.

6(b) Delay

Literature, from Shakespeare and beyond, has long provided criticism when lawyers did not. Dicken's Bleak House is still classically relevant.

" Jaryndyce and Jarndyce drones on. This scarecrow of a suit has, in the course of time, become so complicated that no man alive knows what it means. The parties to it understand least ... Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of people have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hates with the suit. [37]

6(c) Inefficiency

Crossing the Atlantic and looking from the US perspective, there is great dissatisfaction with the legal system, particularly from an efficiency context. The bureaucratic systems produced as a result are seen by many to be inconsistent with the optimum functioning of a mature market economy. [38] Closer to home, the outdated ritual of the courts is unhelpful per se and on a deeper level. As Ludovic Kennedy says, writing from his experience as an investigative journalist,

" The antique ritual of our courts is positively harmful, for it drives a wedge between the citizen and the law, outlawing him as a stranger in his own land, making him hostage to customs which he has no share in framing. There is need for flexibility instead of fossilization, for all the diverse elements in a courtroom to be brought nearer together, not driven further apart, a need for communication and understanding. It is time not only for the rules of the game to be revised; but also to ask ourselves whether the game we have chosen is the one we wish to go on playing." [39]

Likewise, Professor Heuston in his text on tort used the celebrated quotes from Maitland and Atkin in relation to the significance of the forms of action

" So it is still necessary to know something of the forms of action. "*The forms of action*", said Maitland at the beginning of this century, [40] "*we have buried, but they still rule us from their graves*" - perhaps less imperiously today than when Maitland wrote, for Lord Atkin said [41] that "*When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred.*"

In Scotland, the persistence of the medieval nightmare of the feudal system is inexcusable, despite the erudite but spurious excuses which are trundled out more regularly than logic and justice should permit. [42]

6(d) Exclusion

There are numerous illustrations of historical and contemporary exclusion and marginalisation of groups within and by legal systems. Apart from religious, ethnic groups, children, or people with disability and differing sexual orientations, two classic examples are women and indigenous people. [43] In relation to women, Helena Kennedy as a celebrated barrister was in a good position to write that,

"I have chosen in this book to look at the treatment of women in British justice as a paradigm of the faults and blindnesses of the legal system as a whole". [44]

Likewise, legion are the examples in relation to indigenous people whose treatment parallels the treatment of other groups such as women. [45] Wilfred Pelletier, a native American Odawa, mocked the hypocritical approach to the question of jurisdiction, when he wrote,

" Because if Columbus had been met with signs saying: "Private Property" or "Keep Out"- he would simply have turned around and gone back to Spain. He would have told King Phillip: "Too bad. But America is not just inhabited, it is already owned". And that's the job those early pioneers took on straightening out the real estate mess for all those dumb people." [46]

6(f) The Profession

Part of the problem is the profession itself. [47] As Anthony Clare, writing from a psychiatric perspective points out in relation to an interview with a politician,

Up to then, so the intriguing explanation goes, he just worked and worked and didn't spend too much time reflecting on the whys and wherefores. Some high achievers make a virtue out of the avoidance of introspection. It is as if too much thought might reveal too much of the pointlessness of the daily public process..... In Lord Parkinson's case, the explanation he advances as to why he hit the buffers is close to self-justification. It is difficult to detect in that explanation any acknowledgement that the political system, the late-night sittings, the hectic travel, the endless meetings, the whole rigmarole itself is diseased, is pathological, creates or attracts pathological people and is in urgent need of profound overhaul." [48]

There is a parallel to be seen with law. Birkin, in an article which argues that contemporary mainstream

techniques, values and ways of thinking in accountancy are influenced by a dualistic ontology unsuitable for environmental accounting and sustainable development contexts, writing from a critical accounting perspective,

" Cartesian thought describes well a clockwork universe. Mechanical clocks occupied an eminent position in Renaissance technology and one of the greatest achievements of the age, Newton's laws of motion, described planetary motion as a majestic clockwork. Concepts and functions within traditional accounting reminiscent of clockwork: " cogs" are the discrete and specialised parts of both an accounting classification system and the accountant isolated within an idealised, strong professional objectivity: "motive power" is allowed to operate only in predetermined ways subject to strong regulation; precision and cleverness are integral elements of the design (emotion, intuition and wisdom having no place); and numerical analysis provides significant and, for many purposes, wholly sufficient representation of both means and ends." [49]

Ironically, if law is perceived as machine, there is evidence that it is in bad need of repair. It is also relevant to the debate about classes of lawyers and academics and conceptions of law.

