THE RÔLE OF LAW IN THE RULE OF LAW

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Amongst the heavy burdens laid by the David Hume Institute on the shoulders of its Honorary President, none should be lighter than that of delivering the Presidential Address. The Honorary President is free to choose both the date - some time within his three years of office - and the topic - which need be related only vaguely to the interests of David Hume or of the Institute.

So it was that in a carefree moment earlier this year, I committed myself to addressing you this evening on "The Rôle of Law in the Rule of Law". It is an epigrammatic title with which I was rather pleased, not least when the Executive Director, Hector MacQueen, said he wished that he had thought of it first. It has, as a title, the merit of offering scope without obligation of content.

That, however, is a rather risky way of approaching a public lecture. Sooner, rather than later, the moment comes when wine must be found to fill the beaker so carelessly offered. That moment, for me, has now come and I apologise at once to those who have come to hear an analysis of what the Rule of Law meant to Dicey, his followers and his critics, or an analysis of the differences between the Rule of Law as understood by common lawyers and the continental theory of the Rechtsstaat. For that, I am happy to refer you to the published writings of our Honorary Vice-President, Neil MacCormick.

I would like to approach the subject from a different - more mundane - angle, related to what people expect judges to do for them.

Judges are not universally popular. In the sphere in which I work, the European Community, it is no secret that our own and the majority of other member states were determined to exclude the Court of Justice from the fields covered by the first and third "pillars" of the Maastricht treaty - those concerned with foreign policy and security, and with co-operation in the fields of justice and home affairs. These matters will be dealt with on the basis of
"intergovernmental co-operation" outside the reach of judicial control.

It is also no secret - in Luxembourg at least - that some highly placed people in German government circles have been waging a campaign - through articles in Der Spiegel and elsewhere - to weaken the authority of the Community Court of Justice and so justify further constraints upon its jurisdiction. The informed reader, moreover, cannot fail to read the warning message conveyed to our Court between the lines of the recent judgment of the German Constitutional Court on the Maastricht Treaty.

So, gone are the days when Professor Eric Stein could write of the Court of Justice as "tucked away in the fairyland Duchy of Luxembourg and blessed with benign neglect by the powers that be and the mass media".

I mention all this, not in order to solicit your disapproval, still less your sympathy. Public criticism of courts and judges is not a new phenomenon and in relative terms the Court of Justice has come off pretty lightly. We are spared direct personal abuse in the popular press. In any case, judges have to be prepared to accept criticism and to live with it.

I mention it because I believe that those of you who share the aims and interests of the David Hume Institute must find your own answer to a paradox. The paradox is this: that those who boast most loudly that we live under the Rule of Law (and none louder than La Baronne - she was at it again on television last night) are frequently those who are least disposed to accept the logical corollary of that boast.

The corollary is that the Rule of Law must mean, in some sense and to some extent, the Rule of Judges. I stress the words "in some sense" and "to some extent", and perhaps I should put the point in another, slightly more abstract, way.

The boast that official power (state power) can be exercised only within legal limits is a hollow boast if you are not prepared to make the exercise of power justiciable. And that is so, whether the power in question is that of the Environmental Health Inspector, or that of the Council of Ministers.
The withholding, under French law, of the exercise of state power from justiciability in the ordinary courts was the basis of Dicey’s criticism of French *droit administratif* - a criticism he seems later to have modified as he learned more about the French system. But in Dicey’s mouth at least, the proposition that we in Britain live under the Rule of Law, in the precise sense that every official is subject to the jurisdiction of the ordinary courts, was indeed a boast. It was, for him, a proposition with moral overtones as well as legal and political content.

So if you feel that it is morally superior, as well as politically more acceptable, that the Rule of Law should be a principle of government, you must ask yourself to what extent you are prepared to accept the justiciability of public policy issues - issues, that is to say, that have political, social and economic implications, as well as legal.

Outside the context of the debate about a Bill of Rights, that is a question that is too little asked by people in this country. Those who are interested in the law as such tend to shy away from the non-legal side of the problem. “We are lawyers”, they say, “we are not political or social scientists.”

