REITH LECTURES 1986: Law, Justice and Democracy

Lord McCluskey

Lecture 1: The Chill and Distant Heights

TRANSMISSION: 5 November 1986 – Radio 4

If I were to be asked what temptations any new judge is exposed to, I should have to admit that they include arrogance, self-esteem and impatience. That answer must alarm all who know that the principal qualities a judge must possess are humility, modesty and tolerance. But just think of the facts. He has been elevated to a position in which he wields a royal authority. The apparatus of state lies ready to enforce his orders. The visible symbols of his office, the way he dresses, the place in which he sits, the manner in which he is addressed, the respect which he is accorded, all are designed to buttress that authority, to intimidate those who might wish to challenge or evade it.

But it goes deeper than that. He has seen it all before. After a quarter of a century of forensic jousting, he has emerged, in the estimation of those shadowy powers who decide such things, as the combatant best fitted to preside over future contests, deemed to possess the wisdom, the experience, the discretion to decide the rights and wrongs of his fellow citizens, to personify the majesty of the law. As he sits on the bench, observing the exposure, by the forensic process, of the frailties of litigants, pleaders, witnesses and malefactors, the whole scene tends to reinforce a sense of being placed above and superior to the struggle. Of course he knows that he is not, in fact, a superior being, but he is expected to comport himself as if he were. And these accumulated experiences encourage him to suppose that if he were to be given a freer hand and a larger canvas he could dispense a greater measure of justice, provide a more ordered way of regulating social conflict.

Even if judges are sensible enough—as I hope they are—to resist the intoxicating notion that they may be wiser, more dispassionate and surer-footed than their fellow men, others in society may seek to press them into a more intrusive, a more active role. I believe that, in a representative democracy such as ours that would be a mistake. So I shall examine the role and character of our judiciary in the hope of assisting you to make your own judgment.

Let me start by asking: ‘What do judges do?’ To that question most people could offer an instant answer. After all, judges get a generous degree of media exposure as they send the wicked to prison, award large sums in damages or put an unexpected spoke in the wheel of some powerful bureaucratic machine. Occasionally, a judge attracts a degree of public attention, or even notoriety; but usually criticism is restrained, and respect freely accorded. Unlike most others who pronounce in the public domain, judges appear to offer, and to deliver, clear and definitive answers. Justice according to law is a coin which, when tossed, does not come to rest on the rim. It comes down heads or tails; it is clear who has won and who has lost. The judge gives his reasons, pronounces the result and withdraws to the chill and distant heights, constitutionally
indifferent to the consequences. The litigants, and others, must adjust to the court’s prescription, and order their affairs in accordance with it.

But the legal philosopher, the social scientist, the political activist, even from time to time the disappointed litigant, question this picture. They dare to assert, in the words of Warren Burger, lately Chief Justice of the United States, that ‘unreviewable power is the most likely to self-indulge itself and the least likely to engage in dispassionate self-analysis’; and to conclude, as he did, that ‘in a country like ours, no public institution, or the people who operate it, can be above public debate’.

But is ours a country like his? Do our judges wield an unreviewable power? And should the judges join in the debate about the exercise of judicial power, or should they stay above it, adopting the attitude that God presumably takes towards theology? Well, of course, the judges in England and Scotland do not see their role as being in every respect similar to that of American judges. They do not claim to exercise an unreviewable power. They engage for the most part in rendering as between one citizen and another what is due to each, at the expense of the other. True, they make occasional forays into that less private border country where the citizen comes into conflict with the state or some lesser public authority. But politics, social engineering, the constitution; these are realms which the British judge would claim to enter with reluctance, and to quit with relief, just as soon as he has done the minimum that duty requires.

But judges know perfectly well that much of what they do - though not unreviewable - is likely to be final. For most cases are won and lost on the judge’s view of the facts, not on subtle points of law. Judges also know that if they do decide a substantial point of law in one case, that decision can determine the results in many others. And even if large numbers of the public don’t care for the new twist in the law, there may be countless reasons why Parliament will not legislate on the matter. So some judges, on and off the bench, join in the debate. If they do, they may not readily persuade the other protagonists that their pronouncements are disinterested. They must hope to advance the argument not by reason of their authority but by the authority of their reasons.