Similarly in relation to legal education. Students learn law from cases and texts based on cases. As records of contexts of irreconcilable breakdown, they may often create a certain mindset in graduates. Those cases are presented as a relatively static, 'backwards-compatible' body of information. The student studies courses that were largely prescribed by professional bodies. The predominant mode of teaching has been descriptive, black-letter law, discouraging other intellectual skills of creativity and imagination. The student that progresses, is progressing to a profession that has been quite backward looking. Arguments about, relevance, utility and value for money sound hollow from beneath the horsehair and cobwebs. The profession has acted as a protectionist body and as such has not been in the interests of new entrants or society in general. The protectionism has generated inertia that spawns inefficiency. They are expensive, slow and unliked. The personnel of the courts come from the ranks of the profession and tolerate system that are inefficient. The reforms are controlled by the people who cause the problems. The political ranks are peopled with lawyers. Other disciplines are swatted away as irrelevant. Legal academics may be a part of the problem. [50]

7. The Inevitable Forces of Change.

Despite the gloomy side, there are positive indicators that should be briefly mentioned.

(i) *Competition*

Regional competition law systems will lead to an application of competition law principles to the legal professions. EC Competition law applies to the liberal professions. [51] Thus anti-competitive actions by the professional bodies will be subject to severe sanction. This will lead to greater competition and efficiency gains.

(ii) *Liberalisation*

The general trend towards liberalisation of markets, independent of competition law provisions, will increase competition. The attainment of free movement of persons within the EU, and in particular the mutual recognition of qualifications will lead to more competitive markets in legal services.

(iii) *Education*

The process of de-mystification of the legal profession is ongoing, in the face of a far more educated, articulate consumer with increasingly higher service expectations.

(iv) *Service to product.*

The pervasiveness necessary for mass market success in the digital age will lead to mass market expert systems and legal D-I-Y kits, which will replace low-level information transactions, which solicitors in particular have cultivated.

(v) *New Perspectives*

Critiques of western philosophies are emerging from within the west, from feminism, quantum physics, and further afield from eastern mysticism and indigenous philosophy. These will ultimately inform the re-examination of legal systems.

(vi) *Political Will*

A combination of the above will lead to a changing, more critical political climate in relation to lawyers, and thus improve the likelihood of reform.

8. The Fallacy of Inevitable Progress

The great fallacy is to assume that communications technology will automatically produce a benefit to the legal system. Communications technology is a tool. It acts as a magnifier or a multiplier. It will magnify or multiply what it finds. The dreadful possibility exists that, far from solving existing difficulties, it could accentuate them. The OJ Simpson case augurs poorly. As communications technology is harnessed to expand theatricality, rather than reduce it, the next great novel on the legal system on the twenty-first century could be a Gibsonian [52] cyber-cocktail of *Bleak House*, *The Trial*, *Finnegans Wake* and 1984. [53] Furthermore, a protectionist legal profession reacting strategically to some of the changes outlined above, could move to corner major legal information technology, thus undoing any community or consumer benefit which might arise otherwise.

9. The Communications Technology Occasion [54]

As perhaps the Lockerbie dispute and the many recent unsuccessful around-the-world balloon attempts illustrate, jurisdiction is a live and tangible issue. Although jurisdiction is in the vanguard of concepts that will be altered by the contemporary forces of change, there are many behind. The impact of communications technology on the concept of jurisdiction is a litmus test for what is to come. As a foundation concept, the cracks there, will impact on others above. This paper argues that the proliferation of communications technology, provides an historic opportunity and occasion for identification of a new paradigm to inform the process of re-engineering of legal concepts and systems. The failure to use the rapid advent of mass communications technology as an occasion for change, will condemn it to be a negative force rather than a positive one in the development of legal systems.

10. Opportunity for a New Paradigm.

The only solution is an anticipated solution. In an age of great macro-law systems or perhaps meta-law systems, designed rather than evolved, it is imperative to attract paradigms also designed to operate in a synergistic way. It is appropriate to borrow the scientific philosophical analysis of the 'paradigm shift' and apply it to law. [55] It is not enough to aim merely to reach an adequate analysis. I will put my head above the parapet and propose one, or rather propose the appropriation of one.

11. A Proposal for Debate. [56]

Prophylaxis, which comes from a Greek word, would be an appropriate one. [57] Any need for a paradigm is easy to reject out of hand, in law or elsewhere, and it is also easy to reject the specific proposal. [58] In addition, after criticising the legal profession one realises that the shells raining down are likely to be heavier, the scorn louder and the disregard of the argument more complete. Anyway, the word comes from a military rather than a medical root. It forms a model principally in the medical field and as such is far from original, but it may nevertheless be appropriate. It simply suggests the requirement to guard before something occurs, to be proactive, to be anticipatory or to be preventative. Students should learn it, teachers should teach it, lawyers should practice it and law makers should build with it. The following is an indicator of certain trends of thinking in other disciplines which would support such a paradigm.