Perhaps that is why they feel more comfortable with the question whether we should have a Bill of Rights - a question that seems to fit traditional legal categories. Yet the categories of law have been changing for some considerable time.

In a series of lectures about administrative law delivered in Pittsburgh in 1940, one of my academic heroes, Dean Roscoe Pound of Harvard Law School, quoted an English law teacher who, unfortunately, is not identified in Pound’s text. He is reported as saying:

> Public law is gradually eating up private law. Industrial law is being controlled by administrative organs and is, at the same time, eating into the law of obligations. Quotas and marketing schemes under administrative control reduce the operation of commercial law. Housing and planning legislation takes the law of property under public control. This is only to say that *laissez faire* has been abandoned, the public lawyer is ousting
the private lawyer, and the duties of institutions are superseding the ordinary rights and duties of private citizens. I cite that, not as a prelude to entering upon the debate - reminiscent of the Schoolmen - about the frontier between public and private law, but rather to suggest that there is no frontier - or at least that there is a mobile frontier - between public and private law.

Quotas and marketing schemes are, after all, now rather old hat and some at least would have us believe that laissez faire is far from having been abandoned. But public law in the new form of competition or anti-trust law has invaded the territory of the private law of contract and the law of intellectual property. And I say nothing of Community law in its various other invasive guises.

Law, political science and social science do interact, day and daily. The tension between social science and family law is, today, particularly obvious and acute. Yet, just as lawyers shy away from social, political and economic science, so many of the practitioners in these fields do not regard legal science as relevant in any way to what they do.

Such attitudes would have been thought very curious by David Hume and his contemporaries. That is, of course, why it is particularly appropriate that this Institute should be called the David Hume Institute.

It was precisely in order to bring these divergent sciences together that Alan Peacock launched the Institute - to promote rational discussion of the legal and economic aspects of public policy questions. And it was for the same reason that one of Alan's fellow professors in this University, J.D.B. Mitchell, founded another Institute, the Europa Institute (then called the Centre for European Governmental Studies) which celebrates its 25th birthday today.

So it seems appropriate to pass to the next stage of this lecture with two quotations from John Mitchell's inaugural lecture as Salvesen Professor of European Institutions - a lecture delivered in this building on Tuesday 5 November 1968 - 25 years ago, almost to the day.

The first quotation is this:
On the whole British lawyers, perhaps because of the shape of our law, have reconciled themselves to being lawyers in the narrowest sense. ... We have been bred to think in terms of private law, but this will no longer suffice. ... [T]here must quickly and urgently be an enlargement of concepts. Urgently the lawyers must learn to think in terms of public law. For them there is the challenge to lift their eyes to the hills and this way regain their rightful place in the world, but, above all, they must learn to be artists not tradesmen. ... There is a necessity here of seeing law in a more artistic way than has been our habit. Law and politics must come together as academic studies. ... There is no point in looking at institutional structures stretched upon a slab. They can only be understood against a background comprehension of political structures. Yet, today, lawyers and political scientists speak in terms which are mutually incomprehensible. In the same way law and economics must approach each other. ... [I]t will be as important for the lawyer to comprehend economics as for the economist to understand the legal framework within which he is operating ... 4

The second quotation is one that I used in my own inaugural, delivered here 8 years ago - again almost to the day:

Governments and governmental bodies have as many reasons for conniving amongst themselves as they have for opposing each other and, in the evolution of government, it is important that within acceptable limits individuals should be able to participate through the neutral mechanism of courts, not merely [in] maintaining the framework of rules, but also [in] advancing its construction. ... I think it is not unreasonable to assert that the role of courts has, or should have, something to do with the realities of democracy. Properly organized, it is through them that the individual can play a larger and more significant part in government while gaining a greater sense of security. It is evident that such consequences can have a marked effect on the acceptability of decisions and such processes are not to be regarded as a derogation from but as an essential supplement to the traditional political processes in a parliamentary sense. Formerly changes in government
business forced the emergence of a permanent Civil Service - a constitutional bureaucracy became the necessary counterpart of a constitutional monarchy. Today similarly great changes are altering the role of the civil servant on both national and European level and adjustments in legal and political institutions are demanded to take account of this, and courts must certainly play a larger role than hitherto in maintaining the constitutionality of bureaucracy. ... Such techniques help governments to be good, even more than they compel them to be so.5

