

SCOTTISH COUNCIL OF LAW REPORTING

LORD MACFADYEN LECTURE

4th March 2010

“WHAT ARE JUDGES FOR?”

David Edward

It is a fitting tribute to Donald Macfadyen and the respect and affection in which he was held by all of us that this series of Lectures has been established in his memory. I feel proud and privileged, but also humble, to have been asked to deliver the first of them.

There is no-one who more perfectly represented the ideal of what a good Scottish judge should be than Donald Macfadyen: courteous and good-humoured but always in firm control of himself and his court; learned but not pedantic; lucid in thought, in speech and in writing; kind and understanding with a quiet, understated sense of humour; and, as he showed in his long last illness, immensely courageous.

My recollection of Donald goes a long way back. His father was a partner in Hay Cassels & Frame in Hamilton. Their Edinburgh agents were Simpson & Marwick with whom I had been an apprentice. At some time in the mid-1960s, when Donald was a student at Glasgow University, Evan Weir of Simpson & Marwick brought him and his father to discuss with me what course he should pursue. Should he become a solicitor like his father, or come to the Bar? Traditionally, the best advice to anyone thinking of coming to the Bar is “Don’t”. But that was not the advice I gave to Donald and I think you will agree that, in this at least, I was right.

Later on, in what used (inaccurately) to be called his “idle year” before admission to the Faculty, Donald was my devil and he demonstrated all the qualities that marked his career – painstaking mastery of the facts, accurate and unpretentious use of language, and an instinctive feel for the law. Much later, when I returned from Luxembourg to

Scotland, I had the privilege of sitting with him in the Inner House and he was indeed the ideal of what a Scottish judge should be.

So it may seem odd that, in a lecture dedicated to his memory, I have chosen to ask the question, "What are Judges for?" Surely the answer is simple: judges are there to do what Donald did. But the question "What are Judges for?" has turned out to be more topical than I expected.

During the past fortnight, we have read about "Government fury as judges attack security services". The Chairman of the Intelligence and Security Committee asked "what the Master of the Rolls is playing at", and the *Daily Telegraph* attacked "our snug, smug judges" for the way in which they "undermine [an MI5 officer] and his service who take such risks on our behalf". By contrast, Timothy Garton Ash said that "We need judges to investigate our spies, not spies to berate our judges. ... Thank God - or more accurately, thank history - that we still have such judges".

The reason for this furore was one paragraph in a judgment running to almost 150 paragraphs.¹ Once again, we had an illustration of the tension between the vision of the judge as the courageous defender of the rights of the individual, and the contrary vision of unelected judges as activist and interfering, usurping the province of the elected legislator or executive.

Lord Justice Stephen Sedley has remarked that, if we are honest, our reaction to such events will depend on whether or not we agree with the substance of what the judges have done.² That, I think, is the truth of the matter, and in any case, most of these outbursts are no more than passing storms in an over-heated media teacup.

But we are living through a period of far-reaching, though piecemeal, constitutional change. So it is important that we do ask ourselves what judges are for, because the answer to that question will condition the answer to many other questions:

¹ *The Queen on the application of Binyam Mohamed - v - Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, 10th February 2010, and [2010] EWCA Civ 158, 26th February 2010.

² Review of *The Rule of Law* by Lord Bingham, *Saturday Guardian Review*, 20 February 2010,

- How should the courts be organised? Should there be specialist courts with specialist judges and, if so, for what types of cases? In particular, should there be a single Supreme Court and should there be a Constitutional Court?
- Who should be selected to be judges, and how and by whom should they be selected? What qualifications should be required and, in particular, is it necessary that all judges should be lawyers?
- In what form should judges give their decisions? Should judgments contain individual expressions of opinion, or should they be confined to a dispassionate application of the law to the facts? Should there be concurring and dissenting opinions and, if so, how should they be expressed? Have judgments become too long, and should there be some limitation on their length?

All these questions, and more, have been asked and answered in different ways in different countries. I do not have time to discuss them all. But I have had the experience (which I suppose is relatively rare) of sitting with judges from widely different traditions. So I will try to give you a taste of what I have learned in the hope of stimulating a better informed discussion.

Specifically, I will touch on three topics:

- What is it that differentiates the judicial function from those of the legislature and the executive?
- Should the executive be subject to judicial control and, if so, how and by whom?
- Is it the function of judges to "make law", and does this have a bearing on the form of judicial decisions?

What differentiates the judicial function from those of the legislature and the executive?

The theory of separation of powers (legislative, executive and judicial) began with Montesquieu – on the basis, it is usually said, of a misunderstanding of the British constitution. He said

"There is no longer any liberty if the power to judge is not kept separate from the power of the legislator and the power of the executive".³

What is it that differentiates "the power to judge" from the other two powers of the state, the power of the legislator and the power of the executive? I suggest that it is the cumulative effect of six factors.