11(a) *Alternative and Complementary Medicine*

Alternative medicine and complementary medicine has playing a significant role in the re-balancing of some of the negative alignments within orthodox medicine. [59] The profession that G.B Shaw [60] constantly attacked with a battering ram, in a way similar to historic and contemporary assaults on the legal profession, has had a positive impact from the study of a greater familiarity with traditional medicines, such as Traditional Chinese Medicine (TCM) and an increased awareness of some of the inappropriate aspects of certain orthodox paradigms of medical care, such as over-reliance on invasive surgery and pharmaceutical abuse. [61]

11(b) *TQM*

Total Quality Management has been a useful tool in understanding the management of manufacturing and service processes. [62] The ideas underlying it are readily comprehensible, and perhaps deceptively easy to grasp. The basic propositions are simply articulated, such as the need to correct errors at source, the need to prevent problems and the fact that it is always cheaper to prevent problems. Quality is a term of art and is generally misunderstood. Litigation is often used as example of the most costly mechanism used to solve problems which occur at the production stage.

11(c) *Hierarchy of Needs-Theory of Motivation and Personality-Maslow*

Maslow provides a useful model of human motivation and personality. [63] Maslow is perhaps most well known for his 'hierarchy of needs'. This provides a model for the analysis of our existing legal system. Extrapolating from the micro-level to the macro-level and applying it to law, it might be concluded that disciplinary protectionism has caused the bulk of legal work to be concerned with lower level needs, rather than higher level needs. Maslow's theory applied thus, is probably corroborated by the idea of the latent legal market. [64]

11(d) *Indigenous Philosophy*

Indigenous philosophy is moving consciously and unconsciously into many pools of thought. It underpins complementary medicine, has informed re-evaluations of physics, philosophy, psychology, anthropology and art. The more organic, community-based values and concepts which it often promotes have relevance to the arena of legal discourse, despite its virtual exclusion from it, with notable but minor exceptions.

11(e) *Systems Thinking*

Systems Thinking is sneaking into legal thinking, welcome though overdue. [65] Concepts which have emerged in biology and cybernetics have contributed to our understanding of how systems work. It is ironic that law students begin their studies with legal systems, without engaging in any thinking about systems as systems. Legal systems must be understood as systems, which have similar contours to other systems.

11(f) *Transactions Cost Theory- Coase*

Transactions Cost analysis provides some useful pointers [66] to help understand the most appropriate functions of law in regulating conduct.

12. Conclusion Here are the bones of the argument.

- The concept of jurisdiction is a fundamental legal concept
- The concept of jurisdiction has been cast in a mould of its time of origin
- The concept has limitations largely stemming from this mould
- The limitations are increasingly being exposed, despite efforts to mitigate them
- The digital age accelerates the exposure and reveals new limitations
- The limitations are not peculiar to the concept of jurisdiction alone
- The limitations of other fundamental concepts will be exposed in a similar way
- The exposure of the limitations of basic legal concepts necessarily parallels the exposure of other

systemic fault lines in legal systems

- If communications technology is merely introduced into an existing flawed system , it will replicate and magnify the existing problems.
- The exposure of the limitations of the concept and the proliferation of communications technology should provide an opportunity for a paradigm shift in law
- Such a paradigm should incorporate the benefit of analyses from different disciplines
- A starting point could be based on the idea of a preventative system
- The paradigm of prophylaxis is proposed

We would all do well to remember the desirability of simplicity of design, the futility of control in certain circumstances and the myriad of messages that suggest solutions that stare at us from all around. Thus we might remember a haiku by Basho (1644-1694). [67]

From every direction cherry blossom petals blow into Lake Biwa.

