§ Law in context

Choice and the Legal Order

Rising above Politics

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Preface

Many of the themes which are touched upon in this book will almost certainly become increasingly visible in the world order in the years to come. Already futurologists are forecasting the more socially responsible global company, greater co-operation between governments, a burgeoning international, worldwide, upsurge of community, grass-root organisations, greater attention to sustainable development through concentration on job creation with a slimmed-down world energy or infrastructural base, etc. It is clear that knowledge and individual power is capable of growing enormously in the multi-media super-highway of the future with heaven knows what results for the influence of governments and corporations.

None of this should surprise us; the fact that the world is altered and shaped by human action means that the generality of human needs and aspirations will have to be satisfied or there will be a total breakdown in social systems. That is always assuming that we envisage a democratic future rather than a dictatorial world order. However, human needs are such that no other than a loosely democratic outcome is bearable or sustainable.

Correspondingly there should be little in what is said about the UK and its partner democracies that will not have a striking resonance for the world community over the years to come. It is almost certain that important aspects even of the UK experience will have been misrepresented or inaccurately projected so that there would be little point in expanding the analysis outwards at this time. However, on the assumption that global trends are as imagined, the least an island like ours can do is to attempt to set itself on the path which most likely represents common beliefs. The bargained interrelationships between the UK and its allies, the European Union, GATT, UNESCO, CSCE etc are left over for the imagination at this time. That is for the future. The task for the present is to re-examine our own legal order to help reinstate the conditions

for choice to be presented as the leading face of citizenship. If what follows is regarded by some as insufficiently internationalist or is one-dimensional that is understandable. However, for the time being at least, the nation state and some conception of sovereignty remain firmly on the agenda. If there is no vision of the kind of social and legal order the British wish to cultivate, then they will have little to contribute to the larger groupings to which the country is inexorably drawn.

Another large omission must be explained. Although a great deal is said about reconstitutionalising our affairs and the need for administrative law reform to accompany that process, little that follows deals either with the present law of judicial review or a more satisfactory and comprehensive review of the area of individualised justice and the state, except for innovations which are incidental to the larger aspirations. This is not because this area is unimportant; on the contrary. The author's thinking on these matters has been recently explored in company with Patrick Birkinshaw and is published as *When Citizens Complain: Reforming Justice and Administration* (Open University Press, Buckingham 1993).

I should like to thank Butterworths for their speed, courtesy and general helpfulness. I should also like to thank William Twining for justified criticism of the first draft and for helping to improve this book. Perhaps most of all I should thank David Campbell of Sheffield Hallam University for his patience and detailed criticism in finally helping to put the book to bed. The usual sentiments as to ultimate responsibility naturally apply.

Norman Lewis
February 1996

Introduction

Choice has become the ruling political sentiment in recent years, being primarily, but by no means entirely, associated with the New Right. It has informed the rhetoric of politics and yet has not been adequately analysed at a more profound level. Moreover, it has been treated as an ideology which belongs to a particular brand of politics when in reality it goes deeper into the heart of the constitution and the legal order. Choice relates to human beings and their true identity, matters often discussed by philosophers but rarely these days by either political scientists or lawyers. Choice rings political bells but politicians rarely debate its inner meaning; philosophical debate is unalluring to the electorate. However, the debate is crucial if a nation is to offer equal opportunity to all and to be ultimately cohesive. Correspondingly, the ties that bind a nation must find expression at a level beyond politics; in the constitution and the larger legal order. The argument is that the constitution is bigger than politics and any particular generation of politicians. The task, therefore, is to engage in discourse on the kind of legal order which gives centrality to choice as the guiding principle. This will involve going beyond the traditional radicalism of recent suggestions for constitutional reform and calls for a settlement which marries necessary changes in political structures with a statement of belief about citizen entitlements over and above the new orthodoxy of a Bill of Rights, extending to the social and economic sphere and guaranteeing opportunities for participation in all forms of political and social expression.

The argument is set out as follows. Part I seeks to assess the scale and nature of contemporary political developments across the developed world while searching for a vision of the human personality which keeps these developments under the control and direction of human agency. Chapter 1 analyses the concept of choice which is normally taken as self-evident when in fact it challenges the assumptions of ruling political philosophy head-on. On

examination the analysis dissolves into a discussion of human rights which in turn needs to treat the question of what it is to be human more directly than is normally the case. The analysis takes on board the relationship between choice and 'New Public Management' (NPM) or re-invented government and the commitment to markets as an expression of human freedom. It extends the argument to the larger notion of economic and social well-being, and introduces the relationship between these various concepts and the notion of both accountability and entitlement under the law.

Chapter 2 develops a discussion about the contested concept of human nature in political philosophy and in particular counterposes man as a bundle of market appetites – as the classic consumer – and man as the restless seeker of his own identity searching to discover his own soul in communion with others. A collective order which ignores anything so fundamental risks producing alienation and dissonance. Again, it is argued that the higher law in the shape of the constitution cannot remain indifferent to these issues.

