Democracy and Judicial Independence

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One of the pillars of British liberal democracy is the independence of the judiciary; but the problem is how to reconcile judicial independence with efficiency in the administration of justice and with public accountability. The former question, though of immense importance, has received ameliorative attention only in the last few years. The latter question has been resolved largely through the consistent, apolitical appointment of persons of high ability to the Bench. One useful mechanism to promote the continued smooth functioning of the judicial system in the U.K. might be the establishment of a Department of State concerned entirely with the administration of justice and judiciary.

Earlier in this trip I spoke on two sorts of democracy. The first, which I condemned as false, I labelled centralised democracy or elective dictatorship. I claimed that it is a view, of which the ultimate conclusion is a dictatorship of the right or left, based upon two classical theories of British political philosophy, legal positivism and utilitarianism, which rejected, as "nonsense on stilts", the view that law should be based on natural rights, natural justice, or objective criteria of right and wrong. To the other, of which I proclaimed myself an adherent, I attached the label "the theory of limited government", and claimed that it represented the true, the older, doctrine of Western philosophers and lawyers.

Of one thing there can be no doubt. The independence of the judiciary is a great bastion against the absolutist theory of democracy. It is older than Bentham and, in Britain, where it was first asserted,

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it is one of the two foundations on which British freedom is based. From Britain it spread, but in a markedly different form, to the continent of Europe. It is, I believe, more important than ever today.

There is, however, a word of warning with which I must begin. My experience has been exclusively of British politics and, in legal matters, English law. Even if this were not so, good manners would lead me to express my opinions, give my examples, and expose my experience in British or English legal or political idiom. But I believe the problems to which I am drawing attention are universal to the West. The solutions may differ from time to time and from place to place. I hope that what I have to say may be of interest to you, but its exact application to the Canadian scene must be for you to determine.

The course I am taking in this particular exercise is to raise some of the questions which I had to face as Lord Chancellor during my four years tenure of office in Mr. Heath's Government. They are questions which I believe are too seldom asked, and if asked are too seldom identified as important. I am, of course, aware that there is no such official as a Lord Chancellor in Canada. Indeed, England is really the only place where a Lord Chancellor still exists since, although his title extends to Great Britain, a Lord Chancellor has no effective functions in Scotland, and the ancient but separate office of Lord Chancellor of Ireland has disappeared. Nevertheless, the same questions must, I believe, be considered and answered in any free society.

All these questions revolve round a single basic problem, indeed are different aspects of it. The problem is how to reconcile the divergent and to some extent inconsistent requirements of public accountability, judicial independence, and efficiency in the administration of justice.

The *Act of Settlement,* which signalised the final victory of Parliament over the Stuart kings, left the problem, except for judicial independence, effectively unresolved. The judges were freed from the threat of dismissal if they incurred the displeasure of the Crown. But their appointment was, and still is, effected by the Crown's advisers and for centuries was regarded as a reward for political reliability. The salaries were exempted from the exigencies of the annual budget and paid directly from the Consolidated Fund; but though at one time, owing to the existence of a gold coinage and the virtual nonexistence of direct taxation of income, they were relatively enormous, the number, remuneration and pension of judges have become in recent years an almost annual item on the Parliamentary agenda, an item which is almost always accompanied by feverish government whipping and, in the Chamber itself, violent left wing attacks on the judiciary, sometimes as a whole, and sometimes specifying individual personalities.

The *Act of Settlement* therefore did not even solve the problem of public accountability and judicial independence, and it did not even purport to solve the problem of efficiency. Nevertheless, it gave rise to a central doctrine, on both sides of the Atlantic, admitted in theory if not always honoured in practice, that the judges are a separate branch of government, independent of the executive and of the legislature. Even in Britain, where the independence of one another of executive and legislature has not survived the growth of Cabinet government, the doctrine of judicial independence still flourishes. It is this theory and its practical implications that I am discussing now.

