THE EXECUTIVE AND THE COURTS: THE ENGLISH SCENE AND ITS FRENCH COUNTERPART*

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In another place, Mr. Junior, I have often addressed myself to you, in your present or in your previous incarnations; and we have some acquaintance with each other's ways, you and I. Yet tonight is for me a special occasion. For you have visibly put off your familiar academic gown; and in your new robes you appear, by the permission of your seniors, as the representative of the practising profession and indeed of the company of the Society which assembles in this great Hall.

What then may properly be the nature of my business as an academic lawyer with you tonight in your new representative character? Scarcely, I think, any longer to attempt to instruct you—though hope rises eternal in the academic breast—and certainly not to describe to you what actually is happening today in the English courts; for that, in the capacity of your office, you know or should know better than myself. My business tonight, as I see it, is neither instruction nor description: it is a more difficult task—namely, assuming that we know (in the sense that we can recite) what actually today happens, to attempt intelligently to observe this event, to reflect upon it, and to see it in its ampler context.

This kind of observation of a part of his own activity is difficult for any professional man. It is perhaps especially difficult for the lawyer, for the law is a particularly engrossing occupation to which he may easily devote body and mind and heart: the law is in truth a jealous mistress. The academic lawyer has for such an engrossment less excuse; for he is removed, and normally should be, at least from the intense excitement and the great strain of the

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immediate action. It is therefore pre-eminently, I believe, his duty to attempt to attain a detached observation. There is today scarcely any field of law in which the attainment of intelligent observation is more important than that which concerns the relation of the Courts and the Executive. It is for that reason that as an academic lawyer I chose this subject, when the Master of the Moots did me the great honour of inviting me to speak in this Hall.

I have in this matter a further advantage in that, within the field of academic law, I am concerned with comparative law; and for that reason I almost venture to claim to be more academic than the normal run of academic lawyers. It is certainly a powerful incentive to detachment and observation to have had the opportunity of seeing what happens elsewhere and, returning, to come upon the familiar native scene as if it were only yet another specimen calling for a further effort of appraisal.

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It is the business of the comparative lawyer to look for contrasts and analogies. The sub-title of my address will have indicated to you that it is upon the French system that I shall draw for comparison. But the art of making comparison is not as straightforward as is sometimes supposed: apparently obvious and direct comparisons are often not merely mistaken but misleading; for the institutions compared, though apparently similar, may in the differing systems have different functions. It is the useful and revealing comparison which must be sought. In our case it would I think be wrong to attempt directly and simply to compare the courts' relation to the executive in each system. I propose to make a *double* comparison. Indeed a far more complex comparison would be appropriate; but it is, I think, essential to take at least one distinction, namely, a distinction between functions belonging to the executive.

The distinction I propose is one which is self-evident in the French system, though to an English observer—that is to say, to a person accustomed to the English scene—it might seem to be due merely to a historical accident. It is the distinction between the police functions of the executive and other executive functions. Police functions in our sense, not in the French meaning: functions connected with criminal investigation and the putting into movement of the criminal law, which in France fall within the province of the *police judiciaire*. And perhaps it is as well to emphasize that police functions are not only quite evidently executive functions but very important executive functions at that—they very closely

concern the major public interest, the safety of the state: words which even for us have overtones and which for the French have almost a mystical significance. Yet neither they for one set of reasons, nor we for another, automatically include the police functions within the province of the executive when we consider the relations between the executive and the courts. It is my first suggestion to you to-night that we *should* include them.

Taking one distinction between executive functions, we have four members for comparison: namely the English court dealing with the English police, the English court dealing with the English executive other than the police, the French court dealing with the *police judiciaire* and the French court dealing with the French executive in its non-police functions. The advantage of having two members in each system is that it provokes a contrast *within* the system and that it makes possible both a direct and a chiastic contrast *between* the systems. "Chi", you will remember Mr. Junior, is a letter of the Greek alphabet which is written as an "X".

The mere setting up of these terms of reference produces of itself strange and startling results. If we assay the direct comparison between the court dealing in each system with its own police, the comparison is overwhelmingly in favour of the English system—indeed so overwhelmingly that the English observer would conclude that the French court has given up the unequal struggle and does not even try to cope with the *police judiciaire*. But if we assay the direct comparison between the respective courts dealing with the executive in the exercise of its non-police function, the contrast is as overwhelmingly in favour of the French system; and more startlingly, surely, for there is nothing novel in an English observer concluding in favour of the immeasurable superiority of the English system. The nearest equivalent comparison between the systems is of the apparently inappropriate members—namely, between the English court dealing with the English police and the French court dealing with the French non-police executive, though I fear that it is also unfortunately possible pretty well equivalently to compare to the French court dealing with the *police judiciaire* the English court dealing with the English non-police executive.