The first is that judges cannot choose the cases they have to judge. It is true that, in our system, the presiding judge will have some say in the allocation of cases. But in countries where a dictatorship has manipulated the court system – notably Germany – the process of allocating cases to judges, or panels of judges, must, as a matter of principle, be blind. The way in which cases will be allocated must be objective, transparent and predictable in advance.⁴

Our own system is less rigid. But, whatever the rule, it is up to the litigants and those who advise them to decide what cases come to court. Judges who long to pronounce on their favourite topic, or to condemn some legislative abomination or judicial heresy, may never have that opportunity except in the evanescent context of the lecture hall. The day for writing the judgment that makes legal history may never come.

Second, and perhaps more importantly, a judge cannot refuse to take a case because it is difficult, disagreeable or unpopular. In many cases, it will be predictable from the outset that, whatever the outcome, there will be outrage from some quarter and the judge will be pilloried in some section of the media. Someone will be "devastated" and the judge will be blamed. Too bad!

³ *Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice*, Montesquieu *De l'Esprit des Lois*, XI.6.

⁴ This is known as the principle of the *gesetzlicher Richter* (the judge identified according to statute). It governs the way that cases are allocated in the European Court in Luxembourg. In the Court of Human Rights in Strasbourg, there will always be a judge on the bench from the defendant State – if necessary, an *ad hoc* judge. In Luxembourg, although there must be a Judge on the Court from every Member State, the rules are such that the Judge from the State most concerned in a particular case will not necessarily be on the panel that hears the case.

That leads to the third point. Once seised of a case, unless it is settled or withdrawn, the judge must give judgment. The French Civil Code (the *Code Napoleon*) is very explicit on this point. Article 4 provides that:

"The judge who refuses to judge on the pretext of the silence, the obscurity or the inadequacy of the law shall be prosecuted for denial of justice."⁵

Moreover – and this is the fourth point – the process of judging must be conducted within a more or less tightly defined legal and procedural framework. As Dicey put it, "The primary duty of a judge is to act in accordance with the strict rules of law".⁶

Fifth, the duty to judge carries with it the duty to reason, and the adequacy of the reasoning is subject to scrutiny on appeal. Even if there is no appeal, the academic commentator is lurking to pounce on sloppy or illogical reasoning.

And, sixth, having delivered judgment, the judge cannot, except in the most exceptional circumstances, recall, revise, modify or seek to explain the judgment. The judge can only say, with Pontius Pilate, "What I have written I have written"⁷, and leave it at that.

These are, I suggest, the essential features of the judicial function. Cumulatively, they differentiate the judicial power from the legislative power and the executive power. Legislators and administrators enjoy (albeit within limits) a range of choice, and a discretion to act or not to act, that judges do not. The corollary of the judges' power is the strictness of the rules that govern what they do and how they must do it.

⁵ *Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.*

⁶ Dicey *The Law of the Constitution*, 8th edition, *Introduction*, page xxxix.

⁷ *John* 18.22.

Should the executive be subject to judicial control and, if so, how and by whom?

In *The Law of the Constitution*, first published in 1885, Dicey identified the Rule of Law as one of the fundamental characteristics of our constitution, and the supremacy of the ordinary courts as an essential element in the Rule of Law:

"When we speak of the 'rule of law' as a characteristic of our country, [we mean] not only that with us no man is above the law, but (what is a different thing) that every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. ... With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."⁸

Dicey contrasted this approach with that of French *droit administratif*. He said - correctly - that, according to French ideas, "the individual in his dealings with the State does not stand on anything like the same footing as that on which he stands in dealings with his neighbour".⁹

That is true of most continental legal systems where the concept of "the State" as a legal entity - and the powers and prerogatives of its officers - is fundamental to constitutional and administrative law. In 1790, the French Constituent Assembly passed the Law of 16-24 August which is still in force. Article 13 provides that:

Judicial functions are distinct and will always remain separate from administrative functions. It shall be a criminal offence for judges to interfere in any manner whatsoever with the operation of the administration, nor shall they

⁸ Dicey *The Law of the Constitution*, part II, chapter iv.

⁹ *Ibid.* part II, ch. Xii.

call administrators to account before them in respect of the exercise of their official functions.¹⁰

This sounds very like the sort of law that our modern Home Secretaries would welcome. But its purpose at the time was essentially liberal. Under the *ancien régime*, the *Parlements* of Paris and 14 provincial cities were courts of appeal and administrative bodies of a particularly reactionary character. The *Parlement* of Paris, in particular, had obstructed reform of the tax system which was one of the principal causes of the French Revolution. So it was felt important to cut the courts down to size, and prevent them blocking reform.

The effect of the Law of 1790 was to put the acts of the executive beyond the jurisdiction of the ordinary courts. And that remains essentially the position today – not only in France but in many, if not most, of the countries of Europe.

