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The Role of the Appellate Judge in England

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Although this session is engaged in comparison between Scottish, French and English models of adjudication, you must not, I am afraid, expect much in the way of comparisons from me. My knowledge of the French judicial system is far too slight for me to make any secure judgments about the points on which we resemble each other or differ. As for the Scottish judges, some eight years of observing five of them as my colleagues has revealed some sharply defined individual personalities but no common element which I could attribute to their being Scottish. So you will have to listen to the various points of view and make your own comparisons.

I need to make one further disclaimer. I am concerned only with the role of an appellate judge; more specifically, a judge of the final United Kingdom tribunal, presently known as the House of Lords. The functions of a trial judge are of course very different. I spent 7 years as a trial judge and very enjoyable years they were too. But the function of a trial judge is to decide the case correctly, so far as he can, in accordance with the law laid down by Parliament and the superior courts and what appears to be the most probable version of the facts. The function of a first court of appeal, such as the English Court of Appeal or the Scottish Inner House, is to correct erroneous judgments by the court of trial. But the function of the House of Lords is not to annul or set right the judgments of lower courts, although it may incidentally do so. Its primary function is to clarify the law. That is why (apart from some anomalous Scottish appeals) there is no right of appeal to the House of Lords except by leave, usually of an Appeal Committee of the House itself, and why such leave is not given, even if the Committee thinks that the decision of the lower courts was probably wrong, unless the case raises a point of law of general public importance.

My function as a judge is therefore to clarify the law in the reasons which I give for my decision. The content of a judge's reasons, like any other utterance, will be heavily influenced by his idea of the audience whom he is addressing. A trial judge normally has two audiences. One is the party who lost. The party who won is not interested in the reasons; it is sufficient that he won. But the judge feels obliged to explain to the other party why he lost. The second audience is the Court of Appeal. If there is an appeal, the judge will not be there to defend his decision and

his reasons are his only opportunity, with all the advocacy at his command, to persuade the Court of Appeal that he was right.

The House of Lords has a different audience. The strict English system of precedent means that, subject to any amending legislation, what the House says a statute means is what all other courts will follow. And the same for the principles of common law. So the first task of the House is to explain the law in a way which can be applied by other courts in the future. The judges must think of the effect their decision will have on future cases in which the facts may be slightly different. They must try to avoid anomalies and above all they must make themselves clear. Secondly, because they are deciding questions of law of general public importance, they must explain themselves to the public. They must say why they chose to interpret a statute as meaning one thing rather than another. They must expose their reasoning to comment and criticism, usually in professional legal journals but sometimes in the wider media.

The style in which English appellate judges express their reasoning has changed in the 50 years that I have been studying and practising the law. When I was a student, judges were more sparing in their reasoning than they are today. This was true whether they were expounding the construction of a statute or a principle of common law based on precedent. In the case of a statute they would say that that was what the language meant. If Parliament had meant something else, it would have used different language. And that was that. In the case of the common law, they would say that there was no precedent for such a rule or, alternatively, that such a case was based upon a broader principle than people had thought. It was unusual for judges to say much about why they thought that one rule or interpretation would be better than another. I do not want to exaggerate this tendency to reticence. Sometimes judges said that they thought a contrary decision would be unfair or contrary to ancient English freedoms like the liberty of the subject or the right not to have your property taken without compensation. But I remember Viscount Radcliffe, a very great judge of the mid-20th century, saying in a lecture like this that he did not think it was a good idea for judges to be too explicit about the social assumptions which underlay their legal reasoning. They should not, he said, reveal the heart of the mystery of adjudication.

Why has this changed? There are several reasons, of which some have to do with our membership of the European Union and the Council of Europe and others have not. I shall first deal briefly with the second category. One is a change in the education of judges. Fifty years ago a small minority of appellate judges had read law at university and hardly any were interested in legal theory or the views of academic lawyers. Today almost all have law degrees and in the last few years three law lords have been former law teachers – all three, as it happens, at Oxford

colleges. There is far greater interchange of ideas between judges and the academic community, who now form an important part of the audience to whom judges address themselves.

A second reason is changes in the nature of society. Decisions of the highest court can have an important impact on the lives of many people and the lofty patrician remoteness of Viscount Radcliffe seems rather old-fashioned. It is no longer acceptable for judgments to be delivered as if from Mount Sinai. If there was a choice of interpretation or principle, as there almost always is in cases which get as far as the House of Lords, people want to be told why the judges thought that one answer would be better than the other.

In turn then to our membership of the European Union and the Council of Europe, which has brought into our law the European Treaty and the European Convention on Human Rights, together with the jurisprudence of the Court of Justice and the European Court of Human Rights. Of these two influences on the English style of adjudication, that of the European Treaty has been the less significant. This is because of the provisions for preliminary references, which make it impossible for the House of Lords itself to engage in any serious question of construction of the Treaty or its subordinate legislation. Construction of the Treaty is for English judges, as no doubt for other national judges, strictly a spectator sport. The reference is wrapped up by counsel and sent to Luxembourg, two or three years later the messenger from the oracle returns and we give effect to the authoritative declaration of what the Treaty means.