Here, at the outset, is the prime matter which I wish to leave to your consideration. How comes it that there is this *opposite* contrast between the systems? What is the reason for the differentiation *within* each system? Though I propose to say something about each of the four members of comparison which I have selected, the purpose of my address is to call to your attention the

simple and gross fact of the existence of this very odd contrast, the mutual *double* contradiction between these two civilized systems of law—a contradiction of a nonplussing sort which should cause an intelligent observer to rub his eyes and ask himself if he has not misunderstood the most elementary propositions of each.

Equally to the forefront I would like to put one other general observation. Whatever the perplexity, you will I am sure vigorously concur in the suggestion which I make to my French colleagues when they would argue that the esoteric qualities of the police function and its close connection with the high matters of the public safety make it not merely impossible but undesirable that the police should be subject to the control of a court—the suggestion, namely, that the English experience and its success conclusively prove that the police function as such has not inherently a mystical or privileged character which necessarily removes it from the cognizance of any court. A court *can* cope with the police function because the English court *does* successfully cope with it, and long has done so. All that seems to be needed is that there should be an adequate court using appropriate process. Would it be unduly temerarious in England to attempt to suggest the converse: namely that the French experience and *its* success as categorically demonstrate that the executive in its other administrative functions is in like degree and with like profit as amenable to judicial control—provided again that there be a sufficient court and a sufficient process? Is it reasonable for the executive in England to argue, as its representatives do and with an impenetrable conviction, that there is something in the administrative function which makes it inherently incapable of judicial supervision: when judicial supervision of administrative functions has effectively been exercised in France these hundred years or more? Impenetrable convictions of this sort are odd things. Neither you nor I, nor I believe the English executive, would be much impressed in England by an impenetrable conviction that to subject the police function to judicial control would be deliberately to wreck civilized society and to organize a paradise for criminals.

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May I now ask you in this context to consider the first member proposed for comparison—matter which indeed you well know—the relation of the English court to the English police: matter to which I turn with the greater alacrity because we see there the advantages of the English system? And may I say, Mr. Junior, what perhaps need not be said, that it is to members of the fraternity

that I address my remarks to-night—to persons, that is, who share with me my admiration for that system?

The advantages of the English system which appear from the relation in England between the courts and the police are many and great. It is worth while to recall some of them. And first the speed and efficacity of the English remedy. If both the English court and the French court will give a remedy, no reasonable man would choose the French court. The remedy you will get in the English court, if you are to get a remedy at all, is much the more preferable. Indeed it is probably the delay in the Conseil d'Etat which is the main objection to its jurisdiction—though steps have been taken to cure that delay and delay is, as a disease, more curable than diseases from which we may ourselves be suffering. Secondly, it may be worth while to mention the spectacular nature of some of the remedies which the English court sometimes affords. The French comparative lawyer is much fascinated by the spectacular remedies for contempt of court, for example, or on habeas corpus proceedings. They have no doubt their advantages; but I do not wish to spend time on them, more particularly because I suspect that a recollection of them is much like whistling in the dark to keep up one's courage. And it can in all conscience be dark enough here. It is not much consolation to a litigant to remember that the remedy which he might have got might have been a spectacular remedy if the court will in fact give him no remedy at all and probably not even a hearing. Still it should perhaps be borne in mind that the court concerned is a court which is able upon occasion to give a remedy of that kind.

Much more important than the rare spectacular remedy are the energy and drastic character of the normal process of the English court, and the fact that it is the normal process—the ordinary action in tort, for example, against a particular individual—which is used in the relevant situation. It is unfashionable to speak well of Dicey today; but in my opinion he was right, and in a critical respect, in emphasizing the importance to *our* rule of law of this fact, that we use ordinary process before an ordinary court to remedy the misfeasance of an official. And I would interpolate that Dicey seems to me a most perspicacious observer even in matters where I have the temerity not finally to concur in his conclusions, as for example on the Conseil d'Etat itself: he is certainly far more perspicacious than his present-day detractors. The direct remedy against the individual which we use is unknown to the French administrative process. In England it does continue effectively to

function even today, even against the executive, and in particular against the police: *Christie* v. *Leachinsky*[1] may fairly be considered both a recent instance and a leading case.

These notions are familiar to you. Here is one which is perhaps not quite so familiar, or at any rate not in this context, because you are not normally asked to consider it in this context: namely the light which is thrown by the Judges' Rules upon the character of the relationship in England between the courts and the police. We tend to classify the Judges' Rules as rules concerning evidence and so tuck them away in a compartment. They certainly do concern the production of evidence; but they are also directions given by the judges to the police as to the exercise by the police of the police function as such. The policeman is evidently pursuing his proper function in attempting to ascertain the author of a crime. He is clearly not acting *ultra vires*; he is not acting illegally even if he does not obey the Judges' Rules: what tort or crime does he commit in persisting in asking questions? Nevertheless the judges have considered it proper to declare that if he acts in a particular way even in the *intra vires* exercise of his legitimate function they will visit with nullity the result of his acts: indeed the only sanction of the Judges' Rules is that the evidence obtained in contravention of them will probably not be admitted at the trial. This method of supervising the exercise of a legitimate administrative power operating *intra vires* is highly developed by the Conseil d'Etat; it is rare in England. It manifests not merely the close relationship between the police and the courts in this country but also the happy fact that as regards this administrative power our judges feel themselves to have competence and are willing to exercise authority: they are ready, in this instance, by way of exception, to penetrate into the heart of the matter and to control the actual exercise of *legitimate* power.