The corollary of the Law of 1790 was that the citizen had no judicial redress against the acts of the executive. However, beginning under Napoleon and progressively since, France has developed a highly sophisticated system of judicial review of administrative acts through the *Conseil d'Etat* and latterly also the *tribunaux administratifs* (see Annex 1). The practice and procedure of the *Conseil d'Etat* have served as a model, both for many other European countries and for the European Court of Justice.

Those who deal with contentious cases in the *Conseil d'Etat* and the *tribunaux administratifs* are unquestionably "judges", but their training, function and outlook are quite different from those of the judges in the civil and criminal courts (the *magistrature*). The judges of the *Conseil d'Etat* are normally *énarques* (graduates of the *Ecole Nationale d'Administration*) while the *magistrats* have been trained in the *Ecole Nationale de la Magistrature*.

¹⁰ *Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler, de quelque manière que ce soit, les opérations des corps administratifs, ni citer devant eux les administrateurs pour raison de leur fonction.*

The structure of the German court system is different from the French (see Annex 2), but it reflects the same fundamental distinction between the domain of public administrative law and the domain of civil and criminal law, and a corresponding distinction between the judges who deal with them. There are other important differences too.

First, because of Germany's experience of authoritarian rule and ultimately Fascist dictatorship, the German Constitution provides expressly for the right of recourse to the courts:

Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.¹¹

Second, although there is the same distinction between the ordinary courts and the administrative courts, all German judges enter the profession in the same way, and there is no equivalent of the distinction between the *magistrats* and the *conseillers d'Etat*.

Third, in France as in this country, the judge can quash (annul) an administrative decision, but cannot substitute a new decision. Under the German system, there is greater scope for administrative law judges to substitute a new decision for a decision that has been annulled, or to direct the deciding authority to take a different decision.

From that very superficial overview, you will see that the nature of the judicial function depends very much on the underlying structure and philosophy of the legal system. These are conditioned by the history and traditions of the country and, in turn, condition the way in which judges are trained, the powers they have, and the way they work.

To return to this country and to Dicey - the eighth edition of the *Law of the Constitution* (1915) (the last to be published in his lifetime) shows that he had changed his view of

¹¹ *Grundgesetz*, article 19(4). *Wird jemand durch die öffentliche Gewalt in seinen Rechten verletzt, so steht ihm der Rechtsweg offen. Soweit eine andere Zuständigkeit nicht begründet ist, ist der ordentliche Rechtsweg gegeben.*

droit administrative, and a great many other things too, including the Sovereignty of Parliament. Rather than rewrite the book, he republished the original text and explained his new position in an *Introduction* that runs to more than 100 pages. Since his death, the original text has been republished over and over again, but not the *Introduction* of 1915. So, the gospel of Dicey has been passed down to succeeding generations in a form which he himself recognised had become out of date in his own lifetime. The effect, I think, has been to inhibit fresh thinking about the British constitution, but that discussion is beyond the scope of this lecture.

In his 1915 *Introduction* Dicey recognised that what he called "official law" – what we now call administrative law – had greatly expanded in Britain. He recognised that one factor was distrust of judges and of courts – not least because of the Taff Vale judgment on trade union rights in 1901.¹² He concluded that

France has with undoubted wisdom more or less judicialised her highest administrative tribunal, and made it to a great extent independent of the Government of the day. It is at least conceivable that modern England would be benefited by the extension of official law. Nor is it quite certain that the ordinary law Courts are in all cases the best body for adjudicating upon the offences or the errors of civil servants. It may require consideration whether some body of men who combined official experience with legal knowledge and who were entirely independent of the Government of the day, might not enforce official law with more effectiveness than any Division of the High Court.¹³

Well, we're 95 years on, and this has not come to pass. But we can, I think, identify five trends.

The first trend – particularly noticeable after the Second World War – was the removal of many aspects of administrative action from the purview of the courts. This was accepted as necessary and even desirable by senior members of the judiciary. Writing

¹² *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426.

¹³ *Introduction* to the 8th edition, page xlvi.

in 1959, Lord Chief Justice Parker emphasised the judiciary's "positive responsibility to be the handmaiden of administration rather than its governor".¹⁴ (I would be surprised if we heard the Lord Chief Justice say that now.)

The second trend, going hand in hand with the first, was the growth of "administrative tribunals" under the aegis of the executive, financed and administered by policy-making departments of government. The chairmen of these tribunals were decidedly not judges, in status, in salary or in other respects. That is not to suggest that they were not conscientiously independent in outlook and conduct, but rather that the tribunals in which they sat were not fully independent of the executive.

