

Annual Bingham Lecture

Wednesday, 3 May 2017

The Right Hon Lord Judge PC: A Judge's View on the Rule of Law

According to the publicity material, Lord Bingham embraced the rule of law with every fibre of his judicial being. So indeed he did. But although it was true as far as it went, the advertisement was not completely true. I believe that Lord Bingham embraced the rule of law with every fibre of his non-judicial being as well. He will of course be remembered as one of our great jurists. But I should like to start today by reminding us all that he was also a wonderful human being.

Having worked closely with him and come to admire the man as much as I admired the judge, it is a great honour for me to be speaking tonight. If occasionally I refer to him as Tom, forgive what may seem to be an impertinence. It is simply an echo of friendship.

When speaking I should record that I am a member of the Constitution Committee of the House of Lords. May I make it clear that I am not speaking on behalf of that Committee, but exclusively on my own behalf. That is of particular importance at the moment because the Committee, having reported on Parliament and the Legislative Process in 2004, is once again revisiting the Legislative Process, and will make recommendations of its own in due course. And given that we have an election, I should perhaps underline that everything which I have to say has applied or would apply to any government of any particular political colour or combination of colour.

Whether writing or speaking, Tom being Tom, never used those three magical words, "rule of law", as an incantation, "conned and learned by rote", to be trotted out as if it was the answer to any point. I had to get in one quote from Shakespeare, for Tom's sake. It underlines that he wanted us to understand that overuse, or ill considered use of these three words would gradually diminish their significance. From a battlecry or a clarion call they would become mere mouthings. That after all is how phrases become hackneyed, dulled and diminished and devoid of meaningful impact.

Every society has law or rules which govern it. In that sense all societies have rules of law. The Garden of Eden, Demi-Paradise as it may have been, had a rule which was a law. The eating of an Apple from a particular tree was prohibited. That was a rule as well as a law. Perhaps the most important rule today remains the presumption of innocence.

As far as I can discover, the phrase "rule of law" made its first appearance in the sense in which we understand it today in 1610. In the Petition of Grievances the House of Commons protested to King James I against the use of the Royal prerogative, and his attempt to circumvent Parliament. Notice, this was the Commons protesting against rule by proclamations, against what we, today, would describe as a misuse of executive power.

"Among many other points of happiness and freedom which Your Majesty's subjects... Have enjoyed... There is none which they have accounted more dear and precious than this, to be guided and governed by the certain rule of law, which giveth... That which of right belongeth to them, and not by any uncertain and arbitrary form of government. Out of this root has grown the indisputable right of the people of this kingdom not to be subject to any

punishment... Other than such as are ordained by the common law of this land, and the statutes made by their common consent in Parliament".

Although this is not a lecture in history, another of Tom's interests, I want to underline that this was 17<sup>th</sup>-century England, far removed indeed from democracy as we know it, but the Petition fixed on the "rule of law" as the ultimate protector of precious rights and freedoms, and identified public consent as given in Parliament as a crucial ingredient of the "rule of law". What is more it is clear from the Petition, and the context, that "consent" had to be understood as what we would nowadays describe as "informed quote consent, if you like, educated consent. This was not the thought process of notable political philosophers, like Plato and Aristotle, but a plea by a representative group of the community, ordinary men in Westminster, that executive authority should not be exercised unlawfully. We may be tempted to forget that this was a courageous Petition, brave because the Tower was the frequent destiny of Parliamentary dissenters, and dissent could very readily be treated as treason. Yet from London this phrase has travelled the world, and even countries which would not recognise the rule of law if it hit them in the face, claim to abide by and uphold it.

From it, after a Civil War, the execution of one King, and the abdication of another, emerged the sovereignty of Parliament, as the supreme lawmaker in this country, and in 2017, the ultimate democratic authority of a House of Commons elected by universal suffrage. In constitutional theory Parliament can make any law it likes. But the exercise of constitutional sovereignty is not synonymous with the rule of law. The abhorrent laws of apartheid South Africa were constitutionally impeccable; so indeed were some of the appalling laws of Hitler's Germany. We must therefore distinguish between constitutionality and the rule of law. Constitutionality is a vital ingredient of the rule of law, but not always, nor in every country, definitive of it.