I believe profoundly that John Mitchell was right. Courts are normally viewed as an authoritarian emanation of State power. In certain manifestations - particularly in criminal law - it is inevitable that this should be so. But John Mitchell was right in saying that they also have something to do with democracy.

It is as well to have this in mind just now when the more readily recognisable institutions of democracy are, if not in crisis, at least under threat.

It is not, I think, enough to satisfy the democratic instinct of the citizen that he be permitted to go to a polling booth, every so many years, and to put a cross against one or more of a list of names selected by the party caucuses. Partitocrazia (the rule of parties) has fallen into disrepute - most notably in Italy. But the symptoms are there elsewhere, not least and most dangerously in Eastern Europe where there has hardly been time to put the most rudimentary elements of a democratic system in place.

The citizen expects more of democracy than that he be permitted the occasional opportunity to give carte blanche to others to shape his destiny. And I think the citizen is increasingly aware that, in truth, it is not those whom he elects that exercise the greatest power in shaping his destiny.

Why was it such a potent rallying-cry for the anti-Maastricht campaigners to attack the "faceless bureaucrats of Brussels"? They knew, or ought to have known, that most of the decisions allegedly taken by those faceless bureaucrats were taken, formally at least, by elected Ministers. And they knew or ought to have known that the
elected Ministers could not act upon the proposals of the faceless bureaucrats until they had sought and obtained the opinion of the elected European Parliament.

But there was, of course, greater political gain in suppressing these facts and in emphasising what is, after all, partly true: that most decisions which affect the citizen in his daily life, are taken, not by Ministers or by Parliaments, but by officials who, because they are not identified, are truly - to the citizen - faceless.

This is the contemporary reality of government. And the relative weakness of the primary institutions has led to the emergence of parallel expressions of democracy: the campaign, the pressure group, and so on - some wholly admirable, some rather less so, and some positively ugly both in their aims and their methods.

One medium through which such groups have found expression has been the Courts, which have also been a forum in which those with uglier aims and methods have been found out.

Now, I do not wish to claim for courts and judges more than they deserve, or more than they can deliver. They can be - and no doubt frequently are - wrong, both in their methods and in the results they produce. In the field of public administration, courts are frequently said to place unreasonable constraints on the intelligent exercise of administrative discretion, and to be preoccupied with administrative etiquette - a hang-over from

an age of over-refinement, when every practical activity was embarrassed by ceremonial and checks; when the colonel of an English regiment could, in the midst of battle, take off his hat to the colonel of the French regiment opposing him and say: "Gentlemen of the Guard, fire first"; when soldiers went into the field dressed for the ballroom; when a force sent on a forced march to rescue their comrades could come on the field too late because they had to halt ten times in a mile to dress ranks; when an army could be surprised because its thoroughly drilled pickets marched up and down their beats with their eyes to the front after the manner of the barracks drill ground."
As Roscoe Pound said: "Much of the spirit of that time did get into legal procedure." And so, he goes on

A common type of argument decries effective judicial review as imposing legalism upon administrative agencies. We are told that it is characteristic of administrative tribunals that simple and non-technical hearings take the place of trials, that a common-sense resort to usual and practical sources of information takes the place of archaic and technical rules of evidence, and that an informed and expert tribunal renders decisions which look forward to results rather than backward to precedents.