The third trend - the reversal of the first - has been the growth of judicial review, kick-started by the speech of Lord Reid in *Ridge v Baldwin*¹⁵, and the later judgments of the House of Lords in *O'Reilly v Mackman*¹⁶ for England and *Brown v Hamilton District Council*¹⁷ for Scotland. The role of the judge in applications for judicial review is a far cry from that envisaged by Lord Justice Clerk Thomson in *Thomson v Glasgow Corporation* in 1962:

"A litigation is in essence a trial of strength between opposing parties conducted under recognised rules, and the prize is the Judge's decision. We have rejected inquisitorial methods and prefer to regard our Judges as entirely independent. Like referees at boxing contests, they see that the rules are kept and count the points."¹⁸

That is what Dean Roscoe Pound called "the sporting theory of justice"¹⁹ - rather out of fashion these days, though we haven't really worked out properly what to put in its place - certainly not "inquisitorial methods" which, even in France, have nothing

¹⁴Lord Parker of Waddington *Recent Developments in the Supervisory Powers of the Courts over Inferior Tribunals* (Magnes Press, Jerusalem, 1959) page 25.

¹⁵ *Ridge v Baldwin* [1964] AC 40, 72-3.

¹⁶ *O'Reilly v Mackman* [1983] 2 AC 237

¹⁷ *Brown v Hamilton District Council* 1982 SC (HL) 1.

¹⁸ *Thomson v Corporation of Glasgow* 1962 SC (HL) 28, at p. 52.

¹⁹ *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address to the American Bar Association in 1906, 40 *American Law Review*, p. 729 ff.

whatever to do with civil, commercial or administrative procedure. On the contrary, in the latter context, they insist upon the "passivity" of the judge.²⁰

The fourth trend, reversing the second, has been the "judicialisation" of tribunals, in the wake of the Constitutional Reform Act 2005. Most of those who chair tribunals now have the formal title of "judge", and responsibility for their finance and administration has been transferred away from the policy departments. (As Lord Philip's Administrative Justice Steering Group found, there are still some loose ends to be tied up as regards Scotland.²¹)

The fifth trend, and in some ways the most important, has been the adoption into British administrative law of concepts developed in France, Germany and other continental countries, such as proportionality, legal certainty and legitimate expectation. For a while, it was thought that the so-called *Wednesbury* criteria²² would be a sufficient foundation for British administrative law. But partly due to the influence of the European courts (Luxembourg and Strasbourg), the conceptual apparatus of British administrative case law is developing fast.

The question, looking to the future, is whether, as Dicey surmised in 1915, we need to develop a more structured system of administrative law courts including those who "combine official experience with legal knowledge". At present, the function of judicial review is confined to the High Court in England and the Court of Session in Scotland. That is consistent with the view of the House of Lords in *Brown v Hamilton District Council* that only the Court of Session can exercise the "supervisory jurisdiction". But that is not a reason why, if we need a structure of administrative courts to suit the needs of the twenty-first century, some part of that structure should not be located in tribunals below the level of the Court of Session.

²⁰ See, for example, Case C-430/93, *van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, [1995] ECR I-4705, paragraphs 16, 20 and 21.

²¹ *Options for the Future Administration and Supervision of Tribunals in Scotland*, Scottish Consumer Council 2008.

²² *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

It is worth remembering that the Scottish Sheriff used to have a wide range of administrative functions, including the conduct of Parliamentary elections. Going further back, at the time of the crofter risings in the 1870s and 1880s, it was the local Sheriffs Substitute who were expected, not only to judge disputes between landowner and crofter, but also to summon police, or even military assistance, to deal with riots.

So there is no particular reason why the greater degree of specialisation recommended by the Scottish Civil Justice Review should not include allocating some administrative law cases at first instance to the Sheriff Court, or alternatively, as in France, to specialist administrative law tribunals. In the same way as Employment Tribunals include lay members from both sides of industry, administrative tribunals might include lay members with experience of public administration.

Having worked with judges from a public law background, I think there are advantages in having the input of experience in public administration. Those with whom I worked were not unduly favourable to the administration – sometimes rather the reverse: they knew from experience where the bodies were likely to be hidden. Their ultimate concern was to promote good administration and preserve the integrity (in the best sense of the word) of the administrative process. As Professor JDB Mitchell put it, the techniques of administrative courts “help governments to be good even more than they compel them to be so”.²³

Constitutional law raises different questions, although we tend not to make a very clear distinction between constitutional and administrative law.

Traditionally, in the common law world, the task of interpreting the constitution, where it is written, has been exercised by the Supreme Court, as in the United States, Canada and Ireland. The exception is South Africa, but there were special reason for creating a separate Constitutional Court there.

²³ JDB Mitchell Inaugural Lecture *Why European Institutions* (1968) page 10.

