UNIVERSITÀ
DEGLI STUDI
DI PALERMO

DIPARTIMENTO
DI SCIENZE POLITICHE
E DELLE RELAZIONI INTERNAZIONALI -
DEMS

CONFERIMENTO DELLA LAUREA MAGISTRALE *HONORIS CAUSA* IN **"INTERNATIONAL RELATIONS"** LM 52

a ***Barry A.K. Rider***

Palermo
Steri - Sala delle Capriate
12 luglio 2019
ore 11

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PANORMITANÆ STVDIORVM VNIVERSITATIS SIGILLVM

MOTIVAZIONE

Prof. Alessandro Bellavista
Direttore del Dipartimento di Scienze Politiche e Relazioni Internazionali

UNIVERSITÀ DEGLI STUDI DI PALERMO


PANORMITANÆ STVDIORVM VNIVERSITATIS SIGILLVM

Il Prof. **Rider** è tra gli studiosi di diritto più prestigiosi e noti. Insegna da oltre 40 anni nel Jesus College di Cambridge.

Laureatosi con lode al Queen Mary College di Londra, divenuto Barrister presso l'Inner Temple di Londra, ha conseguito due Dottorati in Studi Giuridici presso il Queen Mary College e presso l'University of Cambridge. Molteplici, sono state le sue collaborazioni e ricerche a livello internazionale. Egli è stato professore onorario e visiting presso le più prestigiose università giapponesi, cinesi e sud africane e ovviamente europee e statunitensi, dove ha insegnato diritto comparato, diritto commerciale internazionale e comparato, diritto degli strumenti finanziari internazionali.

Profondo conoscitore della "Finanza Islamica" ha tenuto e tiene corsi specifici in materia di diritto degli strumenti finanziari nei Paesi Islamici.

Tra i massimi esperti di antiriciclaggio e lotta alla criminalità organizzata ha ideato e presiede il Cambridge International Symposium on Economic Crime giunto quest'anno alla 37ma edizione e che vede annualmente riunirsi e discutere della materia oltre 1500 delegati e ricercatori provenienti da tutte le parti del mondo.

Grazie al suo lavoro di ricerca ed alla sua attività di consulenza (International Association of Anti-corruption Agencies), e docenza è stato insignito dalla Corona Inglese dell'Ordine dell'Impero Britannico (OBE) per i servizi resi alla Giustizia e nell'applicazione e rispetto del diritto e delle Leggi.

È dal 1983 Presidente del British Institute of Securities Laws. È Assessor della prestigiosissima London School of Economics and Political Sciences di Londra e Coordinatore dei corsi di diritto finanziario e di diritto comparato del BPP College di Londra.

È stato inoltre per più di un decennio il Direttore dell'Institute of Advanced Legal Studies dell'University of London, tra le più prestigiose istituzioni di ricerca del mondo.

Per sviluppare le ricerche in ambito comparatistico ha fondato la Society for Advanced Legal Studies che vede associati quasi un migliaio di docenti provenienti da tutte le parti del mondo e che pubblica la rivista mensile Amicus Curiae (di cui egli è il general editor). Il prof. **Rider**, per promuovere e sviluppare la cooperazione internazionale e gli studi di diritto comparato nell'ambito del controllo della criminalità economica organizzata ha fondato e dirige tuttora The British Institute of Securities Laws (and BISL Research Management Ltd) e il Centre for International Documentation on Organized and Economic Crime.

Egli inoltre è il Direttore della rivista The Company Lawyer pubblicata da Sweet and Maxwell, nonché del Journal of Financial Crime e del Journal of Money Laundering Control pubblicate da Emerald.

È autore di oltre 38 monografie e saggi, oltre 30 articoli su volume, 54 report e selected works, 78 articoli su rivista nonché di innumerevoli "presentazioni" a convegni e congressi.

Tra queste pubblicazioni spiccano, siccome considerate opere di riferimento nel panorama internazionale i volumi dedicati al Money Laundering, quelli dedicati all'Insider Trading e quelli sulla Finanza Islamica.

Il Prof. **Rider**, che ha anche svolto numerose "lecture" nei corsi della Facoltà e del Dipartimento di Scienze Politiche, ha da lunghissimo tempo contribuito alla formazione di tanti studiosi dell'Università di Palermo e di tanti studenti e post-graduate che hanno potuto svolgere le proprie ricerche, anche sotto la sua direzione, sia presso l'Institute of Advanced Legal Studies sia presso il Jesus College di Cambridge.

L'assoluta levatura morale, la notevole qualità e rilevanza internazionale delle sue pubblicazioni, l'appassionato impegno nella ricerca e nello sviluppo degli studi giuridici e comparatistici, il suo impegno internazionale nella lotta alla criminalità economica e nello studio di forme alternative e non solo "penalistiche" di tutela dei soggetti deboli e dei consumatori, la sua collaborazione con le Istituzioni e con le Università di tanti Paesi sono tra i motivi fondamentali per il conferimento al **Prof. Barry Rider** della Laurea Magistrale *Honoris Causa* in International Relations.

LAUDATIO

Prof. Salvatore Casabona
Coordinatore del Corso di Laurea Magistrale in International Relations

UNIVERSITÀ DEGLI STUDI DI PALERMO


PANORMITANÆ STVDIORVM VNIVERSITATIS SIGILLVM

Magnifico Rettore, chiarissimi colleghi e colleghe, gentili studenti e studentesse, signore e signori,

è per me un grande onore pronunciare la *laudatio* in occasione del conferimento della Laurea honoris causa in International Relations al **Prof. Barry Alexander Kenneth Rider**, docente di diritto commerciale e comparato dell'università di Londra, Fellow Commoner del Jesus College di Cambridge, barrister, Professorial Fellow at the Centre for Development Studies, direttore dell'Institute of Advanced Legal Studies dell'University of London, ideatore e direttore di prestigiose riviste scientifiche, ideatore e direttore dell'International Symposium on Economic Crime, giurista di assoluta levatura e di raffinata sapienza, piuttosto atipico nel panorama accademico inglese, viaggiatore, conferenziere e visiting professor infaticabile, consulente di svariate agenzie governative e last but not least, con un fortissimo, antico e duraturo legame con la Scuola palermitana (e siciliana) di diritto comparato.

Partendo proprio da quest'ultimo passaggio che, per stessa ammissione del prof. **Rider**, è stato fondamentale per l'evoluzione della sua formazione scientifica, non possiamo non ricordare come la stima e l'amicizia con il prof. Giovanni Criscuoli, fondatore della comparazione giuridica siciliana e massimo esperto italiano del diritto inglese, ha consentito lo sviluppo di un continuo e ricco flusso reciproco d'informazioni, di studiosi e di studenti (non solo "giuristi" in senso stretto del termine) tra Palermo, Londra e Cambridge. Qui ad esempio oltre a Mario Serio e Antonello Miranda anche Alessandra Pera, Giulia Pennisi, Costantino Visconti, Paola Maggio, Laura Santoro, Gabriella Marcatajo, Giuseppe Giaimo, Domitilla Vanni, Enzo Bivona, Rosario Petruso, Emanuele Nicosia, me stesso e un innumerevole gruppo di dottorandi, dottori e assegnisti di ricerca (tra i quali vorrei ricordare almeno Rita Duca, Stefano Insinga, Letizia Palumbo, Emilio Mineo, Maria Rosa Baglieri, Giovanni Barbieri e Sara Rigazio) hanno avuto il piacere di compiere le proprie ricerche e partecipare alle tante attività scientifiche organizzate dal **Prof. Rider**. Dall'Inghilterra a Palermo a loro volta sono venuti a svolgere ricerche e seminari oltre allo stesso **Prof. Rider** anche suoi colleghi e allievi come Graham Ritchie, David Pearl, Andrew Hines, Richard Alexander, Bill Tupman, Chizu Nakajima.

Il professor **Rider** ha iniziato da giovanissimo lo studio del diritto ottenendo poco più che ventenne lo LLM in legge al Queen Mary. Successivamente ha conseguito il dottorato di ricerca, ottenendo anche un premio universitario per merito speciale e il premio Draper's Company. Nel 1975 è entrato nel consiglio di amministrazione dello Institute of Advanced Legal Studies dell'università di Londra. Nel 1976, ha ottenuto la Fellowship al Jesus College di Cambridge, dove ha anche conseguito un MA, e un secondo dottorato

di ricerca. Nel 1977, è diventato Barrister dell'Inner Temple classificandosi primo nella graduatoria di merito. Subito dopo è divenuto Senior Research Fellow del Queen Mary, istituendo il corso di Securities Regulation. Dal 1976 (a soli 24 anni) ha insegnato al Jesus College (dove, con un pizzico di orgoglio e una buona dose di autoironia racconta di aver soggiornato nella stanza che fu di Oliviero Cromwell) e nel 1995, dopo diversi incarichi governativi e una copiosa attività di ricerca nel campo del diritto commerciale e del diritto dei servizi finanziari, diventa direttore dell'Institute of Advanced Legal Studies, incarico che manterrà per un decennio e che viene ricordato come il più ricco, prestigioso e stimolante nella lunga storia dell'Istituto stesso. In quegli anni, per sua iniziativa, fu fondata la prestigiosa Society of Advanced Legal Studies che ha tra i suoi Fellows circa 250 tra i più autorevoli studiosi ed esperti di diritto di tutto il mondo (di cui tre dell'Ateneo di Palermo). La Society, molto attiva per gli scambi e le iniziative culturali, pubblica la rivista internazionale "Amicus Curiae".