But I must start with administrative efficiency, the least dramatic and, in terms of value, the least important of the three requirements I have listed. All the same I would not recommend a free society to neglect it, as I suspect that most of the Common Law countries traditionally do. Justice delayed, says the judiciary commenting on *Magna Carta,* is justice denied. But justice inefficiently administered is also justice denied, and usually justice delayed into the bargain. When I first became Lord Chancellor I was almost unaware of the absence of efficiency in our judicial system. Take, for instance, the physical provision of court buildings, the recruitment, management, remuneration, and career structure of ancillary staff, and the listing of cases. In my innocence I believed that almost any building would do for a court if it had four walls and a roof, a sufficiently comfortable seat for the judge, and sufficient space for counsel, the public, the press and, if a criminal court, for the jury and the accused. It is obvious, is it not, that this is an excessively foolish and superficial judgment. But, owing to the absence in England of adequate Parliamentary accountability, efficiency in judicial administration was, until recently, largely lost sight of. The vast ancillary staff has to be housed, paid, fed and cooked for, and given a proper career structure with sufficient avenues of promotion. There must be proper accommodation for the storage and availability of voluminous records. Libraries must be stocked, housed, and maintained. Quite apart from this, and, perhaps most importantly, in courts of lower jurisdiction, the offices are thronged with plaintiffs and defendants in various stages of litigation, often without the slightest idea of what to do and how to do it and, in the smaller cases at least, without legal advice. When I first became Lord Chancellor, our higher criminal and civil courts in the provinces were largely administered by a peripatetic staff moving from town to town with the judge, finding their own sleeping accommodation as they did so, and carrying among other things many of the court records in their luggage. In practice, of course, the problem of listing cases so that they come in for hearing in an orderly flow as and when they are advertised, without undue periods of waiting for the parties, or keeping the extremely rare manpower resource — judicial manpower — waiting, demanded a very high degree of professional skill on the part of the

staff. But the judicial administrator was scarcely known and when attempts were made to introduce such an official they were often resented as interference with judicial independence. Such administration as was done in the High Court was largely supervised, and to some considerable extent actually performed, by the Lord Chief Justice, the Master of the Rolls, the President of the Divorce Division (as it was then) and the Senior Chancery Judge, together with their unqualified if intelligent clerks in the midst of pressing, voluminous and increasing judicial business. These distinguished men were not only badly overworked in consequence, but were also partly unaware of the skills and arts of the administrator; and, though by my time the suspicion and bad blood which had existed at the time of Lord Hewart and Lord Schuster between the Lord Chief Justice and the Lord Chancellor's department had entirely evaporated, increasing arrears of work, particularly in the criminal courts were threatening to bring the whole system into disrepute.

The reason for this lay in the fundamental constitutional problem of reconciling efficiency with public accountability, and both with judicial independence. Constitutional lawyers are, as I have said, taught a lot about the gradual victory of Parliament in its long struggle with the Crown, through the control of finance, and the subordination of Ministers to votes of confidence in the Commons. But equally important, and far less carefully studied, is the independence of the judiciary from the executive. The problems underlying this important prerequisite of freedom have been long in coming to the surface, and have been far less carefully identified, owing to the fairly primitive solution which was established by the *Act of Settlement.* Of course, so long as judicial administration was thought of, as it still is in various parts of the Commonwealth, as a part time exercise for the judges themselves, this presented few problems. The cost was small. The salaries of the judges were provided for through the Consolidated Fund, and junior judicial posts lay within the personal patronage of the senior judges including the Lord Chancellor himself, a circumstance which, however, gave rise to two of the extremely rare judicial scandals in our annals, one in the 18th and one in the 19th century.

But with the rise and recent increase of jurisdiction in the county courts, the enormous increase in crime, resulting in the multiplication of courts at the Old Bailey and the almost permanent sitting of the Assizes in Birmingham, Manchester and Liverpool, the decentralisation of divorce, and the huge development of informal tribunals to act as a sort of specialised judicial arm in a wide variety of quasi-administrative matters, the problem had largely become insoluble on the old lines, and at the time of my appointment only seven years ago the chaos was rendered worse by the nonsense of having separate jurisdiction and administrative machines between assizes and quarter sessions. Even now the process of rationalisation is far from complete since, owing to the extreme conservatism of the profession and of

backbenchers in the House of Commons in matters which they do not understand, Britain, or at least England, is still wholly without a rational system for courts of summary jurisdiction. These Courts are badly sited, often housed in unsuitable buildings without proper office accommodation, and without the simplest catering facilities. The staff are locally recruited and administered, a few still unqualified, without posting facilities or career prospects, and responsibility for them is divided between two central government departments, and two separate local organs, four authorities in all. This is largely the price we have paid for judicial independence and is wholly inconsistent either with efficiency or public accountability. None the less it is worth paying only so long as no more sophisticated solution can be devised. My impression abroad in Commonwealth countries is that the situation, although utterly different in detail, is equally chaotic. Administration on the scale required by a modern society can only be achieved by an efficient and expensive organisation and this involves the principle of public accountability.