The tradition in Europe during the nineteenth and early twentieth centuries was different. The legislature was the judge of its own powers under the constitution. After the First World War separate constitutional courts were set up in Austria and Czechoslovakia, and after the Second in other countries, notably Germany and Italy. France adopted a different approach. The Constitution of the Fifth Republic established a Constitutional Council (*Conseil Constitutionnel*) which, although it performs some of the functions of a court, is not a court. More than 50 states throughout the world now have separate constitutional courts or councils.

Countries differ as to the qualifications required for the judges of Constitutional Courts. The members of the German and Italian Courts must be lawyers, but the members of the French *Conseil Constitutionnel* need not be; many have been actively engaged in political life, and one, for example, is a sociologist. This has a significant bearing on the way in which the French body works.

There has been some discussion in this country about whether we should have a Constitutional Court separate from the new Supreme Court. Personally, I am not persuaded. There is a risk - as there is with all specialist courts - that the judges of constitutional courts lose sight of the wider context in which other courts operate. After a somewhat tense meeting in Luxembourg with members of the Constitutional Court of one of the Member States, one of my colleagues said, "Thank goodness my country doesn't have a constitutional court".

However that may be, it has been borne in on me during my time in Luxembourg and since, that constitutional law calls for an approach to legal reasoning that is different from the type of reasoning to which British judges and lawyers are accustomed.

One of the criticisms of the Privy Council when it was effectively the Constitutional Court of the Empire was that the judges approached constitutional issues in much the same way as they would dispose of a conflict of rights between private litigants. Their approach, for example, to the British North America Act 1867 (Canada's written

constitution, now called the Constitution Act) was the traditional textual approach to statutory construction.

It was not until 1929 that Lord Sankey struck out a different line:

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention."²⁴

(The question at issue, incidentally, was whether women were 'persons' within the meaning of the 1867 Act since only 'qualified persons' could be appointed to public office.)

With the passing of the Human Rights Act, the devolution acts, and especially the creation of a Parliament²⁵ in Scotland, we have, to put it no higher, the beginnings of a written constitution in this country. But I am not sure that we have fully recognised the implications of this for the allocation of judicial functions and manner of legal reasoning. (It was not until the 1960s that the Irish courts, urged by my former Luxembourg colleague, Donal Barrington, recognised that the approach to interpretation of a Constitution should be different from the traditional common law approach to interpretation of a statute.²⁶)

We can, I think, see the glimmerings of the dilemma in the judgments of the UK Supreme Court on interpretation of the Scotland Act 1998 in *Martin & Miller*²⁷, handed down yesterday. Although it is not obvious on the surface, there are signs of the tension between, on the one hand, the traditional (Privy Council) approach to statutory

²⁴ *Edwards v Canada (Attorney General)* [1930] AC 124. The last sentence is a quotation from Sir Robert Borden *Canadian Constitutional Studies* (1922) p. 55.

²⁵ "Parliaments" are considered to have inherent prerogatives – see, for example, *Case C-70/88 European Parliament v Council* [1990] ECR 2041.

²⁶ *Ryan v Attorney General* [1965] IR 294. For a full discussion, see Seamus O'Tuama, *Judicial Review under the Irish Constitution: More American than Commonwealth*, vol 12.2 *Electronic Journal of Comparative Law*, (October 2008), <<http://www.ejcl.org/122/art122-2.pdf>>. ISSN: 1387-3091

²⁷ *Martin v HMA* and *Miller v HMA* [2010] UKSC 10.

interpretation and, on the other, a more systematic, constitutional approach, considering how the provisions in question fit into the scheme of the Scotland Act in prescribing the relationship between different organs and levels of government. Perhaps it is significant that the leading dissenting judgment was delivered by the only member of the panel with extensive experience of government and public administration.

Is it the function of judges to "make law", and does this have a bearing on the form of judicial decisions?

Traditionally, the genius of the common law lay in the work of the judges. Tennyson described England as

A land of settled government

A land of just and old renown

Where Freedom broadens slowly down

From precedent to precedent.²⁸

In his old age he was rather less flattering, referring to

... the lawless science of our law,

That codeless myriad of precedent,

That wilderness of single instances,

Thro' which a few, by wit or fortune led,

May beat a pathway out to wealth and fame.²⁹

Dicey wrote enthusiastically about the merits of "judicial legislation":

As all lawyers are aware, a large part and, as many would add, the best part of the law of England is judge-made law. ... Judicial legislation aims to a far

²⁸ Tennyson, *You ask me why, tho' ill at ease*.

²⁹ Tennyson *Aylmer's Field*.

greater extent than do enactments passed by Parliament, at the maintenance of the logic or the symmetry of the law.³⁰

This contrasts sharply with the injunction in Article 5 of the French Civil Code:

It is forbidden for judges, in pronouncing on the cases submitted to them, to make rulings of general or regulatory application.³¹

The function of judges is to apply the terms of the Code, not to make law. However, that provision of the Civil Code applies only to the ordinary courts. The law applied by the French administrative courts is largely judge-made law. And, even in the ordinary courts, judicial decisions (*jurisprudence*) are a recognised source of law.