Nothing I am saying is intended to cast the slightest doubt on the principle that the foundation of our constitutional arrangements is the sovereignty of Parliament. Nor indeed should anyone take what I am saying is a coded message, implying that we are on the way down to horrors like apartheid or Nazism. What however I am asserting is that the sovereignty of Parliament is emphatically not the sovereignty of the executive or the government. And nearly 4 years after retirement as a judge, and spending an increasing amount of time in the House of Lords, I see the legislative process in a new way. In summary, the process of scrutiny, which provides the basis for Parliamentary control of the executive, has if I may adapt the famous aphorism of John Dunning, diminished, is diminishing, and ought to be increased..

As a judge I would spend time construing a section, or a section or two of a statute, in the context of the whole statute, attempting to discern its meaning. Sometimes the meaning was plain, frequently not, but beyond the occasional gripe about the amount of legislation (an entirely justifiable gripe) like other judges, I had no time to focus on the legislative process as a whole, a process which is now a torrent, and faces a legislative tsunami, as the process of Brexit offers the greatest challenge ever faced by our legislative processes.

You will be told that the number of Bills has been at a steady level for some 50 years. True enough. But the average number of sections in each Act has doubled. Lawyers know that every section has grown much longer, and then there are the killer schedules, which in many cases are at least as long, if not longer than the sections of the legislation. During the last few years something like 3000 typed pages of primary legislation have been produced annually, and in addition laws are made by some 12,000- 13,000 pages of delegated legislation.

Again, annually. The productivity is wonderful. But there is a deeper question. How much of this lawmaking, whether by primary or delegated legislation, has actually been read, just read, let alone scrutinised, by how many of us in Parliament in advance of the enactment coming into force?. Yet, as I have already indicated, legislative scrutiny is an essential

ingredient of our Parliamentary democracy. The government should be held to account for its actions, and its policies, and consequentially for the laws it seeks to enact to implement its policies and legitimise its actions.

We now have legislation which is not much more than intended political propaganda. Because of Tom's deep interest in Wales, and by way of respect to Sian's ancestors, I use the Wales Act 2017 as the example. Section 1 (2) tells us that the purpose of this Act is to "signify the commitment of the Parliament and government of the United Kingdom to the Assembly and the Welsh Government". Hurray, but that is not lawmaking. It is a legislative provision which is not legislation at all. Section 2 inserts into section 107 (5) of the 2006 Act: "but it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the assembly...". Hurray again.

What on earth does "normally" mean? Who decides? When the issue arrives at the Supreme Court the unfortunate Justices will be told that they should keep their noses out of party political matters. Look just a little deeper, and what you have is a provision which purports to recognise a constitutional convention, and then purports to give it legal force, while preserving the notion that it remains a convention. Please bear the propaganda element in mind when I return, as I shall, to the Wales Act. Please, also, do not forget that legislation is an entirely inappropriate vehicle for government propaganda. Moreover the more time spent on propaganda, the less time there is for scrutinising what I might call real legislation.

Then we have "skeleton" Bills. There are numerous examples. The Childcare Act made provision to secure that childcare was available free of charge to qualifying children of working parents for, in round figures 30 hours in each of 38 weeks annually. If you look at the Act you will find no more in truth than an assertion of this ambition, and all the rest will be dealt with by regulation. There are regulation making powers in section 1 (4), s1 (7), and again in s1 (8). Turn to section 2. To discharge the duties, no less than 11 regulation making powers are included in s.2 (2). These include the creation of criminal offences, and financial penalties, and the conferment of powers on HMRC. There is yet further regulation making power in subs 6. In section 5, there is a further regulation making power, relating to the publication of information about childcare and related matters. Are you keeping count? I make it 16 so far. Because there is the grandmother and grandfather of regulation making power in what is described as a supplementary provision about regulations, which enables any provision made by or under any Act (whenever passed or made) to be amended, repealed, or revoked, by regulation. All these regulations, to secure free care for children, including the creation of criminal offences. There is therefore no scrutiny during the enactment process, because there is nothing to scrutinise, and as we shall see, effectively no scrutiny when the regulation making powers are exercised.