This leads me to say that on the continent of Europe the problem has been solved in principle but at a price and in a manner wholly different from what would be acceptable in Common Law countries. On the continent of Europe judges form part of the civil service. They are not part of the practising legal profession. They have never been advocates. They often form part of the administrative machine being, at least for a time, wholly seconded from judicial duties. They are recruited from the law schools of the universities on graduation, at about age 27, and move up the ranks of promotion as they acquire seniority. They are, to an extent greater than would be tolerated in Britain, subject to a Ministry of Justice, with a politician at the head, though their positions are fairly secure, and the original recruitment is by merit. Contrast this with the British tradition. We appoint our judges from the practising profession at about the age of forty-five to fifty-five. We seek to do so from mature advocates with successful practices and long experience of court work. I doubt myself whether, given the adversarial system of litigation peculiar to Common Law countries, any other method of appointment is possible.

But how is it to be effected? Is there to be any, and if so what, system of disciplinary control? Is the appointment to be for life, up to a retirement age, or is it to be renewable? To what extent, and in what sense, are political appointments to be avoided? None of these questions is easily answered. In the United States it is notorious that many appointments are by election. No doubt this was due to the feeling at the time of the Revolution that appointment by the Crown was corrupt. But so is appointment by election, which is achieved by direct political influence and canvassing and may be lost if enough, or sufficiently influential, disappointed litigants can be found to protest

at reappointment. Even where election is not involved, the dual system of state and federal courts provides a wide difference in the degree to which appointments are politically motivated and in the quality of appointees. The Supreme Court has, of course, a very high standard, but since its judgments can directly affect the executive acts of the President and the validity of acts of Congress and State legislatures, the occasional controversy which surrounds Presidential nomination is not without a solid foundation of fact.

British appointments were, until recently, often frankly political. The correspondence between Lord Salisbury and Lord Halsbury, not less than the contemporary controversy surrounding Lord Halsbury's appointments, establishes that this was so, at any rate until the end of the nineteenth century. But in fact the practice continued much longer, and even between the wars some appointments were far from being above suspicion. It is now, I believe, accepted on all hands that, at least since 1945, all paid judicial appointments are impeccably impartial and made from the best talent available without regard to political leanings. We have now a bench, I believe, of higher average quality than ever before in my lifetime, and one which is also markedly less political.

In one way this gives rise to a new sort of problem. When I was first called to the Bar a high proportion of High Court Judges, and a smaller number of county court judges, had actually been in the House of Commons. Personally I regarded, and still regard, this as an advantage. I do not myself think that the possession of political opinions and political experience is a bar either to judicial office or real impartiality. Membership of the House of Commons, which necessarily involves close acquaintance with the other side in politics, tends to knock off angularities and mitigate prejudice rather than the reverse, and this certainly coincides to my mind with my personal assessment of the qualities of my predecessors on the Woolsack who, of course, were all overtly political appointments. By far the most politically prejudiced have been those with the least experience of public life in the House of Commons. I would gladly myself have appointed MPs directly from the House to the judicial bench but was unable to do so in a single case during my period of office. This is because the combination of a first-class practice at the Bar with membership of the House of Commons has been increasingly difficult. The result, I believe, has not been altogether happy since it has broken the centuries old understanding of our political system on the judicial bench, and the understanding of forensic affairs in the House of Commons. This has led to a two-fold misfortune. Judges more often unwittingly ruffle the susceptibilities of MPs in their observations from the bench; and the increasing practice of fairly unbridled criticism of the bench of judges by members of Parliament and even Ministers (unknown in my youth) has led to a fairly widespread belief among MPs that they should be in on the act when any controversial decision is made. The result

has been a flood of *ad hoc* Bills by private members designed without regard to any coherent view of the general issues involved to override the effect of particular decisions, and a spate of offensive and ill-informed criticisms of the judicial bench both inside and outside the House of Commons.