The difference in approach on the two sides of the Channel lies partly in the extent of deference accorded to precedent and partly in the form of judgment.

On one occasion in 1981, at a hearing before the Court in Luxembourg, the agent of the French government cited a decision of the *Conseil d'Etat* from 1946. The leader of the Paris Bar considered it scandalous to mislead the Court by citing such an old, out-of-date authority. It is assumed that the courts will, from time to time, take a fresh look at the law, and I understand that in the Netherlands one cannot rely on a precedent more than ten years old.

To put it shortly, in other European countries, precedents are recognised and respected but are not binding. Indeed, I do not think most European lawyers would seriously dissent from what Lord Mansfield said about precedents

The reason and spirit of cases make law, not the letter of particular precedents.³²

³⁰ Dicey *Law and Public Opinion in England during the Nineteenth Century*, 2nd edition (1914) pp.361 and 364.

³¹ *Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises*

³² *Fisher v Prince* (1762) 3 Burr 1363

The law of England would be a strange science if indeed it were decided upon precedents only. Precedents serve to illustrate principles and to give them a fixed certainty.³³

In this country, the doctrine of binding precedent is much less firm than it used to be and, as far as the Luxembourg Court is concerned, there is very little difference between its approach to precedent and ours. What is unquestionably different is the form of the Luxembourg Court's judgments – both the style, and the fact that there are no individual opinions of the judges. The reason for this is embedded in the continental tradition.

To some extent, it reflects the view that judges are there to apply the law, not to make it. But I think it goes further back to a tradition that Scotland shared – that of the "collegiate" court. As we know, the old Court of Session was a court of fifteen judges all sitting together – the hail fifteen. Morison's Dictionary and earlier collections report the facts, the arguments and the decision, but not the individual opinions of the judges. Although the judges expressed their opinion on the bench in public, the individual opinions were rarely reported, and indeed Lord Eskgrove protested against the activities of the reporters: "The fellow taks doon ma' very words".³⁴

The decisions of the old Court of Session were collegiate decisions – taken, if necessary by majority vote – and embodied in a depersonalised interlocutor. Discussion and exposition of the law was the task of the institutional writers and those who followed them, either by editing the earlier texts and bringing them up to date, or by producing new treatises such as Bell's *Principles and Commentaries*.

That is the continental tradition. Although respect is paid to case law (*la jurisprudence*), the same or more respect is accorded to learned writing (*la doctrine*). It is the professors rather than the judges who are expected, in Dicey's words, to "maintain the logic and symmetry of the law"

³³ *Jones v Randall* (1774) Cowp. 37

³⁴ Cockburn *Memorials of his Time* (1856) p. 165.

By contrast, in the common law tradition, the individual expression of opinion by the judge is an integral part of the way in which the law develops. Decisions are valued, not only (objectively) as precedents, but also for the strength of the reasoning and the authority of the judge. Students are taught (or at least used to be taught) to search for and identify the *ratio decidendi* of a case by close study of the reasoning.

The downside of this approach was alluded to by Lord Rodger in *Martin & Miller*, to which I have already referred:

Until now, judges, lawyers and law students have had to try to work out what Parliament meant by a rule of Scots criminal law that is "special to a reserved matter." That is, on any view, a difficult enough problem. Now, however, they must also try to work out what the Supreme Court means by these words. It is a new and intriguing mystery.³⁵

That is not the first time that I have heard such comments from judges, academics and law students who have been trying to work out the effect of the increasingly lengthy (might one whisper, long-winded?) judgments of the House of Lords and now the Supreme Court. Some of the decisions of the US Supreme Court, with judges concurring in part and dissenting in part, present problems reminiscent of advanced Sudoku.

In addition, judges in the United States have been subject to threats, including death threats, because of their judgments on issues like abortion. In discussion with me, two federal judges showed considerable interest in the anonymity of European Court judgments which they thought might provide some protection.

So the arguments in favour of individual judgments and against a single anonymous judgment are not all one way. More fundamentally, the form of judgment conditions the way judges work. In the common law system, the legal and factual issues in a case are argued out in public in a dialogue between bench and bar. It is perfectly common

³⁵ *Martin & Miller*, paragraph 149.

for our judges, in the course of the debate in open court, to express their doubts about the merits of a case or the arguments advanced in support of it.

By contrast, in most continental systems, there is no debate between bench and bar. Contrary to a widespread impression in this country, the so-called "inquisitorial method" applies only in criminal cases. In other cases, as I mentioned before, importance is attached to the "passivity" of the judge. To discuss the merits of an argument with counsel at a public hearing would be regarded as compromising the judge's impartiality - or, to put it the other way round, it may give the appearance that the judge no longer has an open mind. Indeed, on one occasion, a French judge visiting Luxembourg said he thought questions from the bench would constitute a breach of Article 6 of the European Convention on Human Rights. I replied that, in our system, it might well be considered a breach of Article 6 if a judge were to decide a case on a point that had not been put to counsel.

