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JUDGES, LAW AND BUSINESSMEN

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Preface

Law can be treated as an abstract art, but justice can be achieved only when life's realities are taken into account. Over many years this has been the recurrent theme of my column in the *Financial Times*, and neither respect nor modesty restrained me from criticising judges, however high seated – both English and European – if they indulged in logical constructions instead of seeking a just solution, or preferred doctrine to reality.

This volume, largely based on my published articles, is an attempt to reinforce what I have tried to say: that the main purpose of law is to prevent disputes, but that if it comes to them they should be resolved fairly, in a way which makes commercial sense, even if it means abandoning outdated precedents. And that justice is denied whenever the process is too slow or too costly for the wronged party.

I hope that the readers of this book will find in it useful, factual information on the topical issues of business law; and if they are reminded that improvements do not come by themselves, my labours will not have been in vain.

On the nature of these improvements, and how they ought to be achieved, opinions will differ: some of the views expressed in this book are controversial and most were reached without the benefit of argument and consultation. However, though the responsibility for the product is mine alone, I owe a great debt of gratitude to those from whom I learned, who made the work possible and who helped.

Of the many from whom I learned, I will mention only one: Hans Kelsen, who taught me to view law as a dynamic system constantly recreated at each step of the pyramid. The *Financial Times* gave me a sabbatical leave for the completion of this work, and the articles used in it as material could not have been written in the first instance without the support received from Geoffrey Owen, the Editor, who allowed me complete freedom in the choice of the subjects and their treatment.

Finally, I could have hardly organised the accumulated material, its updating, supplementing and editing in the short time available without the help of Marianne Stark, who also typed the manuscript, compiled the list of notes and cases, and eliminated some of the repetitions bound to occur in a work of this type.

A. H. Hermann

The Role of the Courts

U.K. JUSTICE TORN BETWEEN THE PAST AND THE FUTURE

As always happens in times of rapid change, the parliaments with which Europe enters the 1980s are no longer reflecting the real power structure of the countries they aspire to rule. The power of the bankers and of the unions escapes their control. Separately and jointly, these two dynamic forces are destabilising both the economy and law. As a result, not only the basic problems of balance of power, but also many minor problems of law, cannot be resolved in good time, or at all, by legislation. Industrial relations, company law, protection of creditors in the rising flood of insolvencies, the adjustment of the intellectual property law to the era of high technology and the requirements of antitrust laws designed to protect free competition while vast areas of the economy are regulated by private, state or international monopolies and regulatory agencies – all these areas of business law are beset by contradictions which courts and tribunals are called to resolve.

Law and politics

In the U.K. this has caused recently much unease about the role of the courts, and some suspicion that they are meddling in politics. The unions have made accusations about Lord Denning, some of whose judgments have been reversed by the House of Lords. Though there is no court to overturn the judgments of the European Court, for all practical purposes it has been reversed no less than 18 times so far, by governments flaunting its decisions, most spectacularly by France's refusal to respect its decision ruling out import restrictions on lamb. All this seems very confusing to believers in a clear-cut theory of the separation of powers. Where is the frontier between legislation and judicial power, between making law and interpreting the law, between courts and politics? The answer is that there are no such firm boundaries.

While laws of nature describe the inevitable, the rules of law merely indicate how people should behave. They differ from the moral, religious, or simply conventional rules of behaviour by being enforceable. The enforcement can be achieved not only by the strong arm of

the state but also by the compelling power of sanctions imposed by society – or a particular group – which has accepted the rules of law as necessary to its way of life and operation. In short, for law to rule it must be backed by the power of the state and by its acceptance by the majority of those subject to it.

Nature's laws have always been here, so to speak, waiting to be discovered, but nothing like that can be said about the law. Not even the British parliamentary draftsman, unsurpassed in his efforts to provide for all possible situations, can ensure that a statute will, in fact, answer all the questions that will arise when it comes to its application. The same applies to the edifice of common law constructed of precedents, as no case is really exactly like another. In every case the judge has to make his choice between two or more possibilities, all within the law, and as he does so he is stepping into the realm of politics, taken in its broadest sense.

In making his choice – taking his 'political' decision – the judge is, of course, not quite free. The limits set on his freedom by the statute may be wide or narrow; this makes all the difference between the very general way in which a Swedish legislator would express his intention in a statute and the enormous pains taken in the U.K. Finance Act to make sure that tax has to be paid only when clearly specified conditions have materialised.