In the meantime, and for quite different reasons, a marked increase has taken place both in the number of politically sensitive decisions and of the attitude of the judiciary towards them. When I was called to the Bar in 1932 it seemed almost as if the Common Law had sunk, if not into a decline, at least into a state in which there was no more to be said. The great constructive period which began about 1860 had come to an end by the beginning of the First World War. The great advance of statute although, of course, it had reached nothing like its present proportions, was already beginning. Subordinate legislation with statutory force, already the subject of a famous book by Lord Hewart, was assuming gigantic proportions. At that stage it would not, I think, be disrespectful to describe the judiciary as content to adopt the role of lions under the throne, maybe even sleeping lions. Occasionally a low growl would be heard as in the case of O'Brien in about 1922 or 1923, when the Home Secretary exceeded his powers. But in the main the judges seemed to accept that Parliament was constantly conferring new administrative functions on Ministers and other subordinate authorities, and these, it was thought, should make their own decisions and pursue their own policies free from judicial interference. Perhaps the high water mark of this tendency was reached during the last war in the cases under 18B *(eg Liversedge* v. *Anderson)* and relating to the Crown privilege to withhold confidential information and documents *(Duncan* v. *Cammell Laird).*

A very different situation presents itself today. This is, of course, not primarily the doing of the judges who, after all, do not decide what cases come before the Courts, and often do not relish the fact that some of them contain a constitutional or political sting in the tail. The real cause of the spate of constitutional cases has been the vastly increased activity of the other two branches of government, executive and legislature, intruding or progressing (whichever way you choose to look at it) into almost every branch of human society, and the disturbed and occasionally explosive social scene which underlies it.

The new mood has covered almost every field of law, contract and tort, evidence, commercial and patent law, shipping, as well as constitutional cases. It seems to have begun about 1945 when Mr. Justice Denning, whose remarkable judicial career was then just beginning, proclaimed his independence of the doctrine of consideration in contract and opened up, as he believed, the new and exciting field of promissory estoppel. But, since then, decisions in the field of constitutional law have become more and more numerous and more and more contro-

versial. The Divisional Court and the judges of first instance operating the old prerogative writs of certiorari, prohibition and mandamus, and the discretionary remedy of declaration, have become more and more alert to detect irregularities in the performance of the growing body of statutory tribunals, and local boards, and authorities. The doctrine of natural justice, long almost dormant, has been creatively received. The Court of Appeal has not hesitated to criticise and overthrow ministerial decisions, and in the main it has been supported by the House of Lords under the brilliant leadership of Lord Reid, although restraining some of the more audacious innovations.

Of course, none of this has occurred without public controversy. But, as I have said, an independent judiciary cannot avoid controversy in an age of continuous social change. The flow of controversial work never stops. Cases succeed one another about industrial relations, squatters, students, immigrants, new religions and philosophies, Cabinet memoirs, wireless licences, sewerage rates, the sky train, comprehensive schools, foreign compensation, war harm, conspiracy to corrupt public morals, the National Society for the Prevention of Cruelty to Children, even just television personalities and politicians. You name it. The judges have to decide it; and whether they refuse the remedy or grant it, decline jurisdiction or accept it, they will come in for criticism from disappointed litigants, trigger-happy politicians, offended ministers, disgruntled trade unions, or angry bosses, and, what is more, they have got to take it in silence because they cannot answer back.

Of course, we can all form our own views as to whether this new period of judicial creativity is good or bad, popular or unpopular. For what it is worth, my own is that the renewed and increasing creativity of the judiciary is to be welcomed and, even where the particular manifestations of it have been controversial, far from unpopular. If I am right, the public has been growing increasingly restive at the encroachments of government, and even of the majority in the House of Commons, on individual liberty, and increasingly critical of powerful corporations and trade unions in the damage they sometimes quite callously inflict on innocent third parties, or even their own members, and of their curious belief that they have a right to deprive the public at large of their most basic needs in the ruthless pursuit of what they believe to be the sectional interests of their members. It is, I believe, increasingly recognised that judicial independence remains one of the few remaining protections of the individual and minority groups against the encroachment of the bureaucracy and the politically motivated jack in office, against the intrusiveness of mass culture and the oppressiveness of Unions and great Corporations. Individuals and minorities are coming more and more discontented at what they regard as the increasing remoteness of governments, the facelessness of modern public companies, and the insensitivity of officials or private associations.

I cannot, of course, prove the assertion I have just made, that all this judicial creativity is far from unpopular. But there is one fact to which I can point with confidence that goes to show that by and large the judges are doing a good job of work. Whenever some public scandal, real or imagined, takes place, or some public calamity demands investigation, or, more often than not, when controversy breaks out in the course of an industrial dispute, or when a commission or committee is required to enquire into some proposed legal change, public opinion almost inevitably demands, and successive Governments have usually ensured, that the investigation is carried out or chaired by a senior member of the judiciary; and though judges do not themselves relish these additions to their contractual duties, they seldom refuse; and the readiness of the public to accept their findings is a tribute to the respect in which they are held, no less than to the public spirit which leads them to accept a controversial and sometimes dangerous and unpleasant task.

