IDEAS OF JUSTICE

Address to the Franco-British Society
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by

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Sir John Fretwell suggested that I might talk to you about the way in which the European Court of Justice, on which I sit, interacts with the British and French legal systems. The topic has two aspects: first, the differences between the British and French legal systems; and second, how they come together in the European Court and in the European Community generally.

I propose to say something about both aspects, and hope to do so in a way that is intelligible to laymen. But I must begin with a health warning. From a lawyer's point of view, nearly everything I say will be incomplete or inaccurate in some respect. But let the lawyers criticize. The law is not for lawyers only: it is part of the machinery of society. The differences between the French and British legal systems reflect different approaches to the process of justice as part of the machinery of society. Hence my title, "Ideas of Justice".

Gibbon said that the laws of a nation are the most instructive portion of its history. And Sibyl Bedford, in a book called "Faces of Justice", made a very interesting observation about the law and its connection with real life. She said:

"The law, the working of the law, the daily application of the law to people and situations is an essential element in a country's life. It runs through everything: it is part of the pattern like the architecture and the art and the look of the cultivated countryside. It shapes and expresses a country's mode of thought, its political concepts and realities, its conduct. It enlists it in the corridors of public offices, one sees it in the faces of the customs officers. It all hangs together whether people like it or not and, the whole is a piece of the world we live in."

The idea that the law is something that different people want to do is important. In the early nineteenth century the introduction to Scotland of jury trial in civil cases was hotly opposed by Sir Walter Scott. He thought it was "founded on what he should venture to call Anglophobia - a rage of imitating English forms and practices, similar to what prevailed in France about the time of the Revolution, respecting manners and dress. We may very effectually destroy our own integrity of judicial systems; but we can no more make it the English law than a Highlander could make himself an Englishman, by wearing boots, a dark great coat, and a round hat instead of a caped one."

In the event, the reforms that Walter Scott opposed were adopted. And British legal procedure became very much an English procedure, at least in the sense that the Scots and the English now share most of the same basic assumptions about how the legal systems ought to work. They are assumptions which we do not share with the French. Since those assumptions are essentially English in origin, I will from now on talk about the English, rather than the British, legal system.

All of those broad generalisations have a grain of truth, except the last. But all of them are, in some degree, seriously misleading.

In order to understand what the differences really are, imagine you are in a courtroom anywhere in England. What do you see in your mind's eye? A judge on the bench - a single judge, sitting alone. Advocates at the bar below, sitting side by side on the same level. A witness in the witness box. How do you imagine that? Only: it is part of the machinery of society. The differences between the French and British legal systems reflect different approaches to the process of justice as part of the machinery of society. Hence my title, "Ideas of Justice".

What you have been watching is "a trial" - a form of legal procedure stemming from a time when nearly all civil and criminal cases were tried by jury. You cannot hear one witness today, two witnesses tomorrow, and three more the week after next. Nor can you expect the judge to read large quantities of written material. Both the evidence and the arguments must be presented orally.

The second defining characteristic of the English system concerns the status and function of judges. Under our system judges are treated as individuals, in the sense that they give personal judgments, attributed to them under their own name. In the appeal courts, the judge who disagrees with the majority can write a dissenting judgment.

Nevertheless, the judges collectively "embODY the law". Hence the doctrine of precedent which requires judges to "follow", not only the judgments of higher courts, but also those of judges of same rank in the judicial hierarchy. So the law is built up, case by case, each precedent...
being "binding" on judges of the same or lower rank.

That doctrine has now been substantially watered down, but it remains a defining characteristic of the common law system which differentiates it from others.

The third defining characteristic is that everyone is subject to the same law, declared and administered by the same judges in the same courts. That was the essence of what Dicey, the great English constitutional lawyer, called "the Rule of Law". In particular, there is no difference between the law applying to disputes between citizens ("private law") and the law applying to disputes between citizens and the organs of the state ("public law" or "administrative law").

That doctrine, too, has been substantially watered down, and there are now many "administrative tribunals" - industrial tribunals, social security tribunals, tax tribunals, and so on - outside the structure of the ordinary courts. But there is usually the possibility of an appeal from these tribunals to the ordinary courts, and "judicial review" of the administrative acts of ministers and civil servants is still conducted by the judges of the Queen's Bench Division who also try criminal cases and civil disputes between individual citizens. Her Majesty's Judges are a branch of government albeit, in Britain, the weakest branch...but that is not necessarily so in other countries of the common law world.

I have identified what I have called the three identifying characteristics of the English legal system: the trial: the status and function of judges; and the idea that everyone is subject to the same law administered by the same judges.

The French approach has been fundamentally different from the time of Revolution on. Ironically, the leaders of the Revolution were initially inspired by admiration for the English system. It was not only in manners and dress that they were infected by Anglomania. They set about eradicating the abuses of the Ancien Régime inspired by Montesquieu's Esprit des Lois, which had (misleadingly) identified the "Separation of Powers" as a defining characteristic of the British constitution - an idea which, incidentally, also inspired the American revolutionaries.