Dal 2006, ritornato al suo insegnamento di Cambridge (per la verità mai sostanzialmente abbandonato) il professor **Rider** si dedica alla realizzazione del nuovo Centre for Development Studies, dell'University of Cambridge, dove ancora oggi segue i dottorandi di ricerca e gli studenti del Master of Art in diritto e contemporaneamente insegna, con un gruppo di suoi ex Allievi, diritto comparato al BPP College of Law di Londra.

Il prof. **Rider** ha anche ricoperto numerosi incarichi pubblici, tra cui quello di Direttore della Commonwealth Commercial Crime Unit e di Assistant Director (Legal) presso il Segretariato del Commonwealth. Ha anche lavorato con l'incarico di consigliere per l'FMI ed è stato consulente della Banca mondiale, della Banca asiatica di sviluppo, dell'Islamic Financial Services Board, dell'Unione Europea e di varie organizzazioni delle Nazioni Unite e Regionali. Ha esercitato la professione di avvocato e consulente presso lo studio legale City Beachcroft LLP e lo studio legale internazionale statunitense Bryan Cave LLP. Negli ultimi anni i suoi principali clienti sono stati la Kuwait Investment Authority e la People's Bank of China.

Il prof. **Rider** è Direttore di The Company Lawyer, del Journal of Financial Crime, del Journal of Money Laundering Control e del già citato Amicus Curiae. Fa inoltre parte dei comitati editoriali e consultivi di numerose altre pubblicazioni e riviste, tra cui l'Hong Kong Law Review e il Journal of Economic Law.

Credo, infine, che si debba ancora una volta ricordare la ideazione del the longest-running play "Symposium on Economic Crime" che vede da 37 anni (un vero record per i giuristi, se si eccettua la pièce "the Mousetrap" al St. Martin's Theatre di Londra) riunirsi per un'intera settimana oltre 1500 esperti, consulenti, autorità, rappresentanti dei

Governi, magistrati e amministratori pubblici e privati, provenienti da tutte le parti del mondo, per discutere sui metodi e sull'efficacia delle azioni di contrasto della criminalità economica. Inutile dire che il nostro ateneo ed in particolare la facoltà di Scienze Politiche, poi Dipartimento, sono da quasi vent'anni partner ufficiali del Symposium.

Se dovessimo indicare una figura di studioso capace di superare i confini tra teoria e pratica oltre che quelli tra le declamazioni del diritto positivo e la realtà operazionale (e anche quelli "fisici" tra Paesi e Culture), non potremmo che pensare appunto a Barry **Rider**.

Essendosi formato alla scuola di grandi studiosi di respiro internazionale come Clive Schimtthoff e Stefan Frommel egli ha acquisito ben presto la consapevolezza che lo studio delle regole del diritto non può limitarsi alle astratte per quanto scientifiche ricostruzioni della dottrina nazionale ma deve necessariamente confrontarsi con la realtà sociale quotidiana in continuo movimento e trasformazione. In questo, come ho detto, Barry **Rider** è giurista e studioso piuttosto atipico rispetto al generale panorama accademico inglese dove, di regola, la dottrina svolge un ruolo piuttosto limitato e direi ancillare rispetto all'enorme lavoro della giurisprudenza, focalizzandosi l'insegnamento universitario su pochi e limitati aspetti del sapere giuridico. Ad esempio, la critica velenosa mossa da alcuni giuristi inglesi agli studi sulla "*property*" del compianto collega prof. Jim Harris di essere troppo vicino alle "ricostruzioni teoriche" e alle elucubrazioni "tipiche dei College americani", la dice tutta sull'atteggiamento della tradizionale dottrina inglese di fronte a studi di ampio respiro e proiettati ben di là dal semplice dato normativo nazionale e concreto.

Che il diritto inglese sia per (auto)definizione *the most professional body of rules* è risaputo; un po' meno noto ai non addetti ai lavori è l'atteggiamento "snob" (ahimè ben chiaro a chi cerca di attivare gli scambi del progetto "erasmus") della dottrina che, tradendo un atavico complesso di inferiorità nei confronti della giurisprudenza, tende ad essere essenzialmente descrittiva più che speculativa e soprattutto "concentrata e ristretta" negli angusti spazi del diritto nazionale.

Come dice bene lo stesso prof. **Rider**, "i giuristi inglesi, almeno nell'era moderna, hanno acquisito la reputazione di essere pragmatici... Così è comprensibile che, data la storia dello sviluppo del diritto inglese e la maniera piuttosto artigianale che essi adottano su così tante questioni nello sviluppo e nella riforma del diritto, lo studio della comparazione giuridica nelle università britanniche sia rimasto eccezionale... Se questo sia il risultato dell'arroganza dell'impero, o dell'intrinseca fiducia nella capacità della tradizione del common law di risolvere tutti i problemi, o semplicemente il sospetto per qualsiasi cosa

venga dall'esterno, in particolare dal continente, rimane da vedere. Ancora oggi nel Regno Unito si crede che il nostro sistema di diritto — data la sua essenza flessibile e pratica, di fatto pragmaticamente efficace-, potrebbe essere esportato con grande convenienza persino in Cina… incoraggiando lo sviluppo di una forma più chiara di Stato di diritto. In sostanza, gli Inglesi tendono non a studiare da una prospettiva comparativa gli altri sistemi di diritto, ma semplicemente a utilizzarli — quando è conveniente farlo" (1).

Un atteggiamento, a dire il vero, diffuso oggi in diverse parti del mondo "de-globalizzato".

Barry Rider, sin dai primi momenti della sua carriera accademica, ha intuito la necessità di rompere gli schemi della dottrina tradizionale inglese e, pur mantenendo stretto il rapporto con la concretezza ha affrontato nei suoi primi studi, pubblicati tra il 1977 e il 1978 sulla prestigiosissima Modern Law Review e poi ancora sul Cambridge Law Journal i temi del diritto del commercio e dei traffici in modo critico e ricostruttivo-sistematico e soprattutto aperto alla conoscenza dei sistemi stranieri e alle loro soluzioni.

Che il *common law system* sia abituato ad annoverare tra le sue fonti, sia pure persuasive, le decisioni di corti straniere ed anche le elaborazioni degli "Autori", è certamente un dato di fatto che dimostra l'apertura del sistema e la sua permeabilità alle regole altrui ma, come si diceva, ciò che è usuale nella giurisprudenza inglese non lo è, in genere, per la dottrina inglese più "tradizionale". Il prof. **Rider**, anche per la sua "vocazione" internazionale, ha sin da subito dimostrato di prediligere un inusuale approccio logico-sistematico e ricostruttivo degli istituti studiati, poco frequente nella dottrina inglese ma più vicino e consono al modo di pensare e ragionare dei moderni giuristi continentali e soprattutto dei "comparatisti".

Come racconta lo stesso prof. **Rider**, egli nel 1978 ebbe "la presunzione di scrivere un breve articolo, pubblicato sul New Law Journal, alquanto descrittivo e senza dubbio poco

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(1) "*English lawyers at least in the modern era have acquired the reputation for being pragmatic… Thus it is understandable that given the history of the development of English Law and the rather artisan manner that Engish lawyers adopt to so many issues in its development and reform of law, that the comparative study of law in British universities remain exceptional… Whether this is a result of the arrogance of empire, self-confidence in the capacity of the common law tradition to solve all problems, or simply a suspicion of things foreign – particularly from the continent, remains to be seen… Even today there is a belief within the UK that our law – given its vibrant and practical – indeed, pragmatic expediency, could be a greater boon to China… encouraging them to a more recognized form of the rule of law. In the result, the British tended not to simply study from a comparative perspective other systems of law, but to simply utilize them – when convenient to do so.*"

informato sulla recente normativa concernente i mercati dei capitali in Italia." "Nonostante l'essenzialità dell'articolo — ci dice **Rider** — ho voluto fare una o due osservazioni circa il contesto delle discussioni che allora si stavano svolgendo nel Regno Unito in relazione alla regolamentazione di particolari abusi nella City of London. Se gli italiani erano riusciti ad affrontare questi problemi, che cosa ci impediva di farlo anche noi se non l'estrema fiducia nei responsabili del modo in cui opera la City? Così, la legge italiana e in particolare il modo robusto con cui apparentemente veniva applicata, diventava un bell'esempio di ciò che si poteva fare, ammessa una volontà politica" (2).