The least that can be expected of one who might be branded an apologist is that he should admit his perspective. The judge should go further and acknowledge both his history and his limitations. The principal limitation, though it is also his strength, is the law itself. For under our system, the courts are bidden to do justice according to law. But at a purely functional level, each case demands a ‘yes’ or a ‘no’ answer. And when a judge begins to think that justice demands a ‘yes’ but the law requires a ‘no’, he has to stop and remember that judges have no general responsibility for considering the greatest good of the greatest number, or for advancing social or moral aims. Except insofar as such ideals are already woven into the law they apply, judges cannot think or judge in these terms. Justice itself is not a legal concept, but an extra-legal or pre-legal one. Insofar as he helps to build the just society, the judge’s role is to be not an architect but a bricklayer.

The Role of Bricklayer
It is for this role that, under our system, his training and experience are supposed to prepare him. Judges of High Court rank are appointed from the practising Bar. As
advocates, they will have spent perhaps 25 years before the courts, advising clients about the remedies they may seek or the claims they should resist. They will have advised how to avoid litigation or, if litigation proved inevitable, will have sought the acceptable compromise in order to escape the unpredictable risks, and costs, of a fight to the finish. When cases came to trial, they will have laboured to master the principles of other people’s trades. As advocates, they will have marshalled the precedents that are helpful and found ways of differentiating the unhelpful, so that each client’s case may be cast in a legally defined mould. If the first judgment went against them, they will have sought for flaws in the judge’s reasoning, and if they believe they have found such flaws they will have attempted to persuade appeal courts of the errors of the lower court.

Occasionally, they will have engaged their forensic skills in litigations of high drama or deep significance. For, though most of their cases will have touched no one other than those directly involved, some, perhaps unexpectedly, will have produced results which for years to come affect the legal relations, the financial burdens or even the liberties of many who were unaware that the critical point was being litigated. So in one rather unlikely-looking case in 1929, a Scotswoman, nauseated by finding a decomposed snail in a glass of ginger beer she was about to drink, was advised to pursue an action for compensation against the manufacturers and, by persuading the House of Lords that she had a good cause of action, changed the law for consumers throughout much of the English-speaking world.

And in 1980, a Glasgow woman sought a court order to prevent the local water authority from adding fluoride to her domestic water supply; she argued on the facts that, as she no longer had teeth, fluoride could do her no good, but it might do her some harm; and on the law, she argued that Parliament had given no power to water authorities to put medicine in the water. She won the legal argument, but Parliament then changed the law and enabled every water authority in the kingdom to add fluoride to its water supply; because the same court which gave her the legal victory also decided, as a matter of fact, that fluoride could do your teeth some good and your body no harm. And recently an English mother, Mrs Gillick, raised an action to prevent health authorities from advising doctors that they could, without parental consent, prescribe contraception to girls under the age of 16. She eventually lost her case, but obtained a judgment so phrased as to leave doctors and their patients perplexed as to the limits of the doctor’s duty of confidentiality.

From examples such as these, several things are clear. First of all, the courts may be called the ‘courts of justice’; but the only justice they can offer consists of a limited portfolio of remedies such as damages, injunctions, declarators, divorce, custody, fines, imprisonment, and Liberation; and the results, even of victory, can be wholly unexpected. And, secondly, in deciding each particular case the courts are not trying to change society. They occasionally effect some sweeping change, but they cannot, at the time of decision, calculate realistically the social consequences of the rules they formulate.

If the lawyers guiding the litigants through the courts are partisan, as they must be, and spend their professional lives thinking in terms of precedents, rules and remedies, is it to be expected that the moment they don a judge’s red robes they will suddenly acquire new habits of thought, new intellectual tools, new social perspectives? Of
course it is not. Victory will indeed cease to be a goal because the judge espouses no one’s cause. But the discipline of the law, the need to choose which litigant is entitled to what remedy, the intellectual habit of rationalising decisions, these are enduring imperatives that will influence all his decision-making.