Pursuing their admiration for the English system, the French revolutionaries set about the abolition of the inquisitorial system of criminal procedure and establishing a clear separation between the functions of the legislature, the executive and the judiciary.

To the French, the "inquisitorial system" means the oppressive kind of criminal procedure that was in operation before the Revolution. It was a procedure that was secret, written, gave the defendant no rights worth having, and where the functions of judging and inquiring were inextricably confused.

The first stage in that procedure was that the witnesses were interrogated, in secret, by a judge. The defendant was then interrogated on the basis of what they had said. This interrogation was also done in private, and the defendant was neither told in advance of the case against him, nor allowed a lawyer to help him to meet it.

Where the defendant refused to confess, the judge, if he thought there was a strong prima facie case, could order the defendant to be tortured, to see if this would change his mind.

On the written record of the various interrogations the court - of which the investigating judge was a member - decided whether the suspect was innocent or guilty. If they pronounced him guilty, they could again order him to be tortured - this time to get him to reveal his accomplices (if any).

Torture was abolished in France by Louis XVI just before the Revolution, but an early act of the revolutionary government was to introduce trial by jury on the English model.

Let us become excessively smug, it is as well to remember that peine forte et dure (pressing to death for refusal to plead) was not abolished until 1772, and was last employed at Cambridge in 1741. Well into the nineteenth century, there were many capital offences and Blackstone, the great English jurist, praised the "pious perjury" by which juries undervalued stolen goods in order to place them below the value at which the death penalty would apply. That is perhaps an illustration of why the jury system was seen in France as an essential guarantee of liberty.

Not long after its introduction to France, jury trial became unpopular for two reasons: it failed to secure the conviction of the gangs of robbers and bandits with which France had become infested after the Revolution; and, perhaps not surprisingly since the two countries were at war, the French became dissatisfied with all things English. They hankered for the merits of the old system, notably its thoroughness and the existence of a full written record of what transpired.

This coincided with the major Napoleonic reforms - especially the Code Civil of 1803 (often known as the Code Napoleon, though Napoleon was responsible for other Codes too). The Code Civil incorporated some features of the Roman law but also many features of the old coutumes. The suggestion that it is "based on Roman law" is highly questionable.

Article 4 of that Code says

Le juge qui refusera de juger, sous prétexte de silence, de l'absence ou de l'inintelligence de la loi, pourra être poursuivi comme coupable de délit de justice.

Article 5 goes on to say

Il est dérivé par les juges de prononcer par voie de déposition générale et réglementaire sur les causes qui leur sont soumises.

The idea behind those provisions of the Code is that the Code is complete: it states all the law and replaces all previous statements of the law. The function of the judge is simply to apply the law as stated in the Code: to apply the text to the facts.

1808 saw the introduction of a new Code d'instruction criminelle (Code of Criminal Procedure) and 1810 the introduction of the new Code Pénal. These involved a reversion to an "inquisitorial" system, but not in the old sense. What was established was really a blend of the inquisitorial and adversarial approaches.

The functions of the magistrature were separated between the magistrature debutant, responsible for prosecution of crime, and the magistrature assise, responsible for judging. Serious crimes were to be investigated by a juge d'instruction, separate from the prosecutor. The evidence collected was to be recorded in writing and placed in the dossier. Only if the evidence collected in the dossier disclosed a prima facie case against the suspect would he be brought before a chambre d'accusation where judges of the magistrature assise would decide whether the case was sufficiently strong to go to "trial", either before three judges sitting alone or before three judges sitting with a jury.

It is because French procedure does not proceed to "trial" unless the dossier discloses a good case against the accused that embitters from the common law system suppose that the accused has to prove his innocence. But that is not the function of the trial which is, rather, to see whether, assuming the existence of a prima facie case, the judges, or judges and jury, can reach "intime conviction" of the guilt of the accused. As it is said, on juge l'homme, pas les faits.

So the trial will begin with interrogation of the accused by the presiding judge, including questions as to the previous convictions. The victim of the crime may be represented, ask questions and make submissions about guilt and sentence as partie civile. If the accused is found guilty and sentenced, application of the sentence will be supervised by the juge d'application de la peine.

The defining characteristics of this system are that "the judge" is, in fact, a number of magistrats, each performing a separate function in the system as a whole: that the whole procedure is subject from beginning to end to judicial supervision; and that the emphasis is, as under the
Ancien Régime, on writing. The system is "inquisitorial" in the sense that the magistrature collectively is responsible for investigation, judgment and sentence. It is not "adversarial" in the sense that the prosecutor in France is not an advocate fighting on the same level as counsel for the defence. But the procedure is not "inquisitorial" in the old sense: the accused is entitled to the presumption of innocence; and there are some respects in which the rights of the accused may be better protected than under the common law system.