It is sometimes said that the Treaty and the Luxembourg jurisprudence have exposed English judges, even as spectators, to a compulsory education in continental methods of interpretation. There is no doubt some grain of truth in this, but in my view very little. The notion that English judges were slaves to literal construction until enlightened by the continental influences is a myth. As long ago as 1562, in *Stradling v Morgan* Plowd. 205, the court referred to a number of even earlier precedents and said:

> "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the

Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion".

The references to the intent of the Legislature are of course something else that must not be taken literally. The Elizabethan judges did not ask the legislators what they meant, any more than judges would today. The intent of the legislature means the judge's view of what a sensible legislator would have intended. So teleological construction, or what Lord Diplock gave the equally unattractive name of purposive construction and I would prefer to call simply construction, is nothing new in English courts.

The change, in my opinion, has not been so much in the degree of freedom which judges have felt in construing statutory language or developing common law principles as in the matters which they were willing to take into account in choosing one interpretation rather than another. And they have been willing not only to take such matters into account but also to say expressly that they were doing so. In bringing about this change, the Human Rights Convention has had a very considerable influence. It has obliged English judges, in very explicit terms, to confront the underlying values which have moulded many of the principles of statutory construction and detailed rules of the common law, hitherto often silently but now openly, in a way in which judges have not had to do before.

English law, whether statutory or judge-made, has traditionally been hostile to abstract statements of principle. In 1793 Jeremy Bentham, one of the most perceptive of English legal philosophers, wrote a paper on the Declaration of the Rights of Man and the Citizen, which had recently been proclaimed by the French National Assembly. Bentham, who was no conservative and very sympathetic to the American Revolution, called his paper "The Anarchical Fallacies". That gives a fair indication of what he thought about it. His main objection was that French law provided no means to enforce the rights it proclaimed. There was no limit to the powers of the legislature or the government and no tribunal to protect the citizen against the state. To talk of rights in such circumstances was, in Bentham's famous phrase, "nonsense on stilts". They were imaginary rights. In England, on the other hand, there was no abstract statement of rights but they existed because the government was subject to the law. No law said, as article 8 of the Conventions says today, that everyone has the right to respect for his private and family life, his home and his correspondence. But when the Secretary of State in 1763 authorised a search of John Wilkes's lodgings and the seizure of his correspondence, Wilkes successfully sued the officer for damages by the ancient writ of trespass. The fact that he acted under warrant of the Secretary of State was no defence because the government had no more right than anyone else to

enter his home. In English law, such rights were not derived from general statements of principle; on the contrary, the freedoms upon which the English prided themselves and foreigners like Montesquieu admired were generalisations from specific rules or the absence of specific government powers. So Bentham wrote in 1793:

> "It is in England, rather than in France, that the discovery of the *rights of man* ought naturally to have taken its rise: it is we- we English, that have the better right to it...Right, the substantive right, is the child of the law: from real laws come real rights; but from imaginary laws, laws of nature, fancied and invented by poets, rhetoricians and dealers in moral and intellectual poisons, come imaginary rights…"

The French declaration, he said, gave its authors, in addition to self-satisfaction –

> "the sort of titillation so exquisite to the nerve of vanity in a French heart - the satisfaction...of teaching grandmothers to suck eggs. Hark! ye citizens of the other side of the water! Can you tell us what rights you have belonging to you? No, that you can't. It's *we* that understand rights; not our own only, but yours into the bargain; while you, poor simple souls! know nothing about the matter."

How things have changed. Even before the European Convention, the absence of general statements of principle did not mean that English judges were not influenced, in their approach to statutory construction and common law, by the underlying human rights values which the law protected. Sometimes these influences were expressly acknowledged and sometimes they were not. As I have said, there has been a general trend towards greater frankness in judicial reasoning. But the Human Rights Convention, particularly since its incorporation into English law by the 1998 Act, has brought these questions into the foreground of decision-making. Judges are now obliged to explain why they consider that the rule or interpretation they are applying would or would not infringe a Convention right or come within one of the qualifications to that right. Sometimes the answers are fairly easy. The Convention was largely drafted in London and intended to reflect the values of the English common law. In most cases, therefore, the enactment of the Convention has made no difference. But times have moved on and there are some cases which are more difficult. And then there is the jurisprudence of the Strasbourg court, which sometimes elucidates and sometimes obscures.

English judges have always, or at least since the struggle between King and Parliament in the 17th century, seen one of their most important roles as the protection of the citizen against the

power of the state. But the degree of protection has not always been the same. They have always insisted that the government was subject to the law, but much depends upon what they construe the law to be. Until about 40 years ago they were often content to construe Acts of Parliament or the prerogative of the Crown as conferring wide powers upon the government, simply because these powers were expressed in broad language and irrespective of their effect upon the rights of the citizen. But even before the 1998 Act, there had been great changes in this approach. All kinds of implied qualifications were read into statutory powers: that they should be exercised only for particular purposes, should not be exercised unreasonably and so forth. And gradually a pattern began to emerge, in which one could see that human rights were exerting their influence upon the way statutory powers were interpreted. Courts were very reluctant to construe any statute as authorising the government to override fundamental human rights unless the language made this absolutely clear. And now the 1998 Act has not merely authorised but directed judges to interpret legislation in this way.