Probabilmente l'ultima cosa che il prof. **Rider** pensava di aver fatto era quella di aver scritto un lavoro di comparazione giuridica, almeno per quella che era (e forse ancora è) la metodologia tradizionale seguita dalla dottrina inglese. Infatti, soprattutto per l'influenza esercitata da autori come Zweigert and Kotz e anche per delle forti resistenze "linguistiche", gli Autori inglesi si limitano a fare dei semplici riferimenti a singoli aspetti del diritto straniero (penso al "contratto" o all'area della responsabilità civile ovviamente declinata nelle sue varie epifanie).

Come dice **Rider**, "*by and large a home grown English lawyer would generally only seek to refer let alone analyse an aspect of foreign legal system or rule with the utmost trepidation. Generally not having the linguistic capacity to ascertain the true experience of other people's law, comparative reference becomes by and large a matter of adornment and presumption*" (3).

In fondo si può dire che mentre la dottrina italiana, che un tempo aveva avuto modo di studiare in Germania e più di recente negli Stati Uniti e in Inghilterra aveva acquisito notevoli conoscenze importando in modo critico idee e soluzioni, la dottrina inglese era solo limitatamente interessata allo studio del diritto straniero per di più affrontato, quan-

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(2) "*The presumption to write a short article on the recent legislation relating to the capital markets in Italy and had this somewhat descriptive and no doubt ill informed piece published in the New Law Journal. Not with standing its short comings, I was keen to make one or two points in the context of the discussions that were then taking place in the United Kingdom in relation to the regulation of in particular abuses in the City of London. If the Italians had managed to address these issues, then what was stopping us, other than the cosy self-confidence of those responsible for the way in which the City operates? Thus, the Italian legislation and in particular the robust way in which it was apparently being administered, we set out as examples of what could be done, given the political will*".

(3) "In generale, un giurista inglese formatosi nel proprio sistema userebbe la massima cautela nel riferirsi ad un qualsiasi aspetto del sistema giuridico o della norma straniera; figuriamoci cosa accadrebbe se dovesse analizzare il sistema straniero. Non avendo la capacità linguistica per accertare e comprendere la vera natura del diritto altrui, qualsiasi riferimento comparatistico diventa in generale una questione di abbellimento e supposizione".

do affrontato in chiave comparatistica, con un taglio essenzialmente pratico di accostamento acritico e asistematico tra norme giuridiche.

Ed è proprio in questo che **Barry Rider** fa la differenza: intuisce e istintivamente applica il metodo comparativo più moderno che non si limita ad osservare le regole altrui ma scava nelle radici profonde del sistema esaminato cercando di comprenderne i meccanismi non solo giuridici ma di contesto e finalizzando la ricerca verso una possibile migliore interpretazione e ricostruzione del proprio sistema.

Credo che sia davvero singolare come "la circolazione delle idee" avvenga a volte anche casualmente in un determinato momento storico. Come ci ha raccontato il prof. **Rider**, quel suo articolo giovanile attirò l'attenzione proprio di Giovanni Criscuoli che, a distanza di due settimane dalla pubblicazione, gli scrisse una lettera cordiale e lusinghiera; in particolare Criscuoli "apprezzò con favore non solo il tentativo di ricostruire sistematicamente e analizzare la nuova normativa italiana, ma soprattutto il fatto di collocarla nel contesto di come essa era e veniva di fatto applicata e concretamente utilizzata... sottolineando che in Italia una cosa è la norma di legge un'altra è il modo in cui viene effettivamente applicata. La legge deve essere vista e considerata a tutto tondo".

Sulla scorta di questo comune modo di vedere e concepire lo studio del diritto e la comparazione giuridica si sviluppò non solo un'amicizia personale ma una lunga e duratura sintonia di idee e interessi tra Scuole che si è estesa poi con il rapporto che ci lega ancor oggi.

Quello che è interessante notare è proprio il modo di intendere la comparazione giuridica che accomuna due persone molto distanti caratterialmente e che, ciascuno a guisa propria, hanno creato un nuovo modo, insolito nei rispettivi Paesi di provenienza, di fare comparazione. Senza voler nulla togliere alle note Tesi di Trento, alla teoria della comparazione sistemologica, a quella della circolazione dei sistemi, alla validissima teoria dei formanti o all'analisi economica del diritto, credo che si possa (e su questo sono sicuro di avere l'appoggio di tutta la Scuola comparatistica palermitana e siciliana) ben dire che si fa comparazione non solo per comprendere un dato istituto straniero e magari raffrontarlo tout court con l'omologo nazionale ma anche e soprattutto per capire se una data esperienza sia giustificata da fattori endogeni ed esterni che la rendono diversa da, o ne giustifichino la vicinanza con, quella di raffronto; per rivedere le interpretazioni, le ricostruzioni e le applicazioni di un istituto del proprio diritto per capire se e fino a che punto quelle stesse interpretazioni e ricostruzioni reggono alla prova del confronto con l'omologo straniero; e per accertare se una data soluzione concreta a un problema giuri-

dico in un sistema straniero, magari ancora non verificatosi nel proprio, possa tornare utile per meglio comprendere e migliorare il proprio diritto.

Come ci insegna Rider occorre preoccuparsi in particolare "nel contesto di una nuova legge, di inquadrarla con la massima precisione possibile, nell'ambiente di riferimento. Di conseguenza, nell'esaminare, ad esempio, il controllo dell'abuso d'informazioni privilegiate a Hong Kong, è necessario considerare non solo le norme in atto, ma anche la rete di meccanismi, giuridici, normativi e di autoregolamentazione all'interno della quale quella normativa avrebbe di fatto dovuto operare. È inoltre necessario esaminare le modalità di applicazione delle norme e la probabile efficacia di questo processo. In altre parole, l'identificazione e la descrizione della norma è solo il punto di partenza per un'analisi e una valutazione molto più approfondita. Naturalmente, più si cerca di collocare una legge nel suo contesto istituzionale, più si esce dalla pura analisi del semplice dato normativo per entrare in ambiti molto più complessi ed interessanti" (4).

Ambiti che superano i confini dei settori disciplinari (con buona pace, oggi, della nostra VQR e ASN) dovendo essere affrontati in modo sagacemente interdisciplinare tenendo conto della politica, delle necessità sociali, delle realtà sociali, dei contesti economici, delle istituzioni e del loro grado di tenuta e resistenza, dei rapporti internazionali e via dicendo. Ad esempio, non mi sembra di aver letto mai in un lavoro di diritto comparato quello che fra breve ci dirà il prof. Rider e cioè che "purtroppo, anche quando cerchiamo di comprendere meglio le esperienze giuridiche e normative altrui, raramente ci preoccupiamo di considerare le persone svantaggiate e deboli. Se lo facciamo, si tende ad avere più a che fare con un interesse antropologico per i costumi pittoreschi che non con la realtà di oggi".

E anche questo è un insegnamento di enorme importanza, saggezza e attualità. Basta pensare infatti, come dice il prof. Rider, alla circostanza che "nonostante sia nei Paesi in via di sviluppo il luogo dove forse si possa ottenere il massimo dall'analisi del diritto so-

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(4) "*The concern, particularly in the context of a new law, was always to set it as firmly as one could with confidence, in the relevant environment. Consequently, in looking at, for example, the contro of insider dealing in Hong Kong it was necessary to address not just the then proposed rules, but the network of mechanisms, legal, regulatory and self-regulatory within which the law would need to operate. It was also necessary to consider how the rules would be enforced and the likely effectiveness of this process. In other words, the identification and description of the rule, was but a starting point for a far more thorough analysis and appraisal. Of course, the more one attempted to set the law within its institutional context the more one was taken out of the pure analysis of normative issues and into far more interesting realms*".

stanziale altrui per realizzare la migliore soluzione legislativa, questi Paesi sono proprio quelli dove minore è la presenza della dottrina comparatistica". E in questo modo si è tracciata la strada per il lavoro delle future generazioni di giuristi.

Si può forse dire oggi, con il senno del poi, che questo approccio metodologico sia ampiamente condivisibile. L'importanza dell'intuizione e dell'insegnamento del prof. Rider però sta anche nell'averlo pensato ed utilizzato per primo, oltre 40 anni fa, in un contesto particolarmente diffidente come quello della tradizionale accademia inglese ed averlo messo a disposizione di tutti grazie al suo costante, appassionato, infaticabile impegno scientifico e accademico.

Concludo dedicando al prof. Rider un pensiero di Descartes che credo racchiuda tutta l'essenza vera della sua opera di scienziato e di comparatista: *"È bene conoscere qualcosa dei costumi di altri popoli, per poter giudicare dei nostri più saggiamente, e non pensare che tutto ciò che è contrario alle nostre usanze sia ridicolo e irragionevole, come fanno di solito quelli che non hanno visto nulla."*

LECTIO MAGISTRALIS

COMPARATIVE LAW IN PRACTICE - A PERSONAL PERSPECTIVE!