In Luxembourg, and in the continental systems generally, it is after the case has been pleaded that the real work of the judges - the deliberation (*le délibéré*) - begins. (Remember that, even at first instance, there will, except in minor cases, be three judges on the bench.) Judge Grévisse, one of the French judges in Luxembourg, said that "the *délibéré* is the heart of our work". In the deliberation, the judges argue out amongst themselves the merits of the case and the possible solutions, very much in the way that a case would be argued out between bench and bar in our system. If there is disagreement, a vote will be taken, but even then, the minority play an active part in drafting the final judgment. Very often the minority can point out flaws in the argumentation of the majority, or suggest ways in which it could be improved, even if they disagree with it.

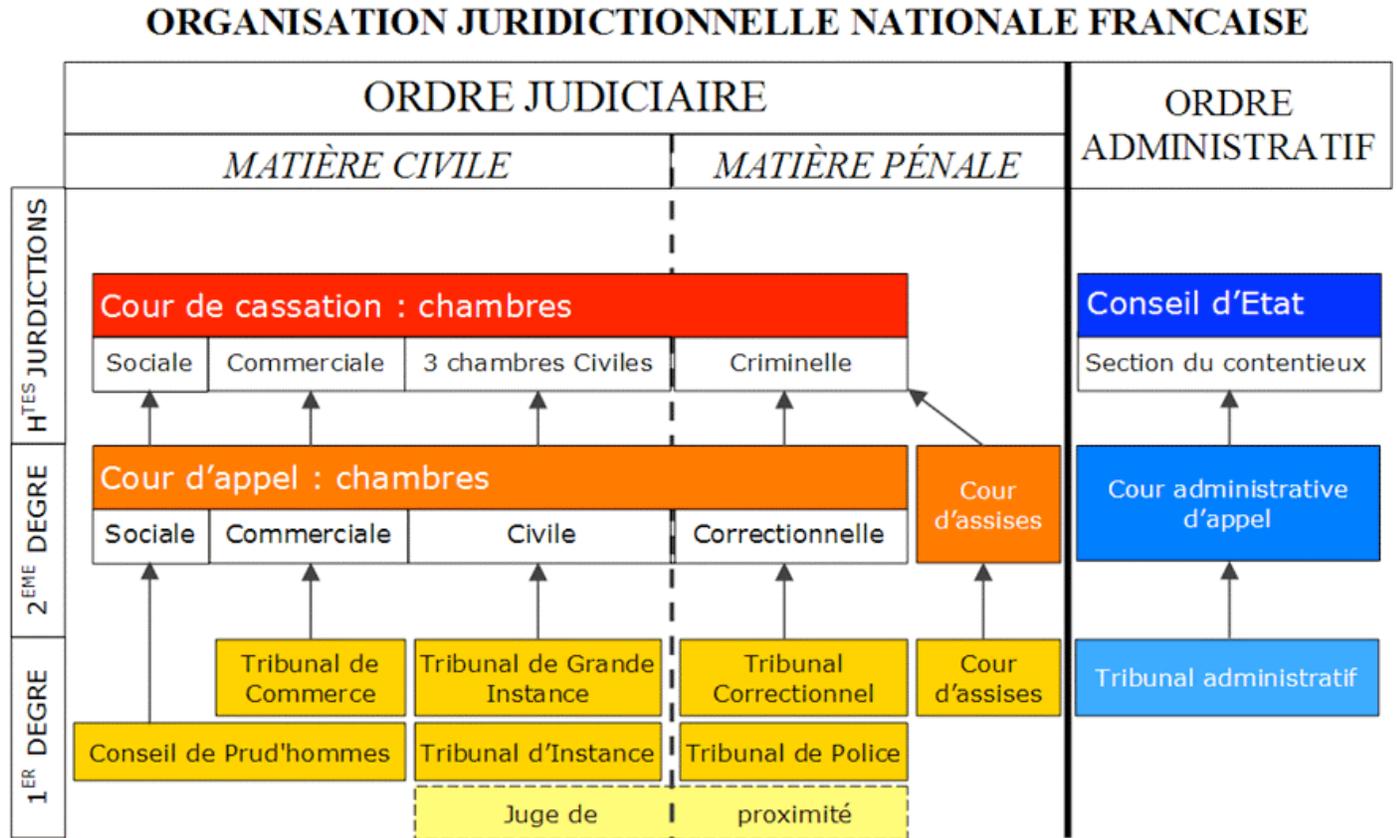
Undoubtedly, this can lead to Delphic pronouncements that show all the signs of an unsatisfactory compromise. But the method of working does lead to a sense of collegiality, very different from the atmosphere of ideological and intellectual hostility

that shows through some of the judgments of the US Supreme Court. The ultimate aim is to produce a text that is legally satisfying, even if one disagrees with the result.