And because the British judge is not an inquisitor, because he is not supplied with what the Americans call a ‘Brandeis brief’—a detailed study which seeks to predict the social consequences of legal rulings—he must be slow to let his thinking be influenced by the real or apprehended consequences for others of what he decides for the litigants before him. And the British advocate, in devoting his professional life to advancing his clients’ legitimate interests, regardless of his own preferences or prejudices, has kept his nose to the ground. So judges are not trained to leap in the air. When they do, it is usually to the detriment of the law. In short, the advocate is the father of the judge and neither is a social philosopher.

Courts do not choose what disputes come before them. Life and litigants choose the problems that judges are asked to resolve. It is largely a matter of chance whether or not the courts get the opportunity to answer any particular legal question, whether it is one that the legal profession was aware of or one that took almost everyone by surprise when it did come along and found an answer so totally unexpected that textbooks had to be rewritten. One such was Rookes v. Barnard, in 1963, when the judges of the House of Lords decided that an Act of Parliament—passed over half a century before—did not, in fact, confer upon trade unionists the immunities that most, till then, had thought it did. So it took 57 years before the highest court in the country had the chance to explain that the Act did not mean what nearly everyone had understood it to mean. So judges have to wait for cases; they cannot reach out and mould the law. Even if a judge has in his breast a sense of how the law ought to be, he cannot forage about for cases that will enable him to develop his doctrines. He must sit and wait with such patience as he can muster. And the vast majority will go from appointment to retirement without more than a rare opportunity to write a bold new page in the lawbooks.

So, between them, the nature of practice and the haphazardness of opportunity put a blight upon reforming zeal. And knowing this, both as practitioners and as judges, they tend to concentrate on the intricate detail of the law, leaving the grand design to others. That is not a criticism. It is just a plain fact. Indeed, modesty is a wholly admirable trait in those who make a profession of directly ordering the lives and liberties of their fellow citizens. The legislator can think in terms of the greater good, but the judge’s aspiration is to give the litigant his due.

There is yet another powerful constraint upon the judge, one which conditions the way he thinks; it is his awareness of the precise, the unique, facts of any case before him. In serious criminal cases, they are largely determined for him by a jury. In most civil cases he determines the facts for himself after the most meticulous examination of the available evidence. But in either event, his knowledge of the precise circumstances in which he comes to apply the law is likely to be profound.

It is this very feature of a judge’s work that gives rise to the greatest public misunderstanding as to why a judge has imposed a particular sentence or decided a case in a certain way. Because, for the most part, and inevitably, the public are
presented with only the sketchiest glimpse of the evidence. Indeed it is the common experience of those who take part in criminal trials that the press, in selecting what to report, prefer the bold evidence of guilt to the less dramatic sowing of doubt. How often have you been astonished, after reading reports of proceedings in a criminal trial, to learn that the accused has been acquitted? That is not because the jury have been bamboozled by techniques of persuasion. It is because the jurors, unlike the casual distant spectator, have heard the evidence, and observed the witnesses.

Similarly, because the judge in a civil case scrutinises the evidence with meticulous care and applies the law in a precise and detailed way which cannot be readily paraphrased, so the actual result will sometimes appear incomprehensible to those who see the result but don’t trouble to study the reasoning. And this essential feature of the judge’s task, the application of existing rules of law to precisely established facts, makes a world of difference between the habits of thought of the judge and the habits of thought of the legislator. It is not just, as it has been put, that judges make law retail and legislators make it wholesale. The legislator prepares the pattern and hopes that the garment will fit all who come to wear it. The judge makes it to measure. The legislator tries to regulate the future. The judge mostly regulates the past.