Barry A.K. Rider
Jesus College Cambridge

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PANORMITANÆ STVDIORVM VNIVERSITATIS SIGILLVM

Comparative Law a fact or fiction?

There are those who argue that the scientific study of comparative law is an invention of the civilian lawyers who congregated in Paris at the turn of the last century at the trade fair (1). So much depends upon definition and no doubt presentation. In my simple common lawyers' perception, those who are interested in the law and its operation have always engaged in comparative description if not analysis. One need only consider the wealth of constitutional comparison exhibited by Aristotle in Politics (2) among others. Of course, those living in a society that strived to dominate through force of arms — such as that of Rome, were not so intellectually interested in what they perceived as deviant and barbaric legal orders and extolled as a primary justification for domination the privilege of access to Rome's law (3). However, even in the context of the Roman Empire and the emphasis that it placed on legality, as it defined and found it, there were noticeable variations in practice dictated by expediency. On the fringes of Empire (4) tradition was often allowed to continue and even in the heart of empire practices whether characterized as essentially religious (5), were often allowed to co-exist albeit always subordinate to the law and experience of Rome.

As in all human endeavors there are few things that can be said without fear of contradiction and the ubiquitous character of Roman law is no exception. The heritage of Rome was to a greater or lesser degree taken up by successive cultures and in some places at least, allowed to exist in a more or less recognizable form. As statehood evolved from weaker and more ambiguous networks of power whether in the forest, fief or burg

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(1) K. Zweigert and H. Kotz, *An Introduction to Comparative Law*, (3rd ed.), Oxford, p 2.

(2) See for example, P. Moraux, *Les Listes anciennes des ouvrages d'Aristote*, *Traductions et Etudes* (1951) p. 130 and R. Mulgan, *Aristole's Political Theory: An Introduction for Students of Political Theory* (1977) p. 116 *et seq*.

(3) Of course, in reality things were no so straight forward. Gaius, for example, underlined that "the Roman people observes partly its own peculiar law (*ius proprium*) and partly the common law (*ius commune*) of mankind" Institutes, 1.1.

(4) The focus on main steam Roman institutions has perhaps distorted historical representation in regard to the edges of Empire, see for example, N. Steien, "The Limitanei' X11 *Ancient Warfare*, p. 39 and more generally, G. Hallsal, *Barbarian Migrations and the Roman West*, Cambridge.

(5) See for example, *Lex Dei quam praecepit Dominius ad Moysen*, T. Mommsen, *Collectio librorum iuris anteistinani* (1890) and even Josephus, *History of the Jewish War*, G. Williamson (1959), Penguin who chronicles some degree of flexibility at least in Jersualem and note the role of the *praetor peregrinus* who presided over disputes in Rome between citizens and non-citizens, referred to H. Jolowicz abd B. Nicholas, *An Historical Introduction to Roman Law* (3rd ed.) p. 104.

— and became articulated through law, it was perhaps inevitable that reference would be made to the experience of others and the product of ingenuity borrowed from neighbors. It is also the case that vestiges of wider power and influence provided standards and fostered acceptable behavior reinforcing mutual self interest. Inter-action through trade, commerce and as the archeologists tell us in early societies — barter, propagated ways of behavior which became normative. Indeed, the ability to deal on terms that were predictable if not certain remains a driving force in the development of law.

Reason replaced traditional concepts of enlightenment — divine or less so and consequently in time pragmatism resulted in the confidence of positivism, albeit not completely and perhaps to humanity's ultimate loss. The extent to which the experience of so many creators and appliers of law was a matter of study within our early juristic academies may be debated. Indeed, in my own country there remained a reluctance to descend to the depths of commerce and trade in the appreciation of how law might or should order us. In fact as late as 1994 there were those who deplored that a mere corporate lawyer should be appointed Director of the Institute for Advanced Legal Studies — a traditionally reserved position for public lawyers! The political value of codes as a means of asserting if not centralized power the commonality of an imperial authority was not missed on Napoleon and again it is probable that there was less scope or reward for comparison of diverse traditions. On the other hand the pragmatism and paucity of real power other than on the high seas, of my own people, meant that the common law tended to be obliging and understanding of local custom and practice. The British provided there was a modicum of order and safety saw their law as primarily a vehicle for trade and to a greater or lesser extent their own social and humanitarian values. The importance of providing effective systems of law that supported international commerce and finance was not lost on those who influenced policy in London or who were sent or more likely found themselves in exotic locations around the globe. Even today there is a belief within the UK that our law — given its vibrant and practical – indeed, pragmatic expediency, could be a greater boon to China in assuring those at its helm, of stability and encouraging them to a more recognized form of the rule of law. In the result, the British tended not to simply study from a comparative perspective other systems of law, but to simply utilize them — when convenient to do so.

There has rarely been what some might dismiss as the pretension of scientific analysis of other people's systems of law in England. Even within such significant institutions as the British Institute of International and Comparative Law the tendency has been to pragmatism and more recently to focus on exciting areas of development in international and especially humanitarian law. My own institute – the IALS made sure that the

shelves containing what was once hoped to be — by those who first conceived the notion of such an 'Imperial law School' a comprehensive treasure house of legal material (6), kept it sufficiently dusty as to put off other than the most intrepid legal explorer. As such an explorer in the old building in Russell Square, which largely survived the bombs of the second world war — perhaps because of its proximity to Hitler's anticipated headquarters (7), I have fond memories to unearthing gems of often obscure legal provisions from the most exotic sources — most of which appeared to have been untouched since they were first laid down!

Insiders here and there!

My initial attempt at comparative work was built upon my first doctoral dissertation (8) on the law relating to the misuse of privileged information for investment purposes — insider trading. The result was a mammoth volume in which there is a more — or often — given that almost every country is included, a rather less informed, analysis of the relevant law and the institutions that administered it (9). I was privileged with the aid of a very dedicated and well connected literary agent to persuade Macmillan to publish this work — co- authored by an Australian lawyer – Mr Leigh Ffrench (10), a decision which I am sure they regretted as soon as they saw the sales return. The topic was before its time! Indeed, I am currently attempting to persuade one of my publishers to delay publication of the fourth edition of a book on the same subject until things become a little clearer after BREXIT. Timing is everything in the market! I learnt three things from the production of this 'magnus opus'. Firstly, there is great difficulty in researching, let alone writing cogently on a developing area of law which runs across so many areas of law — civil, criminal, regulatory, fiscal, etc. Secondly, when

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(6) See B. Rider, *Law at the Centre*, (1999), Chs 1 and 2 and see generally, J. Cairns, "Development of Comparative Law in Great Britain," in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (2007).

(7) There is anecdotal evidence that the imposing Senate House had been 'earmarked' as a suitable headquarters. It has featured in a number of films in a 'similar' capacity!

(8) B. Rider, *The Regulation of Insider Trading - a comparative analysis* (1976) 3 vols, University of London. See also B. Rider, "One aspect of the unacceptable face of Capitalism; The Crime of being something big in the City," (1975) *Obiter* 9.

(9) B. Rider and H.L. French, *The Regulation of Insider Trading* (1979).

(10) Mr Leigh Ffrench, then a lecturer at the University of New South Wales had been writing a Master's dissertation for the University of Sydney on the law relating to insider dealing in Australia. Leigh later became a professor of law in several Australian universities and an adviser to the Commonwealth government.

looking at conduct and intervention in the markets and the wider economy, then it is vital to be catholic in one's perception of law and its institutions. Thirdly and perhaps most importantly, no one then and not many more today, appear to be very interested in the law of insider dealing! (11)

Taking advantage of information obtained by virtue of a special position to afford an asymmetrical opportunity in an investment transaction should be of concern to those who are responsible for protecting and advancing our economies (12). Whether we can demonstrate empirically or not actual harm to the operation of supply and demand and the consequential pricing of securities, it is strongly arguable that those who look to the markets as fair determinants of value - and thus, hopefully price, will consider exposed and suspected insider dealing as undermining their confidence in the proper and fair operation of these mechanisms (13). Do people want to invest in markets that they consider to be unfair? Indeed, one of the earliest examples of the criminal law intervening in such circumstances, albeit for manipulative conduct can be found in the ancient common laws of forestalling, regrating and ingrossing. That such an appreciation of the need to protect markets is as important today as it was in pre-Norman England, is manifest in the use today of offences based on similar notions to address the manipulation of LIBOR rates in the City of London (14). This underlines the virtue of not only a comparative approach, but also one that has the potential to take a historical perspective. Indeed, arguments that such provisions might have purchase in cases of traditional insider dealing in the UK have been made on the basis of developments in Israeli and Hong Kong law (15).