You will hardly be surprised that the Delegated Powers and Regulatory Reform Committee, whose tireless efforts to the improvement of draft legislation when it reaches the House of Lords should be gratefully acknowledged, took the view that this Bill contained "virtually nothing of substance beyond the vague "mission statement"....". The criticism was entirely justified. The criticism of "skeleton" bills has been directed at a significant number of recent Bills, including for example only, the Education and Adoption Bill, where the concept of a "coasting school" was created, without a statutory definition of what that might be, with its meaning to be found in regulations to be made subsequent to enactment. Another example is the Cities and Local Government Devolution Bill which was described as "in essence an enabling Bill in that it primarily confers delegated powers rather than containing operative provisions". True it is, that the efforts made by the Committee in relation to these, and other Bills, has some influence during the debate in the House of Lords when considering the legislation, and the Government sometimes acknowledges the force of the argument.. For example, in relation to "coasting" schools, it conceded that the delegated legislation should

be subject to affirmative procedure, but rejected the crucial weakness, the absence of a definition in the primary legislation. It will not be for the courts to interpret the word "coasting" as a perfectly ordinary English word: this perfectly ordinary English word will be defined in regulation. And whatever definition may be adopted, there is in reality not the slightest chance, I do mean, not the slightest chance, that the new definition would be rejected.

Yet, here we have skeleton bills, in which important policy questions are being left to delegated legislation. It is all perfectly constitutional. But this is legislation relating to matters of principle and policy, rather than what my much admired colleague on the Crossbenches, Lord Lisvane, vividly described as the "mechanics", which is what delegated legislation is for, and for which it is entirely apt.

In the available time, I must offer no more than a glance at the "Christmas tree" Bills. In summary the Christmas tree is the grand title to the Bill, apparently well focused. The tree is then festooned with multiple miscellaneous, potentially controversial provisions, with no apparent connection with the title of the Bill. Included in a bundle like this, they can escape scrutiny in the Commons. The Bingham Centre, with the economy of language which Tom himself would have appreciated, describes them as "bad practice". I agree, and have nothing to add.

Can I now come to Henry VIII. Some of you will have heard me on that tyrannical menace, but I shall not detain you for long. Do remember the Wales Act? Do remember all those grand statements? Well Part 5 rapidly brings us down to earth. Regulations may be made which will give power to the Secretary of State to "amend, repeal, revoke or otherwise modify

- (a) an enactment contained in primary legislation, or
- (b) an instrument made under an enactment contained in primary legislation".

To avoid any doubt, and by way of contrast with "coasting schools", "primary legislation" means

- (a) an Act of Parliament
- (b) a Measure or Act of the National Assembly of Wales".

So here, by regulation, a Minister will be empowered to amend any Statute or legislative provision enacted not only by the Parliament which chose to bless the Minister with this extraordinary power, but also by the representative Assembly which did not. When I use the word "extraordinary", I am describing the constitutionality of the provision, not its frequency. Clauses like this are now commonplace. I shall not reanalyse the Childcare Act. Provisions like these are, and I used the word advisedly, "commonplace". In the last Session no less than 14 Bills included no fewer than 41 of them.

They are always called Henry VIII powers and we believe that the 1539 Parliament gave such powers to him. Certainly he wanted them, but he did not get them. Parliament refused to allow him power to override Statute. This indeed was what the Petition of Grievance objected to. Now, here we are, with a Parliament based on universal suffrage, conceding to the executive, the power to overrule primary legislation, and we do so habitually. All this is constitutional. It derives from the sovereignty of Parliament. It is not a recent phenomenon. It is embraced by governments of all political colours. Yet what Henry VIII could not get from his normally subservient Parliament, we now grant.

Indeed they are nowadays granted with a benevolence far in excess of their numbers in the 1930s. Yet public concern at that time led the Donoughmore Committee to recommend that "the use of the so-called "Henry VIII clauses", conferring power on a Minister to modify the provisions of Acts of Parliament... Should be abandoned in all but the most exceptional cases,

and should not be permitted by Parliament except upon special grounds." As to delegated legislation generally, it concluded that "there is at present no effective machinery for Parliamentary control and the consequence is that much important legislation is not really considered and approved by Parliament" That was in 1932. All I can add is that no notice was taken of Cassandra when she piteously warned against the Trojan Horse.