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End Notes

1. Christian Huygens, 'New Conjectures Concerning the Planetary Worlds, Their Inhabitants and Productions', circa 1690, quoted by Carl Sagan, *Cosmos, Futura*, 1980.
2. Deliberately referring to the short story by Robert Louis Stevenson.
3. It would be, I feel, some organic or holistic metaphor, identifying somewhat with elements of the traditional 'Realist' schools, despite the fact that the mechanists are more brutally realist in the narrow legal domain. The lecturers that fell into mechanist class did not seem to like 'jurisprudence' very much, or any going behind the scenes, as it were. The legal system was as it was, and that was all there was to it. The mechanist school would probably be described as Cartesian by some, and in its worst manifestation perhaps the Gradgrind school, after Mr. Gradgrind of *Hard Times*. That debate is another story.
4. As RLS points out how the Worldly Wiseman would urge the young man in *Pilgrim's Progress*.
5. Now Minister for Water in South Africa.
6. As a Senator, a President and the UN Commissioner. This was expressed in relation to Somalia, Rwanda and Algeria.
7. The indivisibility of the political and legal in relation to concepts of jurisdiction is well illustrated by the constitutional claim of the Constitution of the Republic of Ireland 1937 to the six counties,
8. This is merely a thin flavour of the concept necessary to contextualise what follows.
9. Both the book by Arthur C. Clarke and the film directed by Kubrick. (Kubrick also directed *A Clockwork Orange* whose title, from Anthony Burgess, might be a concept which expresses the tension between the mechanists and the rest).
10. Here referring to Shaw's *Pygmalion* Higgins.
11. The Brehon Law contributed the celebrated, first copyright decision, for example.
12. Magnusson, *Vikings!*, The Bodley Head, 1980.
13. Johnson, *A History of the Jews*, Phoenix, 1987.
14. See Englander, Norman, O'Day and Owens (eds), *Culture and Belief in Europe 1450-1600*, Blackwell, 1990 at 327.
15. See The King's Speech to Parliament, 21 March 1610. Tanner, *Constitutional Documents of the Reign of James 1, 1603-1625*, Cambridge, 1961.
16. Modern constitutions still claim authority under God, or as in the Irish case reflect the Christian nature of the State.
17. See Shearer, *Starkes International Law*, Butterworths, 11th ed, 1994 at 11.
18. Article 1 identifies the characteristics of a State.
19. Shearer, see note 16, at 90.

20. Codex 1181, Proceedings Against Galileo Galilei. See Bronowski, *The Ascent of Man*, BBC, 1973. Chapter 6,
21. *The Starry Messenger*.
22. Michael Lynch, *Scotland, A New History*, Pimlico, 1991 at 186.
23. Examples would include, the EC Jurisdiction and Judgments Convention of 1968, The Tokyo Convention on Offences And Certain Other Acts Committed on Board Aircraft of 1963, The Hague Convention for the Suppression of Unlawful Seizure of 1970, The Montreal Convention for the Suppression of Unlawful Acts Against Civil Aviation of 1971 or The United Nations Convention on the Law of the Sea of 1982.
24. Lord Macmillan, *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 at 496-497.
25. Geneva Convention for the Suppression of Counterfeiting Currency of 1929 and the Geneva Convention for the Suppression of the Illicit Drug Traffic 1936.
26. In Chinese terms, the great philosophical dichotomy was between the Taoists and the Confucius. The authoritarianism associated with Confucianism which manifested itself in Imperial structures was in stark contrast to the Taoist doctrines that were had a greater respect for natural forces. Water was the central image of Taoist philosophy, underlying the *Tao Te Ching*. Water and other moveable forces have been historically difficult for the concept of jurisdiction to deal with.
27. For recent discussions of the technological state of play, see Taylor, 'The World Radiocommunication Conference Clears a Path for Broadband Systems Using Geo-Stationary Orbits', *Satellite Communications*, Feb 1998.
28. For a recent article on the technological and economic context see Gonzalez Durantez, 'Adapting Service Strategies to Deregulation', *Telecommunications*, May 97 at 37.
29. From the poem, *The Leaden and the Golden Echo (Maiden's song from St. Winefred's Well)*, by Gerard Manley Hopkins, who is buried a few miles away from here in Glasnevin Cemetery.
30. See for example *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.
31. Edwards & Waelde, *Law & the Internet; Regulating Cyberspace*, Hart Publishing, 1997, at 189.
32. See Fysh, *The Spycatcher Case*, 1989 *Fleet Street Reports*.
33. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie (Libyan Arab Jamahiriya v USA), Provisional Measures. Order of April 14, 1992, 1992, ICJ Reports 114.
34. Bonnington, 'News Without Frontiers: Pre-Trial Prejudice and the Internet', in *Law & the Internet; Regulating Cyberspace*. See Note 41 above. Also see Walker 'Fundamental Rights, Fair Trials and the New Audio-Visual Sector,' [1996] 59 *MLR* 4, 517
35. *HMA v George Outram & Co Ltd* 1980 SLT 13 and *Hall v Associated Newspapers* 1978 SLT 241.
36. Davison, 'Geographical Restraints on the Distribution of Copyright Material in a Digital Age: Are they Justified'. Opinion: [1996] 9 *EIPR* 477.
37. For example, *The Verdict* (1992), Directed by Sidney Lumet.
38. Dickens, *Bleak House*, Pan at 36.
39. Howard, *Death of Common Sense, How Law is Suffocating America*, Warner Books 1996. Spence, *With Justice for None, destroying an American Myth*, Penguin, 1989.
40. Ludovic Kennedy, *Truth to Tell. The Collected Writings of Ludovic Kennedy*, Black Swan at 399
41. Footnote 12 for Heuston- *Forms of Action*, p, 296 [Maitland].
42. Footnote 13 for Heuston- *United Australia Ltd. v Barclays Bank* [1941] A.C. 1,29.
43. See Rennie, 'The Feudal System-Going, Going, Gone?', 1995 *Juridical Review* at 321
44. The references here are obviously and necessarily brief.
45. Helena Kennedy, *Women and British Justice*, Vintage, 1993 at 1.
46. See for example Weaver (ed) *Defending Mother Earth, Native American Perspectives on Environmental Justice*, Orbis 1996.
47. Pelletier, *A Wise Man Speaks, Amerindianization Program,*, Department of Indian Affairs, Quebec
48. See Hanlon, 'A Profession in Transition?-Lawyers, The Market and Significant Others, (1997) *MLR* Vol 60. No 6 at 798. From the celluloid zeitgeist there are many examples of critiques of the legal profession, such as *The Firm*, (1993) Directed by Sydney Pollack.
49. Clare, *In the Psychiatrist's Chair 11*, Mandarin, 1995 at 258.
50. Birkin, 'The Ecological Accountant; From the Cogito to Thinking Like a Mountain', *Critical Perspectives in Accounting*, Vol 7, (1996) at 231.
51. See for instance, Schlag, *Laying Down the Law: Mysticism, Fetishism and the American Legal Mind,*