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(11) See B. Rider, "The Control of Insider Trading – smoke and mirrors!" 1 *International and Comparative Corporate Law Journal* (1999) 271 and B. Rider, "Insider trading – a Crime of your Time?" (1989) *Current Developments in Banking and Finance Law, Current Legal Problems Series*.

(12) See B. Rider with H.L. Ffrench, "Should Insider Trading be regulated – Some initial considerations," (1978) 95 *South African Law Journal* 79, B. Rider, "Insider Dealing in Great Britain." (1982) *Revista delle Societa* 1207 and B. Rider, "Insider Trading – A Question of Confidence," (1980) 77 Law Society Gazette 113, *L'arrivita di repressione dell insider trading in Grand Bretagnia in L Insider Trading* (1992) (C. Rabitti Ed) and in particular, J. Anderson, *Insider Trading, Law, Ethics and Reform* (2018) Cambridge.

(13) See chapter 1 B. Rider, K. Alexander, S. Bazley and J. Bryant, *Market Abuse and Insider Dealing*, (3rd ed.) Bloomsbury (4th edition in preparation).

(14) See supra at 13 at ch 6 and in *R v. de Berenger* (1814) 3 M & S67.

(15) See B. Rider, "The Regulation of Insider Trading in Hong Kong" (1975) 17 *Malaya Law Review* 310, continued 18 *Malaya Law Review* 157 and B. Rider, "The Crime of Insider Trading," (1978) *Journal of Business Law* 19.

With the opening of the Chinese economy and the Chinese Communist Party's paradoxical concerns about market integrity (16) and especially the misuse of privileged and in particular advance information in investment, it is interesting to remember that one of the earliest attempts to legislate against officials taking advantage of such information, was by the Nanking Government in 1921 (17). The perceived efficacy of legal systems to impede the misuse of inside information and create what might appear as a more level playing field for investors has turned out to be an acid test in many countries in assessing the competence and reliability of the whole financial regulatory system (18). Indeed, there are many examples around the world where a perceived failure to inhibit insider abuse and bring elite offenders to justice has resulted in the re-structuring of regulation and the demise of supervisory and regulatory agencies (19). The IMF has even sponsored the development of model laws and enforcement policies (20).

It was looking at the rather curious approach of CONSOB — the financial regulator in Italy and the emphasis that was placed on promoting transparency in an otherwise relatively opaque environment that led me to an interest in the substantive Italian law (21)

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(16) See B. Rider, *International Financial Crime – China* (2013) China Finance Publishing House (translation by Li Hong Xing and Yan Haitung).

(17) B. Rider, "Policing Corruption and economic crime – how can we do it better? *Frontiers of Law in China* (2015) Renmin University, China.

(18) See for example B. Rider "Policing the international financial markets: An English Perspective" (1990), XVI *Brooklyn Journal of International Law* 179 and with H.L. Ffrench, "The Regulation of Insider Trading in Corporate Securities in France," (1977) 26 *International and Comparative Law Quarterly* 619 and supra at note 12.

(19) B. Rider with E. Hew, "The Regulation of corporation and securities laws in Britain – The beginning of the real debate," (1977) 19 *Malay Law Review* 144; B. Rider, "The Regulation of Insider Trading in the Republic of The Philippines" (1977) 19 *Malaya Law Review* 355, republished in the Philippine Law Journal; B. Rider with E. Hew, "The structure of regulation and supervision in the field of corporation and securities laws in Britain," (1977) *Revue de la Banque* 83 and B. Rider, "The British Council for the Securities Industry," (1978) *Revue de la Banque* 303; B. Rider, "The regulation of Insider trading in the Republic of South Africa," (1977) 94 *South African Law Journal* 437; B. Rider, Abuse of Inside Information (1977) 127 *New Law Journal* 825 and see material at note 15 and B. Rider, "Insider Trading – Hong Kong Style," (1978) 128 *New Law Journal* 897.

(20) B. Rider, *The Control of Insider Dealing - A Model Law* (2000), IMF see also B. Rider, Blindman's Bluff – A Model for Securities Regulation (pp 351 to 393) in *Emerging Financial Markets; The Role of International Financial Organizations* (1996) Kluwer (J. Norton and M. Andenas Eds).

(21) B. Rider, "Securities Regulation in Italy," (1978) 128 *New Law Journal* 135.

and a deep and lasting friendship with one of the world's great comparative lawyers — Professor Giovanni Cruscuoli (22). The way Italian law and practice has addressed important and complicated issues in the financial and commercial sectors have provided instruction to the rest of the world. For example, the development of a corpus of law which allows the effective interdiction of assets associated with suspected criminal organizations and their sequestration has attracted attention of scholars and legislators across the globe. Over the years as someone who rather more as a practitioner than academic commentator, has been concerned with the dark side of business, I have often sort inspiration from the Italian law and in particular its judiciary. In addressing the insidious threat of organized crime Italy has had more experience than most and has long recognized the importance of fostering non-traditional and often controversial initiatives. These have been followed by other jurisdictions and have had an impact in shaping not only international law, such as in the Palermo Convention against Trans-national Organized Crime, but also, and perhaps more importantly, the regime of soft international law that today impacts on us all (23).

Making sure crime does not pay?

While there are many mechanism for sharing experience in private law, in the case of criminal law and in particular areas where there is a mixed application of criminal, civil and administrative — there are a limited number of institutions wit6h competence outside of government. Arguably as a result of this disengagement by academic lawyers and even practitioners, it is in this area where often the stakes for society are very

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(22) See B. Rider, A Gentlemen and a Scholar – Professor Ricordo di Giovanni Criscuoli, in *Modernita del Pensiero Giuridico di G. Cruscuoli* (2015), University of Palermo (A. Miranda ed.).

(23) See generally B. Rider and T.M. Ashe, *Money Laundering Control* (1996), Sweet & Maxwell; B. Rider, The crusade against money laundering (pps 673 to9 681) in *Politica Criminal Derechos Humanos Y sistemas Juridicos en el Siglo* XX1 (2001) Depalma; B. Rider, Probing Probity – A Discourse on the Darkside of Development (pps 607 to 639) in *Liber Amicorium, Ibrahim Shihata* (2001) Kluwer, (S. Schlemmer-Schulte and K.Y. Tung eds), B. Rider, The Financial war on Terrorism (pps 34 to 61) in *Combating the Financing of Terrorism* (2003) *Centre for International Security Policy*, Switzerland/NATO; B. Rider The war on Terror and Crime and the Offshore Centres: The New Perspective (pp. 97 to 125) in *Global Financial Crime* (2004) Ashgate (D. Masciandro ed.); B. Rider, Old Weapons for New Battles – the Role of Stewardship in the Development of the Common Law in its fight against Corruption and Self-Dealing (pp. 33 to 71) in *Centre of Anti-Corruption Studies* (2009) ICAC, Hong Kong and B. Rider, Corruption the Sharp End of Governance (pp. 1 to 46) in Risky *Business – Perspectives on Corporate Misconduct* (2010) Caribbean Law Publishing (S. Ali ed) and material at note 17.

high, that there is so limited analysis and penetrating understanding of the law. It is easy to say that this is because from one perspective — perhaps mainly that of the common lawyer — there is no real money in it, and from that of the civilian lawyer, it crosses too many definitional redlines. However, to leave the development of the law and its administration simply in the hands of pragmatic government lawyers — who almost inevitably see things from a defined and perhaps overly focused perspective, results in areas of great uncertainty and therefore legal and regulatory risk. Let me take by way of example the law relating to criminal property. When the Americans realized that almost whatever they did in their war against drugs had little result in the homeland, they devised strategies which facilitated — at least in theory, the identification of property associated with the illicit drugs trade and enabled them — through very interesting legal inventions based on admiralty law fostered during the war of independence against Britain, to seize and forfeit property associated with criminal drug dealing.

Of course, it was necessary now that thinking enterprise criminals has a real incentive to hide their wealth - not simply from the taxman and other competing criminals, but from law enforcement and the courts, to enact laws discouraging money laundering. Inevitably — these had to apply to people and institutions that minded in the ordinary course of business, other people's wealth. It created the risk of criminalizing the conduct of those who had hitherto facilitated the financial transactions of suspected criminals with impunity and perhaps thereby stabilizing and expanding the financial base of their general activities. Such was the logical imperative of all this and the ease with which politicians could transfer and lay off responsibility on others — such as privileged bankers — no doubt to the satisfaction of the rest of society, that this approach has over the years been widened beyond the proceeds of drug trafficking to almost everything we don't like — including the imposition of sanctions for largely political reasons. There was little if no thought given to a host of issues that all this could give rise to — perhaps not surprisingly given the pressing political agenda — short term as always, the high moral imperative that crime should not pay, and the fact that government lawyers tend to be exclusively from the public side of law and don't really know much about how business let alone finance works. So little if no thought was given to how once suspect wealth could be de-stigmatized and re-habilitated to the lawful economy. Without some theory enabling the determination that suspect wealth, that may conceivably have been associated with crime or terror or one of Mr Putin's friends, is not really a threat to anyone, as President Clinton once recognized we are in danger of criminalizing the world economy. Sadly we have no principle other than it may be just too hard to prove the nexus, enabling us to regard property

that is in the hands of re-habilitated terrorists — some of whom are now in government, no longer tainted, let alone more generalised suspect wealth. This is a real issue for stability, inclusion and sustainable development. Indeed, the problem becomes all the more serious when we utilise in our new war against corruption much wider concepts such as political exposed persons and throw a net of suspicion over all who occupy positions of influence and who hold wealth the provenance of which is not obvious (24).