We are told that Parliamentary control of secondary legislation is secured by the requirements of affirmative or negative resolution before regulation making powers come into force. In theory this is true. In constitutional theory it represents the sovereignty of Parliament. In practice Parliamentary scrutiny is minimal. Regulations put before the Commons are given the level of consideration which it would be an exaggeration to describe as cursory. That extends to the exercise of Henry VIII powers as well as matters of policy and principle which have not been included in primary legislation.

I only have time to identify a few facts. Delegated legislation is brought into force by statutory instruments. The statutory instruments are drafted by government departments. There are three processes, negative resolution, affirmative resolution, or strengthened procedure, enhanced and super affirmative, resolutions. Within these three procedures there are 16 variations. In the Commons they are considered by the Delegated Legislation Committee, a group of 18 members. The last time the Commons rejected a statutory instrument was in 1979, over 35 years ago. At least the Lords has rejected 6 such instruments since 1968, that is, in almost 50 years. And from time to time a "regret" motion is passed there too, which nevertheless does not prevent the instrument to come into force. Everything I wish to say about these processes is contained in "the Devil is in the Detail: Parliament and Delegated Legislation, produced by the Hansard Society.

"Generally speaking, however, DLC debates are often a waste of Parliamentary time.... Members are ill-prepared for the debates, they can often be seen dealing with constituency correspondence, and they may have no knowledge at all of the often technical issues under discussion. The average length of a debate in the 2013 – 2014 session was just 26 minutes, but can be as short as 22 seconds. They make a mockery of the concept of effective scrutiny."

This summary of legislation covering 12,000- 13,000 pages annually, and literally thousands of statutory instruments, is really rather chilling. It is chilling anyway, but particularly so in relation to skeleton bills and the exercise of Henry VIII powers. Whatever concerns I may feel, I have to repeat, that for as long as Parliament, and in particular the Commons, are content with these processes, they are entirely constitutional. Perhaps to lift the gloom, I should also add that from time to time Parliament does wake up and reject legislative proposals, or makes it clear that proposals are unacceptable and would not receive Parliamentary approval. Of these, perhaps the most obvious in recent years was the Legislative and Regulatory Reform Bill of 2006, which was nicknamed the "Abolition of Parliament Bill". If enacted a new constitutional principle would have emerged, that there is nothing that a Minister cannot do.

Generally, however, constitutional questions receive scant attention, or are treated dismissively. For the government of the day the imperative is to get its business through Parliament..I shall not reiterate my profound unease at the absence of any sensitive understanding of our constitutional arrangements which led to the Lord Chief Justice hearing the news on the radio that the office of Lord Chancellor was abolished; nor indeed that the courtesy was the result of a deliberate policy, not accidental oversight. But, ignoring all other aspects of this constitutional upheaval, there is one major consequence which is not attracted the attention it deserves. The point is a simple one. There is no member of the Cabinet who has had any specialist experience or practical understanding of the constitution which the Lord Chancellor in his former role brought to the table. There is a Minister for the

Constitution but he is not the Lord Chancellor, nor indeed a member of the Cabinet, and as he is not a member of the Privy Council, he does not attend Cabinet meetings. We can wonder what attention will be given by the executive to the current work of the Constitution Committee on the Legislative Process. In 2014 the Constitution Committee complained that there was "no clear focus within Government for oversight of the constitution. We invite the Government to agree that a senior Cabinet minister should have responsibility for oversight of the constitution as a whole." As if recognising that whichever Party came to power after the forthcoming election might not see the point, it was repeated, quite deliberately, "we repeat our recommendation that there should be a clear focus within Government for oversight of the constitution as a whole, beyond individual constitutional reform proposals, with a senior Cabinet minister identified as responsible for that work". Following the general election in 2015 there was a new government and a Constitutional Reform Cabinet Committee was created "to consider matters relating to constitutional reform within the United Kingdom".. In nine months it met once. I am not sure whether it still exists. But the repeated specific recommendation of the Constitution Committee has been ignored. That crucial function personally performed by the old-style Lord Chancellor in reality is not capable of being performed, either by the Minister for the Constitution, nor indeed by the Minister for the Cabinet Office who has been assigned this responsibility. Neither is an office which is remotely capable of replacing the old style Lord Chancellor, who would have appreciated some of the subtle nuances which underpin our constitutional arrangements, and whose office carried historic and effective weight in Cabinet.