The Piano Needs the Pianist

Now I began by asking what judges do; and I shall not attempt a complete answer. But a fair summary might be this: a judge listens to other people giving evidence, which is extracted from them by lawyers who share with the judge a common understanding of the rules of evidence. Then the lawyers present arguments about what the evidence establishes, and bring to the attention of the judge such relevant rules of law as their own researches have discovered and invite the judge to give their clients the remedies they seek. The judge hears both sides. He passes all the material over his own well-calibrated mind, satisfies himself how the law applies to the established facts, and pronounces judgment which determines the rights and liabilities of the litigants. In short, he makes such decisions as are necessary in the light of the matters presented to him to declare which litigant wins and which loses. If several judges sit together, hearing cases on appeal, the facts are put before them in some pre-packaged form, and their real task is to consider if the law has been properly applied in the court below. So Appeal Court judges are routinely concerned with questions of law, sometimes abstruse, frequently intricate, occasionally entirely novel and seldom of great public interest or moment. But all the decisions of courts result from an interplay between particular facts precisely established in evidence, and law derived from Acts of Parliament or from the Common Law.

Now it might be thought that if that is all there is to it, there should really be no problems. Alas, that is not all there is to it. First of all, though in a perfect world it should not matter, some advocates are better than others, and many a sow’s ear is made to look like a silk purse, to judge or jury alike. Secondly, the law does not have the quality of a railway timetable with predetermined answers to all the questions that human life, man’s wickedness and the intricacies of commerce can throw up. One of history’s greatest lawgivers, the Emperor Justinian, promulgated a Code of law in the belief that it contained all the answers; he prohibited any commentary upon it in the hope that by preventing interpretation of its provisions the law would remain clear. It was a vain hope. The law, as laid down in a code, or in a statute or in a thousand
eloquently reasoned opinions, is no more capable of providing all the answers than a piano is capable of providing music. The piano needs the pianist, and any two pianists, even with the same score, may produce very different music.

Most cases that are fought to a finish are fought because, within the context of the rules, there is much to be said for both sides. Such cases are seldom hopeless till they’re finished. One of Scotland’s greatest judges, Lord Macmillan, believed that in most cases that were appealed it would be possible to decide the issue either way with reasonable legal justification. Even on pure matters of law, today’s heresy is tomorrow’s orthodoxy. That which is blindingly obvious to one judge is seen by another as logically unsound. So, in the case about the snail in the ginger beer, a principle of law which one Appeal Court judge characterised as ‘little short of outrageous’ was described by a Lord of Appeal as ‘a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt’, only to hear two other Lords of Appeal disagree with him.

In applying the law in any particular case, the judge is, to a surprising degree, free to make his own choice. It is not just that the law itself is often Delphic, or even that the facts can appear very different to different people. It is also because our system of justice allows judges a substantial element of discretion and choice which is only very lightly controlled. Although that discretion is exercised within the law, it is not wholly directed by the law. And that at once raises the question: what are the influences that determine for any particular judge in any given situation the result of the extra-legal, the non-directed choice? It is difficult to escape the conclusion that the choices which the system leaves the judge free to make are influenced by the judge’s personality, his instincts and preferences, his accumulated social and philosophical make-up and his sense of the public mood.

Consider a familiar example. The newspapers give saturation coverage to an outbreak of savage sexual assaults upon children. And while the storm is at its height a judge has to pronounce sentence in a case of child rape. The law gives him an enormous discretion. He can, in theory, order life imprisonment or 200 hours of community service. The system gives him that wide discretion because the judge, who knows all the facts, including the background of the guilty man, is supposed to look at each case individually. He cannot look to the jury or the prosecution for guidance. The only plea the judge hears is one for leniency. Then he is entirely alone. He knows that society is watching him. And he knows that he alone, at that moment, is charged by society with the power to mark, by the sentence he imposes, its sense of outrage, tempered by the justice of the case, by the wickedness and the frailties of the offender, and by the inability of the penal system to help either the offender or the victim in any meaningful way. He must disregard the fact that almost any sentence of imprisonment he imposes may be materially, but unpredictably, altered by administrative decisions which will take effect, years later, in circumstances he cannot foresee. He can pronounce sentence in seven words or he can give an elaborate explanation of why he is doing what he does. He can deliver a sermon on the human condition. He can deploy his extensive vocabulary of words of censure, pity, revulsion, warning and threat. But, one way or another, from some inscrutable depths of his own gut, he has to make a choice which no rule of law compels. He is not just a machine. He is a person whose experiences, vanities, prejudices, certainties and doubts, however disciplined by training, cannot be wholly suppressed. In them he is unique. Through
them he is different. If it were not so, judges would never disagree. One judge’s self-evident truth would not be another’s outrageous fallacy. The heresy of one generation would not become the orthodoxy of the next.