There has been another change in the way judges present their reasoning. The Convention and the 1998 Act has made judges more conscious of their role in giving effect to human rights in the construction of statutes and the development of the common law. But it has also, by contrast, made them more aware of the limits of their role in areas of the law in which human rights are not involved – which simply involve policy choices properly made by the democratic decision-making process. In other words, the reasoning of English judges now contains more explicit recognition of the separation of powers.

Until about 50 years ago, there was a conspiracy of silence about the separation of powers. Judges did not mention it because the theory was that they were either giving effect to the intention of the sovereign parliament, as expressed in statutory language, or declaring what the common law had been in the time of Richard I. Of course no one believed this theory, because anyone could see that the common law was not the same as it had been in the time of Richard I, and as for statutory construction, it was the judges who decided what intention they should attribute to Parliament. One very eminent judge described the whole theory as a fairy tale. But the need to set boundaries to the scope of human rights has required judges to give explicit consideration to the separation of powers. For example, a couple of years ago, a developer complained that the UK system of town and country planning infringed his human right to have his civil rights determined by an independent and impartial tribunal. Under UK law, the right to permission to build on land can in certain cases be determined by the Secretary of State, who, as the developer rightly said, is a member of the executive, influenced by government policy and political considerations; not an independent and impartial tribunal. But the House of Lords

decided that whether one should have planning questions decided by politicians or by independent experts was a matter of policy which should be decided by a democratically elected Parliament. There was no human right to build on your land and no right to any particular system to for deciding whether you should be allowed to build or not. Under a system based on the separation of powers, it fell within the area which should be left to Parliament rather than the judges.

Even in cases which do not raise questions of human rights, English judges are conscious of the limits which the separation of powers imposes on their ability to choose between different possible rules of law. Another recent case concerned a tenant of a house owned by Birmingham Council who did not have a hand basin in her lavatory. She complained to the magistrates under an old Act, going back to the 19th century, which gives power to require remedial work to be done when premises are in a state dangerous to health. What was meant by dangerous to health? The 19th century legislators would not have thought that having no hand basin made the premises dangerous. Many houses had no inside lavatory at all. On the other hand, opinions about what are necessary change. Should we give the Act a more modern interpretation? If we did, owners of property all over the country, especially local authority landlords, would have had to install lavatories. It would have increased the housing budgets. We thought it was not a proper matter for judges to decide how councils should spend their money. If they wanted to improve their properties, or Parliament wanted to impose a duty on them to do so, that would be a democratic decision. But there was no question of principle or human rights which was suitable for judicial decision.

The separation of powers means that judges, at any rate at the highest level, have to develop what might be called a political sensitivity about the limits of their decision-making powers. By this I do not mean that they should bow to political pressure on questions which it is their duty to decide, such as the balance between the power of the state and the rights of the individual. On these questions they must decide without fear or favor. But they must be aware that they have not been elected to office and that there are certain questions, like the expenditure of public money, which are better decided by the representatives of the people. Quite often these issues lie beneath the surface of the case. In the case of the washbasin in the lavatory, it would have been easy to say simply that the premises were or were not dangerous to health and leave it at that. But the business of judges of the final court is to look beneath the surface and confront the true political nature of the issue: should the court lay down standards for how lavatories should be equipped or should it be left to democratic decision.

I said at the beginning that I was not in a position to make comparisons between the United Kingdom and France. But I can at least say that there are certain obvious differences between the legal systems of the two countries which in my opinion make little or no difference to the role of the judge. One of them is the existence of a judge-made common law as opposed to a system of codes. Most of our cases are concerned with the interpretation of statutes rather than the common law. And I should think that in France there are provisions of the Code which are now so overlaid by jurisprudence as to be indistinguishable from judge-made law. Whether one is interpreting a code or other statute or developing a principle of common law, the constraints imposed upon one's decision-making power by history, language, human rights and the separation of powers are the same. Secondly, I think that it makes very little difference that some national courts have the power to declare legislation unconstitutional and we have only the power to declare it incompatible with Convention rights. The main influence of human rights is on the way statutes and common law are interpreted; actual incompatibility is rare and when it does occur, it is politically difficult for the government to refuse to do anything about it. Where I suspect differences may lie is in the judicial culture which determines the way judges formulate their reasons for decision. In this country, as I have said, judges are inclined to give the reasons in full, not to say garrulous, detail, dealing with both principle and the practical consequences of the options open to them, including matters such as the effect on public finance, which at one time were not mentioned in polite judicial society. In France it may be that the judicial culture tends towards greater economy of exposition. Our system, especially when one has five separate and lengthy speeches by members of the Appellate Committee, provides a good deal of material for discussion but a greater tendency to muddle. The French system inclines more to clarity and elegance. But that, perhaps, is what you would expect of our two countries.