Our reluctance to consider issues in context and to take account of the experience of others is at best discourteous and at worst disruptive. Given the importance of cash in street drugs transactions and the measures that have been placed on banks and other financial institutions to generate financial intelligence, cash is considered to be a problem. The fact that many peoples throughout the world rely on carrying substantial amounts of cash or because of lack of access to developed banking systems or are for whatever reason excluded, is given little account in these laws and the manner of their administration. This has resulted in tension between, for example China with a number of its citizens being subjected to seizure of cash and worse. The assumption that all developing countries can implement and administer regimes that ensure the same levels of identification of bank customers and users as in the West is unrealistic and discriminatory. Even more controversial assumption, reinforced by soft international law, that all financial institutions should be capable of subjecting their customers and their transactions to the same exacting level of due diligence. The inability of the institutions or some countries — mostly developing, to achieve this has led through what is euphemistically referred to as de-risking, to their economic isolation. Sadly even when we seek to better understand the legal and regulatory experiences of others, rarely do we bother to consider those of the disadvantaged and weak. If we do, it tends to be rather more to do with an anthropological interest in quaint customs than the realities of today. Indeed, not withstanding that it is in developing countries where perhaps the most is to be got from examining the substantive laws of others in achieving the best solution in legislation, they are poorly served by the comparative law scholarship - albeit with a few notable exceptions.

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(24) Note in particular the provisions in the Criminal Finances Act 2017 in the UK in regard to unexplained wealth orders. See B. Rider, "Unexplained Wealth," 22 *Journal of Money Laundering Control* (2019) 2 and also B. Rider, *Report to the Russian Academy of Sciences – promoting integrity through development*, 2017.

Context and collateral issues

In common law jurisdictions in particular because of the operation of fiduciary law a number of other issues arise (25). For example, the position of a person who receives property in circumstances where they suspect it has been transferred in breach of a fiduciary obligation or is the result of a breach of fiduciary duty can be highly problematic (26). As they might well find themselves in a position of a putative constructive trustee — they will have a duty to inform and protect the original owner — usually the victim of the fraud or other breach of fiduciary duty. How this sits with the obligations imposed by the criminal law not to tip off or alert others to an impending official investigation is unclear and could result in liability for banks and other intermediaries (27). Of course, in the case of criminal and regulatory interventions one might assume or at least hope that the authorities will behave reasonably and sensibly, albeit no such assurance pertains to private litigants. The treat to financial institutions and intermediaries and many others — including lawyers in private practice is real and unresolved.

Indeed, in so far as most today recognise that depriving criminals of their ill-gotten gains in most countries just does not work — at least through the traditional criminal justice system, the emphasis in law enforcement has moved away from the investigation

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(25) See generally, B. Rider and T.M. Ashe, *The Fiduciary, the Insider and the Conflict*, (1995) Sweet & Maxwell.

(26) Note in particular *Sinclair Investments (UK) Ltd v. Vesailles Trade Finance Ltd* [2011] EWCA Civ 347 developed in *FHR European Ventures LLP v. Cedar Capital Partners LLC* [2014] UKSC 45 discussed B. Rider, Comment, 29 *Journal of Financial Crime* (2012) 325 and 21 *Journal of Financial Crime* (2014) 379. For a wider discussion see *supra* at note 13 at 14.6 and B. Rider, Pursing Corruption the use of the civil law, in *Legal Studies in a Global Era – Legal Issues Beyond the Boarders* (2011) Chuo University (Japan); B. Rider, "The Wages of Sin – Taking the Profit Out of Corruption – A British Perspective," (1995) 13 *Dickinson Journal of International Law*, 391; B. Rider, "International Money Laundering – Developments in the Role of the Civil Law in Money Laundering Control," (1995) *Private Client Business* and B. Rider, "The Limits of the Law: An Analysis of the Inter-relationship of the Criminal and Civil Law in the Control of Money Laundering," 2 *Journal of Money Laundering Control* (1999) 209 (also published as an inaugural address by the University of the Free State, in 25 *Journal for Juridical Sciences* (2000)1 and in *The Practising Criminologist* (1999) 25; B. Rider, "The Crusade Against Money Laundering – Time to Think," 1 *European Journal of Law Reform* (1999) 501 and B. Rider, "The Price of Probity," 7 *Journal of Financial Crime* (1999). 1

(27) See for example, *Bank of Scotland* v. A [2001] EWCA Civ 52 and see B. Rider, Research Handbook on International Financial Crime (2016), Elgar at p. 741. See also B. Rider, "A Careful Path" 25 *Journal of Financial Crime* (2018) 246.

and prosecution of crime to one of disruption. Agents of the legal system — including the tax and regulatory authorities — some of which have been given specific criminal justice responsibilities, are charged with intervening in circumstances to disrupt and impede the operations of those engaged in crime and terror. In doing so they may use any weapon in the legal and regulatory environment or for that matter in some cases outside the legal system. The lack of accountability — particularly to the courts and risk to human rights and liberties is clear. None the less in my own country this has become the prime strategy in addressing the risk of organised crime and terrorism. Virtually no discussion has taken place in the academy as to the implications of all this. The legal and regulatory uncertainty that is thrown up for those who mind other people's wealth is profound. There are numerous other examples of our reluctance to engage in the analysis of difficult legal issues particularly where a particular strategy has been seized upon by the developed world and its acceptance and implementation been made a pre-condition to access to the West's financial system, as it has in regard to the interdiction of suspect and subversive wealth.

Where emphasis in any system is placed on extra-legal interventions whether ordained by law or not, attempting comparative analysis becomes all the more difficult and perhaps of questionable value. For example, until relatively recently the financial services sector in the UK was in substance not regulated by law. While there are very early examples of statutory intervention (28) in more recent times the emphasis was almost wholly on the prevention of fraud (29). Before the Financial Services Act 1986 (30) the City of London in which the vast majority of financial and banking activity took place, was subjected to self-regulatory mechanisms (31). In many respects these worked well (32). Indeed, there were serious suggestions in other jurisdictions such as Hong

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(28) For example in 1697, an Act to restrain the number and ill practices of Brokers and Stock-jobbers was enacted. See generally, B. Rider, C. Abrams and M. Ashe, *Guide to Financial Services Regulation* (1989) CCH, Ch 1.

(29) The Prevention of Fraud Investment Act 1958, see *supra at note* 13 for a discussion of the new provisions in the Financial Services Act 2012.

(30) See B. Rider, D. Chaikin and C. Abrams, *Guide to the Financial Services Act 1986* (1987 and 1989).

(31) See B. Rider, *The Regulation of the British Securities Industry* (1979) Oyez and B. Rider with E. Hew, "The Regulation of corporation and securities laws in Britain – The beginning of the real debate," (1977) 19 *Malay Law Review* 144.

(32) The City Code on Takeovers and Mergers was considered a success – see B. Rider, "Self-regulation: The British approach to policing conduct in the securities business with particular

Kong (33) and even Australia (34), that they should be mirrored as a practical and better alterative to substantive law. In reality such suggestions were nonsense as to understand how self-regulation worked in the City of London it was absolutely necessary to place the UK's financial system in context. In particular, factors such as the very close proximity within which most activity occurred — the so called Square Mile, the degree of homogeneity within management — and not to ignore the English class system, and perhaps most importantly the segregation of a essentially domestic market from exposure to foreign players, with perhaps different standards, as a result of exchange control regulations (35). It was the changes in many of these and other factors which convinced government that statutory intervention was necessary - initially simply in regard to policing insider dealing (36).

Now there is comprehensive law (37) — albeit the bulk of actual regulation remains in the realm of regulations and guidance promulgated by the financial regulators and of great significance pervasive tier of compliance. The vital significance of compliance structures and procedures in the financial world cannot be over-stated. It is far more signif-

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reference to the role of the City Panel on Takeovers and Mergers in the regulation of insider trading," (1978) 1 *Journal of Comparative Corporate Law and Securities Regulation* 319 (also published as an occasional paper by the City Panel on Takeovers and Mergers/Bank of England) and B. Rider with E. Hew, "The role of the City panel on Take-overs and Mergers in the regulation of insider trading in Britain," (1978) 20 *Malaya Law Review* 315.