The reforming judge

The judge is also bound by the rules of interpretation and obliged to respect the intention of the legislator as expressed in the relevant statute or in other statutes (as well as respecting the analogy of judge-made law) before he can decide according to what he considers to be fair and just.

But when he has come that far he is faced with a real difficulty: he must ask himself whether his views of what is right are generally accepted and, in particular, whether the law he will create will be enforceable, and whether it will provide a practical solution to the problem before him. In other words, he is now in the realm of politics which is the art of the possible.

This could not be better demonstrated than by the achievements and failures of Lord Denning, the great reforming judge. It has for a long time been the philosophy of the Court of Appeal over which he presided, that in nearly every case which comes to the court there are at least two possible solutions, and the court must choose that which is more beneficial to society as a whole. Guided by this principle the Court of Appeal has led the way in improving the legal position of the

married woman and the so-called 'common law wife,' and thus prepared the ground for a statutory reform of family and matrimonial property law.

In the field of business, the Court of Appeal has kept the law in step with the changed role of sterling (by allowing courts to give judgments in other currencies), re-established the possibility of enforcing security for future judgments by creating the Mareva injunction, by which the court can prevent the removal of assets from Britain, and extended the protection given by the courts to the minority shareholder. These are but a few of the great achievements made by political decisions acceptable and welcome to a great majority of those concerned.

Turning now to the failures – and the Court of Appeal has been overturned by the House of Lords many times – one can see that the most spectacular defeats were suffered by Lord Denning and his brethren when they made decisions in trade union cases where society is divided and where the possibility of enforcement of what is considered right by the majority does not always exist.

These decisions of the Court of Appeal were an attempt to solve difficulties which successive parliaments and governments left unresolved. By reversing Lord Denning, the Law Lords were saying that the courts do not have the strength and power to settle these difficulties for the politicians; these, indeed, are matters about which the whole nation must make up its mind – and it may well be in the process of doing so just now.

Reading the Law Lords' speeches one is left in no doubt that they shared the spirit which motivated the Court of Appeal in the union decisions. Some of them were also quick to acknowledge that in their view no other living judge has had such a great influence on legislation as Lord Denning.

Nor is it true to say that the Law Lords differ from him by observing strictly the letter of the law. They do pay due regard to the 'intent of the Act', and to let it prevail are sometimes, but not always, willing to disregard the ordinary meaning of the words. On the other hand, Lord Diplock is wary of lawyers inventing 'fancied ambiguities' where there are none.

Basically, however, the difference between the Court of Appeal and the House of Lords is not in the method of interpretation but in the assessment of the political acceptability of the possible meanings of the law.

A masochistic interpretation of law

The supremacy of fundamental rules over the more transient rules of public law is not always clearly evident in a country, like the U.K.,

where the Constitution is unwritten, and no neat Bill of Rights available.

Only the lack of a clear concept of the hierarchy of the rules which make up the law could result in an intellectual confusion of such magnitude as was triggered off by a head-on collision between the five Law Lords and the three judges of the Appeal Court, whose familiarity with the English rules of interpretation could not be doubted. In the steel strike case[1] the Appeal Court held that at issue was not a trading dispute but a political dispute with the Government. The Lords refused to lift their eyes from the text of the statute, and said that if the literal interpretation of the 1974 Act meant 'almost any major strike . . . might bring the nation to its knees,' this was 'good' law however repugnant the consequences might be.

The words of this masochistic judgment make much of the supremacy of Parliament over judges, but its message seems to be that Parliament, when adopting the 1974 Trade Union and Labour Relations Act and its subsequent amendments, either intended to vote itself out of power or accepted such consequence later when industrial action became much more effective in constricting the lifelines than they were in 1974. The fact that in a previous decision the Law Lords decided to interpret the immunity given to trade unions as dependent on the purely subjective belief – however unreasonable – that what they do helps them in a trade dispute is neither here nor there, though it is a good example of the innovative role of judges as there is no support for it in the words of the statute.

The real issue, to use the words of Lord Diplock, 'involved granting to trade unions a power, which had no other limits than their own self-restraint, to inflict by means contrary to the general law untold harm to industrial enterprises unconcerned with the particular dispute, to the employees of such enterprises, to members of the public, and to the nation itself.' The emphasis should be on the 'means contrary to general law.'

Can there be any legal way of undoing the 'general law' and coercing the Government? Yes, there is, but only one: a revolution – a great deed if it succeeds – high treason if it fails. But stopping short of that, neither lawyers nor politicians can really accept that trade union legislation was meant to change the constitution.