The emphasis on writing is even more marked in civil procedure. The case is "pleaded" by an exchange of written mémoires, followed by a very brief procédure orale at which the advocates draw the judge's attention to the salient points of their case. If necessary, the judge will proceed to instruction, calling for documents or expert reports or calling witnesses for examination (by the judge, not by the advocates). Nevertheless, the role of the judge in civil cases is essentially passive and, at the oral hearing, the judge will say little or nothing. Indeed, most French judges consider it improper to give the advocates any indication of how they see the case.

So far, I have been talking about proceedings before the magistrature. But there is a large and very important area of the law where, under the law of 1790, the magistrature cannot enter. That is the field of "public law" or droit administratif.

As regards the separation of powers, the French law on judicial organisation of 1790 contained a provision which is still in force:

Les fonctions judiciaires sont distinctes et demeurent toujours séparées des fonctions administratives. Les juges ne peuvent, à peine de sureté, troubler, de quelque manière que ce soit, les opérations des corps administratifs, ni entrer devant eux les administrateurs pour raison de leurs fonctions.

The revolutionary theory was that it was the function of the legislature, and not of the magistrature, to control the executive - insofar, that is, as the executive was to be "controlled" at all. The strict doctrine of separation of powers presumed that each branch of government would act within its respective powers.

Under Napoleon, the practice grew up of addressing petitions complaining about acts of the executive to the Emperor just as, under the Ancien Régime, petitions had been addressed to the King. Napoleon reinstated an institution of the Ancien Régime, called the Conseil d'État, to which he referred those petitions in very much the same way as petitions to the English monarch were referred to the Privy Council. And, in rather the same way as there is now a Judicial Committee of the Privy Council, the Conseil d'État established a section du contentieux to deal with disputes, both between organs of government and between the citizen and the state.

The Conseil d'État built up a body of droit administratif which is, in effect, a case-law-based system. There has never been a Code of administrative law in France. The French system differs from the English in that no precedent is "binding" and that the procedure is almost entirely conducted in writing in the same manner as French civil procedure.

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To sum up:

- only certain aspects of French law owe anything directly to Roman law;
- only certain aspects of French law are codified;
- an important part of English law is based on precedents (though not binding precedents);
- only the French system of criminal law is "inquisitorial"; the French civil law judge being more silent than the English;
- an accused person is not presumed guilty until proved innocent.

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I turn now to the second aspect of our topic - what is the effect of these differences in the European Court of Justice? The short answer is, very little!

It is true that the working language of the Court is French and that its procedure is recognisable modelled on the procedure of the Conseil d'État. But the working language is French for historical reasons - we use French in the same way as the universities and learned professions used to use Latin - and the procedure is no longer especially French.

Whatever may have been the situation in the past, there are now fifteen member states, all with their own traditions. Only in a minority of member states does the law now owe much to Napoleon or his Codes, and even they have travelled some distance from their roots.

The British notion that there is something homogeneous bloc of "continental countries" all sharing the same outlook, with law based on codes, derived from Roman law and using inquisitorial procedure, is simply wrong. There is a whole variety of systems of law and legal procedure.

For example, there are many differences between the Scandinavian countries and the others, and between the Scandinavians themselves.

In any case, the European Court is not concerned directly with "trying" criminal cases or civil disputes. The purpose of Community law is, not to replace national law or national legal systems, but to complement them in order to achieve things that national law cannot achieve.

The essence of the "Single Market" is the so-called "Four Freedoms" - freedom of movement of goods, persons, services and capital. Achieving a true Single Market is a highly complex and technical task. It involves removing customs duties and all sorts of non-tariff barriers to trade in goods; opening access to the labour market and the professions in other countries for the salaried and self-employed; and coordinating their social security rights; removing restrictions on institutions like banks and insurance companies that want to operate in other countries; and so on. Put another way, creating the Single Market involves dismantling many of the barriers to free movement that are the result of having developed, over the centuries, different legal systems. That cannot be achieved without legal machinery to define what the rules are and to ensure that the member states obey them. That is what "the level playing field" means.

The work of ensuring that the law is applied is given by the treaties mainly, not to the European Court, but to the courts of the member states.

The relationship between the European Court in Luxembourg and the courts of the member states is given by itself, to France, but to Germany and Italy.

Germany and Italy have written constitutions which can be invoked in all the courts of the country. They have a Constitutional Court, to which any other court can refer a question of constitutional law. The Constitutional Court will declare what the applicable constitutional law is, and the referring court will apply it.

This was the system adopted by the European Community treaties. The national court defines what the problem is. The European Court says what the law is, not just for one country or one case, but for any case raising the same problem in any of the member states. The national courts then apply the law as stated by the European Court to the cases before them. It is, if you like, a classic example of what is now called "subsidiarity".

This is a completely new approach which the French often find it difficult to accept as do the British.

The new "idea of justice" which the treaties have introduced can, I think, be summed up in three words:

Liberté - freedom to move;

Egalité - the law is the same for everyone;

Fraternité - common action, common rules and common institutions.

This is not, as some people suggest, a recipe for uniformity. It is, rather, a means whereby the old countries of Europe, including France and Britain, can share their experience and profit from their diversity.