(33) B. Rider, "The Regulation of Insider Trading in Hong Kong," (1975) 17 *Malaya Law Review* 310, continued 18 *Malaya Law Review* 157, republished in book; B. Rider, "Insider Trading – Hong Kong Style," (1978) 128 *New Law Journal* 897 and see B. Rider, *Report on Commercial Crime in Hong Kong with recommendations for the establishment of a Commercial Crime Unit within the Legal Department of the Hong Kong Government and the creation of a specialized unit within the Royal Hong Kong Police Force* (1980), pp. 320. Submitted to the Attorney General of Hong Kong (leading to the establishment of a serious fraud office in Hong Kong, which influenced the establishment of similar units elsewhere) and B. Rider, *Report to the Government of Hong Kong on the Structure and Effectiveness of regulation of and supervision over the financial markets in Hong Kong* (1980), pp. 65, submitted to the Financial Secretary (leading to the re-organization of the Office of the Commissioner of Securities).

(34) *Report of the Senate Select Committee on Securities and Exchange, Australian Securities Markets and their Regulation* (1974) Commonwealth of Australia.

(35) B. Rider, "Policing the City – Combating Fraud and other Abuses in the Corporate Securities Industry," (1988) 41 *Current Legal Problems* 47.

(36) See B. Rider, *Insider Trading* (1980) Jordans and B. Rider and M. *Ashe*, *Insider Crime, the New Law* (1993) Jordans.

(37) The Financial Services and Markets Act 2000 as amended.

icant in controlling conduct than the substantive law. While generally it exists in the realm of contract law — often through employment, there is a tendency for substantive laws to require — by way of a defence, that suitable and adequate procedures have been put in place on a risk based assessment (38). In the modern world it would be impossible to achieve any real understanding of the way in which the law operated in the financial sector without taking full account of these systems. Consequently, attempts to transplant and particular express in conventional law such mechanisms have resulted in real issues in places such as China and the Gulf. If added emphasis is needed in comparative law studies to the importance of a contextual and institutional approach this clearly makes the case.

A related issue is the extent to which laws that have been designed to address a specific and often pressing public issue impact on other laws and regulations and especially the way that business is carried out. For example, the obligation now enshrined, through the operation of soft international law, in all legal systems to require in certain circumstances those who handle other people's wealth to engage in due diligence so that they really do know who they are dealing with and often the character of the transactions, has impacted on the way in which financial and other business is carried out. It is not now acceptable for agents and intermediaries to claim that they are acting for an undisclosed (possibly unknown) principal. Benami transactions in India are largely a thing of the past, as are secret bank accounts and trusts (39). It is also the case that the more4 an intermediary knows about the circumstances of a particular client the more likely a duty of care will be found that is suitable to the situation of

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(38) For example, a defence is provided in section 7 of the Bribery Act 2010 where a business in the UK can show that not with standing one of its agents has paid a bribe to a public official anywhere in the world for the benefit of its business, it had in place adequate procedures designed to address and prevent this risk. There are new similar provisions in the Criminal Finances Act 2017 in regard to businesses assisting those engaged in tax fraud. There are suggestions that this approach should be extended generally to the offence of money laundering which would have very wide implications.

(39) Of course, none of this sits well with informal systems of moving and storing wealth such as the hawallah and Chinese systems, see B. Rider, "Fei Ch'ien Laundries - The Pursuit of Flying Money," 1 *Journal on International Financial Planning* (1992) August and December and *Focus on Money Laundering and Asset Forfeiture* (1994) No. 3 and B. Rider, *Organized Crime in Hong Kong*, *Focus on Money Laundering and Asset Forfeiture* (1993); B. Rider, "Organized Economic Crime" (In Chinese) (1999), *Peking University Law Journal*, 1-128; B. Rider, "The Practical and Legal Aspects of Interdicting the Flow of Dirty Money," 3 *Journal of Financial Crime* (1996) 234, see also in regard to corruption B. Rider, 'New and Not so new strategies in fighting financial crime" 3 *Journal of Law, Governance and Society* (2018) 1.

that client and their expectations. We have already touched upon the profound reallocation of legal and regulatory risk that laws relating to money laundering have had on financial institutions. They are now cast in the role of the first line of defence in combating the financial aspects of serious crime and terror. We have placed the primary obligation on our banks, for example, to provide us with the information that can become intelligence upon which our ability to disrupt criminal and subversive organisations depends. The draconian penalties that have been imposed on those who mind our money in recent years — particularly in the USA and UK, are testament to the reality of these responsibilities. Although the result of this 'encouragement' to assist in the fight against serious crime and abuse might in the eyes of society be to effectively criminalise our financial institutions and undermine the reputation of our financial systems, it should be remembered that in the majority of cases these penalties are imposed by regulators, often without the involvement of traditional courts, not for culpable misconduct, but failures of compliance. Whether we are in danger of 'throwing the baby out with the bath water' is a moot point! There is certainly an issue of proportionality.

Of Fiduciaries

Another issue of relevance which is equally problematic for the business and financial community, is how to properly protect financial intermediaries with numerous clients who may have varied and possibly conflicting expectations (40). Where the institution is multi-functional and comes into a fiduciary relationship, which in many parts of the world is today rather more likely (41), how are such real or apparent conflicts prioritized let alone resolved? Traditionally in the common law we have utilised the principle of segregation. Often the procedures that are put in place to create de facto segregation of function are referred to as a Chinese wall. However, even effective segregation — which

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(40) B. Rider, "The Fiduciary and the Frying Pan," (1978) *The Conveyancer* 114 and Letter to the Editor (1979) *The Conveyancer* 308 and see generally material at note 13 and B. Rider, Conflicts of Interest – an English Problem (pp 149 to 164) in *European Securities Markets – The Investment Services Directive and beyond* (1998) Kluwer (G. Ferrarini Ed.).

(41) The Dodds-Frank Act in the USA which was introduced after the sub-prime crisis imposes fiduciary standards across the US financial services industry. Other countries have introduced trust into their law by stature and while most have not imported fiduciary obligations beyond the trust, other legislation adopts what appear to be fiduciary standards - for example the obligations of directors under Chinese company law, see for example the discussion in B. Rider, "Policing Corruption and economic crime – how can we do it better? *Frontiers of Law in China* (2015) Renmin University, China.

in practice is very hard to achieve, only addresses the risks associated with the flow of information. It does not address the essential conflict of interest that the intermediary has stepped into. Given the profound implications that these legal risks have for the way in which we do business and the stability of economic actors it is perhaps strange that so little discussion has taken place in legal and regulatory circles. The relatively few cases that have come before the courts have doubted the efficacy of Chinese walls (42). A number have involved law firms where arguably the standard should be higher — justice needing to be seen rather than simply asserted (43). However, there are those who suspect that one of the reasons that so few cases have actually been decided and almost none in the financial sector, is that lawyers operating in this area, deliberately impede and undermine the development of the law. They — no doubt for the benefit of the banks and other institutions, possibly with the connivance of government, deliberately close down through early settlement and other ways, complaints so as not to embarrass or put a more compelling question mark against the way in which we do business (44). Consequently, there may be more sinister — albeit perhaps in the public good defensible reasons, why meaningful work has not been encouraged in the academy and elsewhere in relation to these and other such issues. It is the case that in my own jurisdiction those who dwell on such issues are not accorded the cosy relationships with the leading firms and profession - that result in respect, research funds and perhaps most importantly access to information! Indeed, there are probably fewer academicians working on such issues today in the UK than there have ever been. At the end of the day the lawyers with the power, money and connections are concerned with transactions not, sadly, integrity!

The Glorious Shariah!

Another area where the present author has encountered sensitivity is in regard to Islamic law. Perhaps predictably in one of the few remaining structures of natural law with all its trimmings, Islamic scholars are cautious about any suggestion that the tradi-

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(42) See *Prince Jefri Bolkiah* v. KPMG [1999] 2 AC 222 and in particular the Australian decision in *ASIC v. Citigroup Global Markets Australia Pty* Ltd [2007] FCA 963 and book cited at note 14 at 8.16 et seq.

(43) See for example, *Supasave Retail* v. Coward Chance [1991] Ch 259 and B. Rider at note 40, *supra*.

(44) The Law Commission for England and Wales has recognized the need to primary legislation to address the problems associated with Chinese Walls, but this has not found favor with the financial sector. See generally the discussion in B. Rider at note 13.

tional interpretation or application of a principle is less than sacrosanct (45). That the Shariah is much more than a set of legal rules is manifest (46). However, in more recent years with the wish, in many quarters — including beyond the Muslim world, to see the development or rather recognition of a set of predictable rules which can be utilised to facilitate essentially financial transactions which comply with Shariah, the potential for controversy has increased. Non-Islamic courts, particularly in the common law world have generally proved relatively unsympathetic to the utilisation, other than as a cosmetic, of Islamic principles to hard commerce and finance (47). None the less, even in the Islamic world, there have been examples of caution and even diffidence. The limitations of a structure of principles ordained and sanctified in the manner of Islam, in enabling the construction and operation of a financial system that can reasonably meet modern day expectations and interface with other non-Shariah structures are obvious and potentially controversial (48).