Most of all - and here I must close - the single, impersonal judgment does at least have the merit of enhancing judicial modesty. I said earlier that the corollary of judicial power is the strictness of the rules that govern what judges do and how they must do it. Perhaps I should add another: the corollary of judicial power should be judicial modesty. If that is a desirable quality in a judge, it was certainly one of the outstanding qualities of Donald Macfadyen to whom we pay tribute tonight.

ANNEXES

1. THE FRENCH JUDICIAL SYSTEM³⁶



2. THE GERMAN JUDICIAL SYSTEM³⁷

Articles 92-96 of the German Constitution (*Grundgesetz*) establishes the court structure in Germany. As a Federal Republic, Germany's courts are divided between the Federation (*Bund*) and 16 states (*Länder*).

At the federal level there is a supreme court for each of the six major jurisdictions: constitutional, ordinary, labour, social, tax, and administrative courts, as well as a special military tribunal and a Federal Patent Court. The regional and higher regional courts are, at the same time, courts of appeal of their respective states.

1. The Constitutional Courts (*Verfassungsgerichte*)

The Federal Constitutional Court (*Bundesverfassungsgericht - BVerfG*)

³⁶ Source Wikipedia

³⁷ Source Unidroit website <http://www.unidroit.info/mm/TheGermanJudicialSystem.pdf>

MACFADYEN LECTURE 4 March 2010 "WHAT ARE JUDGES FOR?"

The Federal Constitutional Court is the highest court in Germany and it is located in Karlsruhe. There are 16 judges, with exclusive jurisdiction over issues relating to the Federal Constitution (*Grundgesetz*) and the protection of fundamental rights of individual citizens as defined in the Basic Law.

The State Constitutional Courts (*Landesverfassungsgerichte; Staatsgerichtshöfe*)

The *State Constitutional Courts* are not in the same hierarchical structure as the *Federal Constitutional Court*, but rather each is a court of first and last instance in its own hierarchy. Each *State Constitutional Court* has exclusive jurisdiction over its State Constitution (*Landesverfassung*).

2. Courts of Ordinary Jurisdiction (*Ordentliche Gerichte*)

The Federal Court of Justice (*Bundesgerichtshof - BGH*)

Located in Karlsruhe (*Baden-Wuerttemberg*), the Federal Court of Justice represents the final court of appeals for all cases originating in the regional and appellate courts and holds no original jurisdiction.

Appeals on questions of law to the Federal Court of Justice are restricted to cases where the Higher Regional Courts either expressly grant leave to appeal or where the dispute is of general importance.

The Higher Regional Courts (*Oberlandesgerichte - OLG*)

The 24 higher Regional Courts primarily review points of law raised in appeals from the lower courts. For cases originating in local courts, this is the level of final appeal. These courts also hold original jurisdiction in cases of treason and anti-constitutional activity. Similar to the regional courts, The higher Regional Courts are divided into panels of judges, arranged according to legal specialisation.

The Regional Courts (*Landgerichte - LG*)

There are 116 regional courts, divided into two sections, the (*Zivilkammern*) and criminal (*Strafkammern*). Regional courts function as courts of appeals for decisions from the local courts and hold original jurisdiction in most major civil and criminal matters.

The Local Courts (*Amtsgerichte - AG*)

These 675 courts hear cases of minor criminal offences or small civil suits. These courts also carry out routine legal functions, such as probate. Some local courts are staffed by two or more professional judges, but most have only one judge, who is assisted by lay judges in criminal cases.

3. Specialised Courts

In addition to the Constitutional Courts and the Ordinary Courts, there are also four specialised Courts, with a similar structure to the Ordinary Courts,

Labour Courts (*Arbeitsgerichte - ArbG*)

The *Arbeitsgerichtsbarkeit* is the employment law jurisdiction, and includes trade union disputes. The Federal Labour court (*Bundesarbeitsgericht*) is located in Erfurt.

Social Courts (*Sozialgerichte*)

The *Sozialgerichtsbarkeit* is the 'social' jurisdiction, covering public law disputes relating to state welfare payments and the like. The Federal Social Court (*Bundessozialgericht*) is located in Kassel.

Financial Courts (*Finanzgerichte*)

The *Finanzgerichtsbarkeit* is the fiscal jurisdiction, taking in public law disputes relating to taxation. The Federal Financial Court (*Bundesfinanzhof*) is located in Munich.

Administrative Courts (*Verwaltungsgerichte*)

This is the general administrative jurisdiction, covering all public law disputes of a non-constitutional nature. The Federal Administrative Court (*Bundesverwaltungsgericht*) is located in Leipzig.