Part II contains a series of chapters, mostly short, sketching out a number of themes for which the earlier discussions have relevance and which the legal order must ultimately address: they are the social dimension, the federal state, community and society, associations and labour, and markets, regulation and competition.

Part III addresses the significance of the earlier chapters for the legal order broadly conceived; this embraces not only the constitution in the terms which are normally understood, but also what are later described as 'sub-constitutional or directive principles' capable of educative, persuasive and developmental effects. Law is seen as essentially co-terminous with legitimate institutional power rather than as the narrow *gesellschaft*[1] concept associated with Dicey, Hayek and others. Its potential for liberation and self-expression in particular is explored and the conclusion reached is that earlier arguments point to the need for a social market constitution within a social market economy being sufficiently flexible to accommodate the inevitable challenges of the next century.

1 *Gesellschaft* is normally used as shorthand for a historically-specific form of law comprised of broad rules having generalised application which guarantee clear rights and impose corresponding duties. Infringement of the rules is accompanied by equally unambiguous sanctions. Crucial though this version of law is, it by no means exhausts the species.

Most of what follows is a (belated) response to the pace of change being forced in public administration. The rush to market, the impulse to embrace NPM, the farming out of public purposes, all demand a constitutional re-examination which was, in any event, long overdue. Newness is not opposed, going with the global grain is perfectly attractive, but as the world changes so must our perspective on it. It is extraordinary that the quiet revolution worked in governing institutions over the last decade or so has been largely unaccompanied by legislation. The British legal order has long been behind the times as far as the pace of politics is concerned, perhaps nowhere better illustrated in terms of its failure to lend democratic help to the policy-making process, which is notoriously elitist. This too is re-addressed.

THE CENTRAL THEMES

A number of the central themes running through this book can be foreshadowed. Brief mention has already been made of the social market economy which has, at its core, the conviction that market institutions are always embedded in other social and political institutions which shape them. This economy is predicated on the belief in the compatibility of the free market with a socially-conscious state. It seeks to promote a unified political economy based on the principles of freedom and social responsibility. But the freedom of the individual and the responsibility of the state are constrained by the constitutional framework within which the economy operates.

A commitment is made to 'the virtuous triangle' of individual, state and community which the constitution must seek to assure. The case for the autonomous individual is clear and unassailable yet it involves self-discovery and communion with others since human beings live in social settings sharing their lives with others (ideally) of their own choosing. This is a recognition of the need for the encouragement and maintenance of collective or associational outlets. It is clear that only the state or more properly the constitution can ultimately provide these guarantees. The state must allow the individual to flourish; it should be enabling and not directive, but to guarantee both the private and the collegiate life it cannot be anorexic. State, individual and community constitute the virtuous triangle and the constitution must be shaped by this understanding. In particular, the community aspect of living has

been too long ignored by the political system so that it is now necessary for the larger legal order to come to its assistance. Forms of fellowship at the level of local politics and welfare need constitutional backing if paternalism is to be diminished and associationism is to be encouraged. This is where the 'directive principles' of the constitution, referred to especially in chapters 8 and 9, come into play. In similar vein the right to form associations, not limited to labour associations, has enormous regenerative potential.

Choice involves adopting JS Mill's plea for 'experiments in living'. Choice is in part a celebration of pluralism, but it is also driven by the recognition that the human mind is never in possession of perfect information, that following Weber and others, it has to be accepted that rationality crises will recur so that it is only possible to learn through experiment and freedom from prejudice. Correspondingly, the heavily centralised state can never be logically defended since, among other things, it tends to nullify alternative sites of disagreement. Moreover, in the absence of perfect information, the social ecology, including the economic, must be open, transparent, experimental and encourage as much innovation as possible. An entrenched right to 'participation', political, social and economic, can provide a valuable stimulus to pluralism in civic affairs.

The argument also emerges that freedom and choice are only possible within a framework of relative economic and psychological well-being. The negative theory of human rights associated with Berlin as well as Hayek, Nozick, Von Mises and others is rejected in favour of the establishment of a basic floor of material well-being that makes free-willing action possible.[2] The iron law of the division of labour means that humans can only exist within systems of social support for the provision of material and psychic goods.

Citizenship and community are not simply contemporary chic currency; they emerge ringingly from an effective analysis of choice. There is an overwhelming case for encouraging bodies intermediate between the citizen and the state in order to foster the existential need for social association. With the rejection of the centralised state and equally of the 'atomised' individual, there will be increased emphasis on forms of civic and political participation which history indicates are linked to caring and belonging to

2 The negative rights philosophy has been justly criticised as making 'peremptory' assertions which, being intuitionist positions, 'are impotent in the face of conflicting intuitions'; Alan Gewirth *Human Rights: Essays on Justifications and Applications* (University of Chicago Press, 1982) p 198.

informal membership groups. There is also abundant evidence that both the state and the market operate most effectively in civic settings where trust, common standards and networks facilitate co-ordinated action and help to foster partnerships. Bringing all these things together requires paying attention to political and legal institutions, not least at the local level. It is here that there is an increasing clamour for more effective enfranchisement and participation and it is here that increasing dissatisfaction with the contemporary form of the local state can be found.