But, he says,

No one urges that an administrative hearing or investigation be conducted in all respects as a trial at law. No one today objects to any reasonable informality or application of common sense to the ascertainment of facts. What is objected to is the tendencies which ignore what long experience has shown to be fundamental in justice. To say that these elementary requirements of justice are technical "legalism" and that seeking to make available to all who are adversely affected the constitutional guarantee that a decision against them shall have a basis in evidence of rational probative force, and not in prejudice, preformed opinions without hearing the other side, gossip and made-to-order interviews under the name of investigation, is insistence on the "technical rules of evidence", is simply to say that all rights are to be at the mercy of administrative agencies. Looking forward to results achieved in that way is a looking backward to the methods of the administrative tribunals of the Stuarts.

Plus ça change, I fear. Those words were written in 1940. My own experience is that the same attitude persists. When the Community Court of First Instance, of which I was a member, found, in a competition case, that crucial passages had been omitted from documents on which the Commission's decision had been based, and when on that ground the Court felt it necessary to re-examine for itself each item of evidence on which the decision was based, this
was denounced by some as pedantry and by others as an illicit intrusion of the judiciary into the fact-finding prerogative of the administration. Fortunately, the majority of commentators seem to have thought otherwise.

And, indeed, John Mitchell's expectation was justified in that this and other judgments seem to have helped the Commission to be good. At any rate, the Commission has changed its procedures without, apparently, the machine seizing up.

Roscoe Pound and John Mitchell were not legal reactionaries, obsessed by administrative etiquette or adherence to old forms and categories. They were not of the same ilk as the English judge who said to me that he could never forgive the Scots for subverting the law of torts by the rule in McAlister v. Stevenson. On the contrary, they were thinkers about law and its place in society. Pound, in his St Paul Address of 1906 on "The Causes of Popular Dissatisfaction with the Administration of Justice" lit "the spark that kindled the white flame of progress", and John Mitchell's Inaugural offered a view of the law which most lawyers of the time - and I include myself - did not understand. Pound and Mitchell are not less my heroes because they would, I suspect, have disagreed profoundly about what is the best form of judicial procedure for dealing with public policy questions, Pound preferring the methods of the common law, Mitchell those of the French Conseil d'Etat.

Administrative procedures must, to some extent, move with the needs of the times and the Courts attitude to administrative practice must, to some extent, do so too. My own procedural preferences lie somewhere between Pound and Mitchell. But there remains a hard core of what, as Roscoe Pound said, "long experience has shown to be fundamental in justice".

British lawyers have coined the expression "natural justice" to describe these rules: natural justice because the rules correspond to the expectation of the ordinary citizen - his gut feeling, if you like. They do so in two, often contradictory ways: first, in satisfying the demand for rationality, predictability and fairness, as opposed to arbitrariness, in the exercise of power; second, in responding to the need to believe, in a free society, that the truth will out and justice will be done.
I spoke just now of the gut feeling of the citizen. To test your own reactions, let me mention two topical examples.

The first is the Child Support Agency - an administrative agency set up for the laudable purpose of making fathers pay for the wives and children they have abandoned. What seems actually to have happened, since it produces quicker results for the Treasury, is that fathers who have paid what the courts have ordered them to pay (frequently on the basis of "clean break" agreements, designed to take the "conflict" out of divorce) have suddenly been ordered to pay three, four or five times more on pain of bankruptcy - and this by an administrative agency, without a hearing, on the basis of "guidelines".

Now my question to you is whether you feel instinctively, without having gone deeply into the matter, that there is something wrong, that "it should not be so". If you do, is that not because the procedure, in its context, seems to lack rationality, predictability and fairness?

My second example, to illustrate the demand for truth, is the Arms for Iraq Inquiry of Lord Justice Scott. I have not read his terms of reference, and nor, I suspect, have most of you. But when his questioning began to offer inconvenient insights into government behaviour, and the Mandarins started to rend their garments and complain that he was exceeding his remit, how many of you - even those in the ranks of Tuscany - forbore to cheer?

The point I seek to make is simply this: that, if the Rule of Law responds, in some rather ill-defined way, to the citizen's expectations about freedom and democracy, it does so because judges and what they do are a necessary part of the structure of a free society - not simply in repressing crime and arbitrating the private disputes of citizens - but in defining the limits of power and its exercise, and, to some extent, regulating the balance of power between the institutions of the state.