Within the more conservative dimensions of Islamic scholarship, there is a reluctance to accept the implications that uncertainty in the efficacy of the application of a principle can have for the viability let alone vitality of Islamic finance. Comparative analysis is not always appreciated and frankly, is about as compelling in an Islamic 'tribunal' as it would have been to a Roman questor! There are those who given the essential personal obligations of a believer dispute the acceptability in Islamic law of any notion of corporate responsibility and operation. It is possible, given the great ingenuity that scholars have shown over the years, to construct transactions that while affording acceptable levels of mutual financial interest and motivation avoid the taking of interest (riba). However, some have emphasised the analysis of substance over form and struck

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(45) B. Rider, *Islamic Financial Institutions and Services – Resilience and Stewardship* (2009) (pp. 46) Gulf Co-operation Council, Meeting of Governors of Central Banks, Bahrain; B. Rider, *Part V. The Role of Law and Regulation in the Development of Sound and Stable Islamic Financial* Markets (pp. 170) in *The Development of Prudential and Supervision Standards for Islamic Financial Markets* (2011) Commissioned by the Asian Development Bank in collaboration with the IFSB.

(46) See for example the statement of Lord President Salleh Abbas in *Che Omar bin Che Soh v. Director of Public Prosecutions* (1998) 2 MLJ 55.

(47) For example, *Shamil Bank of Bahrain EC v. Beximco* [2004] 4 All ER 1072.

(48) B. Rider, Corporate Governance and Supervision - Basle Pillar 2 (pps. 293 to 310, co-authored with C. Nakajima) in *Islamic Finance – The Regulatory Challenge* (2007) Wiley (S. Archer and R. Karim eds). See also the Changing landscape of Islamic Finance - Imminent Challenges and Future Directions (2010) IFSB and in particular B. Rider in ch 5, "Islamic Financial Law: Back to Basics".

down attempts to structure transactions artificially (49). The implications for the whole of a transaction or series of related transactions where one small part is tainted by a harim aspect, is highly questionable outside the more pragmatic approaches found in Malaysia (50). The reluctance of traditional scholars to countenance any concept of proportionality or purification has threatened major business developments (51). Uncertainty as to the efficacy of asserting what has been described by more pragmatic scholars as 'necessity' as a justification for more minor infractions complicates issues. The standing of transactions that depend on digital documentation has been questioned as have those lacking synchronisation. It is more certain that speculative and non-contemporaneous, that is future, transactions are unacceptable. Those that smack of gambling (masir) or which violate the ethically commendable — but wide prohibitions of Islam are also shunned. The lack of any meaningful notion of jurisdiction (other than personal) — complicates issues. Indeed, what are, in any predictable and enforceable context, the 'legal' consequences of a violation of the Shariah, where criminal sanctions are inappropriate? The obligations of a believer are essentially personal and many not manifest themselves in a recognizable and, from a purely legalistic perspective, justicable consequences.

Perhaps one further example — may be helpful. For a business to be accepted as Shariah compliant it is generally the case that its management must be answerable (whatever in practice this may mean) to a Shariah board — composed of suitably erudite, but not necessarily commercially experienced or knowledgeable, scholars. While having many virtues from the perspective of governance (52), uncertainty in Islamic law let alone the ordinary non-Islamic law as to the status and obligations of such persons should be of concern. Are such persons to be regarded as shadow directors of the company, are they insiders for the purpose of anti-insider dealing laws and what should they do if the managers disregard their advice? These and many other unanswered and frankly, in many cases unasked, questions create profound uncertainty. There are those who say, much like those in the City of London who confidently assert bankers would never take advantage of a conflict of interest, that such scholars are by definition men (and of course, only men!) of great integrity and responsibility and are accountable to their consciences.

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(49) Note, for example, the comments of Justice Datuk Wahab Patail in Arab-*Malaysian Finance Berhad v. Taman Ihsan Jaya Sdn Bhd* (2008) 5 MLJ 631.

(50) See generally *Strategies for the Development of Islamic Capital Markets - Infrastructure and Legal Aspects of Islamic Asset Securitization* (2011) IFSB and especially B. Rider in Ch 3.

(51) See *supra* at note 50 and B. Rider, "The call of profit" 28 The Company Lawyer (2007) 1.

(52) See *supra* at note 48.

They would never take advantage of knowing in advance what a company was going to do — on their advice, or use information obtained in servicing one business for another. While no doubt the vast majority of such persons are of the highest principle, it is debateable as to the extent that the Shariah, given its essentially mandated - agency-contractual stance — lacking intervening obligations of a fiduciary character, actually forbids or even discourages all such opportunities (53). Indeed, there were those who argued before the intervention of the criminal law under statute in the UK that it was quite proper to use inside information for the benefit of a client - in fact, it was the moral thing to do (54)! That there is the potential for real problems in Islamic finance is clear from that fact that not with standing the reluctance of many to accept this, the Malaysian have specifically addressed these concerns in legislation.

Going forward!

In the UK, USA, Japan and most other jurisdictions that are keen to foster Islamic finance, the regulators have emphasised that they consider adequate compliance with Shariah is a matter wholly for those businesses claiming that they are Islamic financial or other institutions. In Britain, the Financial Conduct Authority, for example, has stated that it will not concern itself with whether in fact there is Shariah compliance provided there is full compliance with the ordinary general law. While perhaps understandable given the diversity of interpretations that different schools of jurisprudence hold to, it is far from clear that this approach is lawful and acceptable. Disregarding the wider issues as to the rule of law, if investments and financial services are held out to investors as being Shariah compliant, this is a clear contractual undertaking or at least a representation — which must surely have legal consequences. Furthermore, It directly impacts on the fitness of those who run the business, not to mention its stability and solvency. It is not acceptable for regulators unfamiliar with the relevant principles to wash their hands of responsibility to properly enforce the law and protect investors and creditors.

We can see that there are many dynamic aspects to comparative law in the modern world. It is a matter of regret that so few established law schools — particularly in the

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(53) See B. Rider, Corporate Governance in Financial Institutions offering *Islamic Financial Services (45 pps) in Islamic Finance – Law and Practice* (C. Nethercott and D. Esienberg eds.) (2011) Oxford University Press (2nd edition in preparation).

(54) See G. Cooper and B. Cridlan, *The Law and Procedure of the Stock Exchange* (1971) Butterworths at p 104 and material cited at note 40.

common law tradition do not encourage its teaching as part of the required legal skills that should be expected of any lawyer. In my own country the relatively few opportunities for study at a graduate level are not well supported given the emphasis that is placed in allocating resources to under-graduate teaching. There are few opportunities for remunerated research and because of the lack of priority perhaps even respect for comparative study, exceptionally few tenured academic appointments. Compounding this poor state of affairs — at least in the English legal system, it is possible to perceive a degree of arrogance as to the value and vitality of the common law and its institutions — both judicial and arbitrational. Indeed, in Britain today we see both as important earners for our economy and as a means of reaching out internationally particularly to places such as China (55). Comparative law and its neighbour — conflict of laws, have always had more purchase in the United States given the diversity of home jurisdictions. While as we have argued, pragmatic concerns about trade tended to be more of an influence within the British Empire than the propagation of particular laws, there was a degree of standardisation and on the basis that the home legal system remained aloof, some interesting experimentation with codification. While there has been and remains a more or less vibrant interest in other people's law born perhaps more of an intellectualism rather than justified on the basis of finding good solutions, within the British judiciary (56) and especially at the appellate level, this is not so apparent elsewhere. In a post BREXIT Britain it is to be hoped that parochialism in the development of our law and its application is resisted particularly within the legal profession and academy. Sadly, one is not overly optimistic! Perhaps in confronting many of the highly sophisticated and specialised issues thrown up by technology and its application across the whole spectrum of modern life, we will need to look more to the fostering of entirely new concepts and perhaps principles — but in doing so with out regard to the experience we have had in the past — but perhaps forgotten and that of others around the world, we will be much the poorer.

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(53) See B. Rider, Corporate Governance in Financial Institutions offering *Islamic Financial Services (45 pps) in Islamic Finance – Law and Practice* (C. Nethercott and D. Esienberg eds.) (2011) Oxford University Press (2nd edition in preparation).

(54) See G. Cooper and B. Cridlan, *The Law and Procedure of the Stock Exchange* (1971) Butterworths at p 104 and material cited at note 40.

(55) B. Rider, *Great Britain China Centre, Report to the Foreign and Commonwealth Office (Prosperity Fund) on the Rule if law in China and legal co-operation*, 2017.

(56) See for example *White v. Jones* [1995] 2 AC 207.

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