And, just as each judge is unique in his personality and outlook, so, collectively, judges broadly share experiences and perspectives that make the judiciary different. And this, I suggest, is a central and inescapable fact we must take notice of when, as a society, we decide how and even if we are to harness the talents of judges for social purposes that reach beyond the mere rendering to each litigant of what is his due. That fact is one I must assess when I come to consider whether we should enact an entrenched Bill of Fundamental Rights, and so confer upon our judges a new and enormous power. But, having raised it, let me return briefly to the judge’s role in sentencing.

The judge is never answerable, whether to his fellow judges, to Parliament or to public opinion, for his decision. Of course he is not the Mikado, with despotic and arbitrary powers. His grosser excesses may be curbed on appeal. But he cannot be called to account in the way an elected representative is. As an informed citizen, he is aware that the prisons are full. He knows that it costs more to keep an offender in prison than to send a boy to Eton. He knows that our prison regime does little to rehabilitate the miscreant, and suspects that the sentences the courts impose have only a marginal deterrent effect. He is conscious that nothing in his experience or background enables him to understand why most people commit most crimes, apart perhaps from obvious ones like theft. He is not a penologist or a criminologist. He is uneasily aware of real disparities between sentences.

So when the judge sits alone, throwing his mental dice till they produce a figure that he subjectively feels will do, he knows perfectly well that the exercise is profoundly unscientific and owes more to chance than it properly should. He can hardly be reassured by the fact that what he is engaged in is commonly referred to as ‘sentencing policy’: the only real policy is to let the judges get on with it. And the fact that he is answerable to no one within the limits of a large discretion, though it may make his task simpler, does not still his unease about the justice and effect of what he does. As Clausewitz said of strategy; ‘It is simple, but it is not easy.’ So it is with choosing between sentences of three years and seven years in jail.

**The Judge’s Mystic Principles**

Of course, someone has to decide, and if it has to be delegated to one man it is no doubt best to give the job to a person who knows the facts, who senses the going rate and who has no constitutional reason to look over his shoulder to gauge the likely reactions of those who have a policy, whether of retaliation or of clemency. But is that best good enough? I doubt it. Though non-lawyers are accorded a role in part of this field, through magistrates courts, the lay public has no role. In cases which have gone to trial, is there not an argument for seeking assistance from the very jury that has heard the whole evidence, and determined the fact of guilt? If the judge had the power to put before the jury the upper and lower limits of the range of sentences that he must consider, would not that enable there to be a lay participation in sentencing that would help to produce not only a more just result, but a readier public acceptance of the result? We ignore at our peril public concern about disparity in sentencing between different courts and different judges.
Courts hear ample evidence on guilt or innocence, but very little on the choice of punishment or disposal. Might not consideration be given to letting the public prosecutor suggest a sentence or a range of options, requiring him to produce reasons and perhaps evidence to support what he suggests, thus creating the beginnings of a true sentencing policy, the assumptions of which could be openly scrutinised and discussed in Parliament?

The public are told that sentencing is for the judges. That would be acceptable if judges uniquely knew what mystic principles guided their actions. But they don’t. And it is the public who pay for prisons, who are the victims of crime, and who have to live in the community with and to maintain the families of offenders. Should the public have so muted a voice? It has frequently been suggested that we should consider having a Minister of Justice, answerable to Parliament, whose responsibilities could include the development of a coherent, informed and even-handed sentencing policy, related to the resources available and responsive to public concerns, to replace the present system under which largely untrained judges select from a limited clutch of unsuccessful expedients. It is not for a judge to assess the arguments for such a step. I advocate no particular system. I merely highlight the primitive character of the one we have. But if the judges were relieved of responsibility for so-called sentencing policy, it could only help them to play the role for which they are fitted, that of administering a system of law for which Parliament bears the responsibility.

The theme on which I end this lecture is the appropriateness of using judges to do what the present system requires them to do. The wisdom of setting them to entirely new tasks is another. To that I must return.