When Montesquieu observed in the British constitution the separation of powers between Legislature, Executive and Judiciary, he was observing, in the third branch, an independent "power" in the state. He was not, if I may so put it, observing the Judicial Services
Division of the Lord Chancellor's Department or of Scottish Courts Administration.

The current debate in Scotland about the appointment and status of judges is, though not recognised as such, a debate about a matter of profound constitutional importance. It is not recognised as such because we have not had to live in a society where judges are the tools of the Party, or where the enthusiastic young judge, faced with a difficult case, rings up the Ministry of Justice to find out what the answer ought to be.

We have been protected from such excesses by our history, our geography and, I am sure, to some extent by our instincts. But it never does any harm to learn from the experience of others and, in this respect, there can be no doubt that the rapidly developing administrative law of this country owes much to the cross-fertilisation of ideas through our common membership of the European Community with countries that have had such experience and have developed safeguards against its repetition. We are learning, not before time, that "for too long we have lived in an isolated world of constitutional self-righteousness".12

It would be wrong, however, to conclude this lecture with what might seem to the sceptical enquirer after truth to be vainglorious praise of judges. The judiciary, like all other institutions, needs checks and balances to temper its power. Some would say that these checks and balances need to be explicit. Like the German writers of articles to whom I referred earlier, they look for a written circumscription of the judge's power.

That is certainly a possible approach, but it seems to me to overlook a rather elementary fact, which is that cases reach courts because litigants - or at any rate, people other than judges - bring them there. Be the judge never so activist or interventionist, he must wait for the opportunity, which may never come, to ride his favourite hobby horse.

When the Court of Justice ruled that British courts must be prepared to suspend the operation of an Act of Parliament if that is necessary to protect Community rights,13 it did not do so because, in the words of The Baroness, "it is busy reinterpreting so many things to give
itself and the Community more powers at our expense." The ruling was necessary because the House of Lords had asked the Court to make it. As Lord Bridge put it when the case came back to the House of Lords,

Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty, it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. This, whatever limitation on its sovereignty Parliament accepted when it enacted the European Communities Act, was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply, and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

When the Court of Justice ruled that, if the state is prepared to employ men to the age of 65, then it must be prepared to employ women to that age too, this was not a spontaneous outburst of
supranational or feminist zeal on the part of thirteen male persons of diverse nationality in late middle age. The culprit - if culprit there was - was a determined English lady, a dietician employed by Southampton Health Authority, who felt that she had been treated unjustly and has been prepared to spend 13 years of her life setting it right. Determined litigants like Miss Marshall - and the Roll of Honour is long - are the true instigators of judicial activism. They are the stuff of which the living law is made.

It is the litigant who identifies the abuse of power and calls for it to be restrained. It is the litigant dissatisfied with the lame bureaucratic excuse who calls for a proper explanation. It is the litigant, refusing to lie down under political pressure or administrative highhandedness, who makes a nuisance of himself and goads his lawyer into action - often unwillingly, it must be said, for such litigants are not always the nicest clients. It is the maddening, perverse, unreasonable litigant who disrupts the smooth progress of public business and calls upon the judge to intervene.

If and insofar as the Rule of Law is the Rule of Judges, it is the rule of judges prompted and incited by those who believe, however wrongheadedly, that they have a cause to try. For our part, as judges, it behoves us to be modest about the extent to which we do more than respond to the democratic demand of the citizen to be heard. We are the guardians of rights and the arbiters of power only so far, and for so long, as the citizen, by legal process, invites us to be so.
Endnotes


3 Op cit, pp 7-8.


5 Ibid, pp 10-12.

6 Pound, op cit, p 45.

7 Ibid, p 45.

8 Ibid, pp 77-78.


10 Better known, in Scotland at least, as Donoghue v Stevenson 1932 SC (HL) 31; [1932] AC 562.


12 Mitchell, op cit, p 7.


15 Reg v Transport Sec, ex parte Factortame (No 2) [1991] AC 603 at p 658.