- New York University Press, 1996.
52. See Re The Colegio De Agentes De La Propiedad Industrial (COAPI) (Case IV/33.686) [1995] 5 CMLR 468.
 53. In the sense of William Gibson who coined the term 'cyberspace'.
 54. By Dickens, Kafka, Joyce and Orwell respectively.
 55. See Susskind, *The Future of Law: Facing the Challenges of Information Technology*, Oxford University Press, 1996. Despite some points, this misses some major trends. See Review by Charlesworth, [1997] 3 Web JCLI. See <http://weljcli.ncl.ac.uk/1997/issue3/charles3.html>.
 56. Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press, 1962.
 57. The proposal is tentative here, because there is not enough time or space to elaborate, not because I have any doubt about the utility of the paradigm.
 58. 'Prophulaktikos' and French 'prophulassein'. See Hoad, *Concise Oxford Dictionary of English Etymology*, Oxford, 1986.
 59. Arguments which I would not respect, but expect- (a) It's there already. (b) We don't need it, everything ok. (c) The name sounds like a brand of condoms (d) What's that got to do with jurisdiction? (e) Who's he? or perhaps worse (f) Oh, it's him!
 60. See in general, Marti, *Alternative Health Medicine Encyclopaedia*, Visible Ink, 2nd Ed, 1998.
 61. See in general, *Prefaces by Bernard Shaw*, Constable, 1934.
 62. In relation to TCM see Kaptchuk, *The Web That Has No Weaver*, Rider, 1983.
 63. See for example, Crosby, P. *Quality is Free*, New American Library, 1979. Deming, W.E, *Out of the Crisis*, MIT Cases, 1986. Ishikara, K, *What is Total Quality Control?* Prentice Hall, 1985. Juran, Juran on Leadership for Quality, Free Press, 1989.
 64. Maslow, *Motivation and Personality*, Harper & Row, 3rd ed, 1987.
 65. See Susskind at note 64 above.
 66. See Teubner (ed), *Autopoietic Law: A New Approach to Law And Society*, de Gruyter, 1987. And see Nobles and Schiff, 'Miscarriages of Justice: A Systems Approach,' (1995) 58 MLR 293.
 67. Coase lectured for a while at what is now the University of Abertay Dundee. In relation to his views see Coase, *The Firm, the Market and the Law*, University of Chicago Press, 1988. For a view which urges balance in the dialogue between economics and law, see Goodhart, 'Economics and the Law; Too Much One-Way Traffic?,' (1997) 60 MLR at 1.
 68. Sam Hamill (trans), *The Sound of Water, Haiku by Basho, Buson, Issa, and other Poets*. Shambhala Centaur Editions, 1995.

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