This leads me back to the discussion of the central problem of organisation: how to reconcile judicial independence with efficiency and public accountability. I use the word "reconcile" advisedly because there are high and dry extremists who might argue either for a complete separation of powers or complete subordination of the judiciary to the secular political leadership and philosophy of the state. That the last is in fact the situation in Eastern Europe, and most of all in the Soviet Union, there can be no doubt. In such a case the judiciary remains no more than a technical arm of the state equipped with a particular expertise, bound to give effect to its philosophy and aims but not able to give effect to any objective standards of jurisprudence and justice — standards designed to represent values valid independently of the particular will of the ruling bloc. I will not expatiate on this situation. I believe myself that it is the logical expression of the theory of centralised democracy as it is expounded by the theorists of the left and right in Western countries. They might not admit it bluntly even to themselves, still less to other people. In any event we are still a long way away from that.

On the other side of the fence there are those who believe in the complete separation of powers. But these seem to me to fall down at two points: appointments and efficiency. The appointment of judges in the end must come from the executive, and the money for the administration must be found by Parliament. I have heard it suggested that judicial appointments should be made by a committee of judges or the like. But this would make the judges a self perpetuating oligarchy and I do not believe in the end that this would be acceptable to public opinion or constitutionally correct. Travelling, as I have done from time to time, in other jurisdictions, I have seemed to sense that, to the extent that this view is held, the court system tends to be starved of funds and logistical infrastructures to the point where efficiency is seriously impaired. I do not believe that it is feasible to cut the judiciary

off completely from the political world. Equally I do not believe it is entirely worldly-wise to make it self organised and self perpetuating.

When I was Lord Chancellor I was constantly being asked whether, in England, we did not need a Ministry of Justice. I always replied that, so far as England and Wales were concerned, I regarded myself as the Minister of Justice. But, of course, it all depends on what his functions should be. If by a Ministry of Justice is meant that the same Minister should have responsibility for the administration of the Courts, and the initiation of prosecutions, I violently differ. I saw that system at work at the Attorney General's Department during the war. I also believe that the responsibility for penal treatment after sentence and the responsibility for the judiciary and the courts are incompatible. I am not putting forward the English solution as ideal either in England or elsewhere, but there are two mistakes which I believe we have not made. Prosecutions are the department of the Attorney General; penal treatment, of the Home Secretary.

Nevertheless, I believe that there is a case for a Department of State concerned entirely with the administration of justice and the judiciary. This Minister would be responsible for the general state of jurisprudence and legislation, including the drafting of bills, law reform, criminal law and procedure, and the general state of efficiency in the courts. Of course Britain is a unitary state, and, with us, no problem arises of two separate legal structures, federal and state, as in the United States.

The difficulty of such a department is that it is apt to be too political. So far, we have avoided this difficulty in England by making the Lord Chancellor sit in the House of Lords and not the Commons, and by making him take the judicial oath and occasionally sit as a judge as well as discharge his other functions. Obviously, other nations arrive at other formulae, some by entrenching articles in their constitutions, others by rules of practice designed for the same purpose.

But whatever solution is found, a problem remains which democracy must take seriously. The extreme advocates of what I have called elective dictatorship are always on about what they conceive to be the danger of political judges. There is a real danger here, and I hope I have said nothing to suggest that no problem exists. But it is nothing like the danger of elective dictatorship to which I have sought to point. The moment politicians, whether acting as Ministers or as members of the legislature, set themselves up as wholly above the law, they are setting themselves up as above the people whose interests they are there to represent, and democracy, as it is understood in the West, will cease to exist. The outward mark of democracy is universal suffrage, but its content is political pluralism and a theory of limited government. That means the theory which prescribes that government

may not overstep the bounds set to it by a body of moral values, and, if these bounds are to be effective, there must be a strong judiciary able to call a halt to the acts of politicians whether these claim to be acting as the elected executive or as the legislative body.

Thus, in this lecture I hope to have identified a real need of democracy. It is to have a mechanism constantly available to reconcile judicial independence and impartiality with public accountability and administrative efficiency. Different societies will, of course, create their own mechanism compatible with their national traditions and requirements. There is no magic in the particular formula of which I have direct experience. But my belief is that democrats the world over pay too little attention to the problem and ought to spend more time trying to solve it. I do not claim that the solution will win wars or prevent revolutions. But as a part of a stable and civilised society it forms a useful and, I would add, necessary part of the mechanism. All the more useful and necessary because, at its best, it is liable to remain unnoticed.