Returning to the Constitution Committee In May 2 016 it published an important paper on the Union and Devolution, which included a section on ministerial oversight of constitutional matters. It received the government response on 7 March 2 017 . It is, of course, no coincidence, that the Minister for the Constitution was due to give evidence to the Constitution Committee on the following day. Another important report, on Inter-governmental relations in the United Kingdom, was published in late March 2 015.it received a response nearly 2 years later, in January 2 017.

These observations relate to a period when we had a Conservative government. Bearing in mind that it was a Labour government that masterminded the constitutional revolution between 2003 and 2008, and proposed the Abolition of Parliament Bill I emphasise that I am not attempting to criticise one political party at the expense of another. The truth is that I cannot discern any wild enthusiasm for addressing constitutional issues, unless perhaps to enable a party political point to be made.

I am running out of time. Constitutionally, the only body entitled to address these problems is Parliament itself. If they were facing Henry VIII or James I, I have not the slightest doubt that there would still be men, and now women, who would show the courage shown by their predecessors and stand up to an over mighty executive seeking yet wider powers,or proposing wild laws. There is, I hasten to emphasise, not the tiniest scintilla of evidence which leads me to even the mildest suspicion that somehow or other a power grab is or has been in progress. When Prime Ministers, or senior Ministers, of whichever political colour, speak of the sovereignty of Parliament that is what they mean, and that is what they believe. In the turmoil of daily political life, constitutional issues seem to be very lawyerly, and readily brushed aside. What on earth are men and women of courage supposed to stand up for?. or for us, as citizens to stand up for? Put shortly, it is the rule of law itself. The flaw in our processes is that we are eliding constitutionality and the rule of law. The laws which govern us, whether created in primary or secondary legislation, or indeed codes of practice, should be carefully scrutinised by Parliament before they come into force. An elementary principle which underpins the rule of law in our country is that laws are made after Parliamentary scrutiny. The three words "sovereignty of Parliament" should be no more of an incantation, "conned and learned by rote", than the other three words, "rule of law".

The current arrangements are about to be tested by Brexit. I have very little to add on the legislative processes. How we deal with more than 40 years of laws made in the context of Treaty commitments by which we shall cease to be bound, some of which were enacted by statute, some by secondary legislation, some of which is likely to be agreeable to the majority but not all of our citizens, some of which would be disagreeable to a majority, but not all of them, with many thousands of provisions interacting and bearing on each other, will test our Parliamentary processes. For today's purposes my main concern is that by the time the Brexit process has finished its Parliamentary journey, we shall have irremediably cemented lawmaking by un-scrutinised legislation into our constitutional arrangements. Parliament should indeed take back control

We have arrived where we are for a combination of reasons. For me the most important is the huge increase in legislative activity, primary and secondary, and this at a time when members of the Commons are more acutely aware of and expected to carry out their responsibilities to help each individual constituent. I am certainly not suggesting for one moment that Members of Parliament are idle. My very strong impression is that they work very long hours, both in Parliament and in their constituencies, to discharge their responsibilities in a way which is reflective of contemporary understanding of them. They have come to the Commons to existing processes, which have been gathering the respectability which comes to be given to age and long-standing arrangements. Time is not an unlimited asset and unless it is closely watched the legislative journey through Brexit may reinforce the pernicious habits of political lifetimes.

Like the Hansard Society I firmly believe that we need a Parliamentary Committee of Enquiry to examine and report on how the processes of scrutinising primary and delegated legislation should be restructured, so that the scrutinising process will be re-established within the processes . However admirable the proposals by parliamentarians, or indeed the Constitution Committee itself, as you can see from my narrative about the way its recommendations have been approached, only a Committee of Enquiry would carry the necessary weight for this purpose.

I like to think, and it may be no more than a whimsical thought, that Tom Bingham would have shared my view that a long-term strategy to re-establish effective Parliamentary scrutiny of its own legislation, and so enhance the proper alignment of the sovereignty of Parliament and the rule of law, is now a constitutional necessity.