In order to provide a balance between the settled nature of certain basic human rights and the flexibility necessary to adapt to unpredicted change, a new constitutional shape is called for which provides for three separate categories of 'law': ordinary laws which Parliament passes in the traditional fashion, primary human rights, undisturbable save by a special procedure, and 'directive' or secondary constitutional principles. This middle range of laws would reflect the uncertainty about how the nation gets from one place to another at the same time as being committed to settled philosophic principles, such as the right to a clean environment and to active participation, for example, in economic life. The prescription is for a legal order broader in scope and function than has been traditional, but one which is more normative and purposive. There is a great deal to be learned, for example, from the Indian project of 'Social Action Litigation' which invests the courts with something resembling auditing functions instead of being limited to a Medes and Persian rigid interpretation function. This allows them to appoint fact-finding commissions to monitor the progress of government action in pursuing the obligations laid down by the constitution, and to monitor the response of government to its rulings. It represents a different sort of law which redefines its relationship to the political order, which itself needs radical reform so that the two, working in a restored partnership, enrich each other in fulfilling the nation's purposes.

Finally, there is the issue of 'legal autonomy'. The relationship between law and politics requires careful redefinition in a UK setting both to entrench choice and human rights and to liberate the art of politics itself. However, politics is ultimately subordinate to the higher law of the constitution which is part of the claim for judicial autonomy. A linchpin of the seventeenth century revolution was the concept of judicial independence given the most prominent expression perhaps in the Act of Settlement, and amounting to the simple proposition that an independent corps with entrenched status depending, in the final analysis, on their reputation for disinterested scholarship and authority must retain

the final say on the parameters of the collective settlement. Nothing that has occurred in the more than 300 years since that event has diminished the force of the argument. As has been well-stated:

> 'In the regime of autonomous law, the actions of the organised political community are not self-legitimating. The political elite may make decisions and deploy resources, but the question of whether those acts are lawful requires a separate assessment.'[3]

In spite of much anti-law passion in the UK, few will dispute this assessment. However, the difficulty arises when an argument for constitutional reform is made, not least in the area of human rights, for at this point the bailiwick of the judiciary becomes almost inevitably expanded. This dilemma, if that is what it is, is unavoidable, for although considerable constitutional power can, and no doubt should, be invested in ombudsmen and other 'legal' institutions, ultimately the judicial power is the one which must have the end authority and the ability to trump political cards. The power of the judiciary around the world's democracies has been growing, a trend which will almost certainly continue and gather pace, not least as a result of internationally entered obligations. An expanded catalogue of human rights seeking to guarantee genuine choice inevitably raises the profile and the importance of the judiciary. This is a situation which will be charged with interest and controversy in the coming century.

3 P Nonet and P Selznick *Law and Society in Transition: Towards Responsive Law* (Harper and Row, 1978) p 59.

Contents

Part I

Political developments and human rights

Chapter 1

Choice and the legal order

This book is impelled, as much as anything, by changes in the way Western governments in general and the UK government in particular have been conducting public affairs over the last 15 years or so. The analysis will hopefully transcend the life expectancy of this cycle, if such it is, but it gains resonance from contemporary developments which presently appear likely to occupy the high ground of politics for some time to come. It is not informed by a commitment to any particular political persuasion, but it may appear to be especially directed to politicians of a centre-right cast of mind. This is because they have usually formed the governments of the major nations of Europe and North America during the period when the changes under consideration have taken place, and they have had, without wishing to sour the opposition, the best tunes. Australasia's governments have been more politically varied, but the language which they have also used to justify the new ways of governing resound with declarations remarkably similar to those of a clearly 'conservative-radical' pedigree.

Changes in the perceptions and practices of government have moved almost unilinearly; they have been 'anti-state', they have favoured individualism, have extolled market solutions and, significantly, self-expression, even if the preferred language has been self-help. Particular empirical clusters of political preference have emerged, often mirrored in jurisdictions with similar histories, and appeals to the regenerative power of individual responsibility through free-willing endeavour have relegated paternalism to a footnote in history. The state might be a little more than night-watchman, but its functions in the waking hours are primarily of a benign and conciliatory nature. People must be encouraged to create their own lives, something which is impeded by an intrusive state presence. This brief résumé is a faithful attempt to replicate the credo of the political times, even if the occasional philosophical benefit of the doubt has been painted on. What, however, is