The hierarchy of legal rules, some being more important than others, is reflected in the hierarchy of the law makers. The strict division of power, legislative, executive and judicial, was invented by Montesquieu to serve the particular political purposes of the time; in fact, the frontiers between the three powers are blurred. Parliament passes an Act which gives power to ministers and their servants to determine the

finer details of the law. Individual citizens may fill in further details by making declarations or by concluding contracts, and both the public law and the law of contract is further elaborated by the judges who apply the intention of the legislator or of the contracting parties to a particular situation which often could not be foreseen at the time when the statute law or the contract were made. The efforts to reconcile the reality of law with the fallacy of the doctrine leads to no end of contradictions and uncertainties.

The Lords have been pulling at the chain of Montesquieu's doctrine for a long time. Quite recently they reaffirmed as a well-established principle that if an Act is unambiguous it must be enforced even though leading to absurd or mischievous results, but 15 years earlier, in 1963, Lord Reid said[2] 'to achieve the obvious intention of the legislation and produce a reasonable result we must do some violence to the words.' The words must prevail, he added, only if 'absolutely incapable of a construction which will accord with the apparent intention.'

Lord Denning went only a little further, refuting a lower court's assertion that 'we are bound to apply the provisions of an Act of Parliament, however absurd, out-of-date, and unfair they may appear to be.' Lord Denning said[3] that the literal, grammatical construction of the words was now completely out of date. In interpreting statutes, the Court of Appeal would promote their general legislative purpose – 'it is no longer necessary for the judges to wring their hands and say "there is nothing we can do about it".'

In his steel strike judgment Lord Diplock emphasised the other side of the coin: 'Where the meaning of the statutory words was plain,' he said, 'it was not for the judges to invent fancied ambiguities as an excuse for failing to give effect to that plain meaning because they themselves considered that the consequences of doing so would be inexpedient, or even unjust or immoral.'

Though this judgment seems to limit the judges' freedom very clearly, it does not really, because a text which was unambiguous at the time of drafting may become ambiguous with time as new situations arise to which it has to be applied. The perception of ambiguity would differ from one judge to another who, though sitting in judgment at the same time, has a greater or smaller awareness of economic or social change. Similarly, there are no real gaps in law – *lacunae* as the lawyers say; this is just a cover name indicating that the lawyer would wish that the law should impose some duties which it does not impose. Here again, everything depends on the interpreter's desire.

MORE ON INTERPRETATION

The adaptation of the law to the new circumstances is a continuous process and no legal system can do without creative judges. The difference between the two British legal systems and their counterparts on the Continent, said to be due to the absence of the rule of judicial precedent in Europe, is more a matter of theory than of practice. Continental judges, though not strictly bound by the decisions of superior courts, observe them nonetheless: they see no point in having an unnecessarily large proportion of their decisions reversed on appeal.

Strict in Paris

But from time to time, when a country's supreme court, like the proverbial bull in the china shop, destroys some particularly cherished object of legal art, the lower courts revolt. Such now seems to be the situation in France, after the Court of Cassation ruled in *Janousek* v. *Georges et Cie* that the employer's failure to provide a former employee with a written statement of reasons for his dismissal within the statutory time limit was not a mere procedural shortcoming but a substantive fault which vitiated the dismissal and entitled the employee to compensation of not less than six months' salary.

An Act adopted in France on 13 July 1973, imposed on employers two obligations when dismissing an employee. First, they must inform the employee of their intention to dismiss him and give him a chance to discuss the matter with them. The second obligation is to provide a written statement of the reasons for the dismissal, should the employee ask for one within 10 days of being given his notice. In the parliamentary debates, preceding the adoption of the 1973 Act, the committee report stated, 'There are degrees of culpability in a failure to observe the procedural rules . . . and we can leave it to the judge to assess that degree.' Until the *Janousek* case, however, judges felt that they could assess the culpability only within the limits set by the French Labour Code which distinguishes between procedural and substantive faults of a dismissal.

Prior to the *Janousek* decision, it was assumed that a failure to give written reasons for dismissal was merely a procedural fault. The Court of Appeal of Amiens thought so when dealing with the case.

This decision however, was reversed by the Court of Cassation, which held that the failure to communicate in time and in writing the reasons for dismissal was so detrimental to the employee's legal position that it made the dismissal unfair even if the employer had had a 'real and serious cause for dismissal.'