I would ask you to observe the advantage *to the police* in England of the existence and the exercise of effective supervision by the courts; for surely the advantage to the subject is self-evident. The police must of course attain to a certain standard of good behaviour, but that is certainly not to their detriment as a police body. It is neither true nor fair to suggest that they attain to that standard only because they are subject to judicial control: they of their own motion spend time and effort in endeavouring (with great success) to fix into their members the sense of the need of impeccable behaviour. Still the fact that that behaviour is publicly and externally sanc-

[1] [1947] A.C. 573.

tioned is no small further incentive to its attainment. What is more important is that the existence of this public sanction, and its occasional infliction, is a most potent cause of the really quite extraordinary public confidence in the police which there is in England. It is certain that we have a highly efficient police, perhaps the most efficient in the world. But we are singular, in Europe at least, both in the extent of the judicial control of our police and in the public confidence in the good behaviour of the police. There is, I think, a link between these two singular consequences. Abroad it is not believed possible to have an efficient police force without the exercise by them of secret and arbitrary power, which makes of them objects of fear and hate and suspicion. We know that it *is* possible. And please note that the public confidence immeasurably increases the efficiency of the police. We also know, surely, in the case of the police, that it is silly to suggest that the judges by claiming and exercising control over the police desire to subvert the police or to impede them in the due discharge of their duties or jealously to usurp their function—all of which suggestions are made by the executive-minded in case of the judicial control of other executive powers. Nor has it yet been suggested that because we have a well-behaved police it is therefore not necessary that they should be capable of being sued if ever they do behave badly, or that in case of their bad behaviour the possibility of asking a question about it in the House of Commons would be in all respects just as satisfactory a remedy for the subject as is his present right to a verdict by jury—and a jury quite frequently is impanelled in such a case—upon evidence produced and examined in open court.

No doubt I should show prudence even when speaking about the police power. I should call your attention to such cases as *Elias* v. *Pasmore*[2]—surely a scandalous case—and *Thomas* v. *Sawkins*;[3] and you should be reminded of the disreputable rule that material evidence illegally obtained by the police in England is admissible against an accused—a rule not accepted in France and not acceptable, I think, in Scotland, though recently again recognized by the Privy Council in *Kuruma* v. *The Queen*.[4] And is there not in *Ellis* v. *Home Office*[5] the threat that the monstrous degree of privilege which our courts grant to government departments will be allowed to infect actions against the police also? It surely is ominous that a claim to such privilege in its most extreme form should have been made by the Home Office, which is not unconcerned with the pol-

[2] [1934] 2 K.B. 164.
[3] [1935] 2 K.B. 249.
[4] [1955] A.C. 197.
[5] [1953] 2 Q.B. 135.

ice function. There is cause, I am sure, for prudence in one's praise of the existing situation. Nevertheless, it is, I think, true to say that the relationship established between the courts and the police in the classical period of English law shows some signs of endurance; and it is certain that that was a most fortunate relationship, as much for the police function itself as for the subject.

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To turn now to the second member of the comparison: the French courts and the French police. Of this I wish to say very little. It is a sad and depressing picture. By reason of what is claimed to be a fundamental principle of political science, the doctrine of the separation of powers as received in France—a doctrine as mystical and impenetrable in France as is with us, say, the doctrine of ministerial responsibility—the *police judiciaire* escapes the control of the Conseil d'Etat: the *police judiciaire*, as its name indicates, is in France regarded as an emanation of the judiciary from which the executive is formally and finally to be distinguished; and the Conseil d'Etat has competence only in respect of the executive. Theoretically a member of the *police judiciaire* can be sued by a special civil process—the *prise à partie*—in the civil courts; but that process is in fact obsolete and useless. It is the process to be used against a judge for misconduct in his office. The French citizen has as much prospect of a civil remedy against a police officer as we have of a remedy against a magistrate acting as a magistrate. A member of the *police judiciaire* is also theoretically subject to criminal prosecution; and for offences against the state outside the scope of his investigation duties—if, for example, he should embezzle public funds—he is of course prosecuted. But the prosecution is in the hands of the *procureur*, who is himself a member of the *police judiciaire*; and it is in the highest degree unlikely[6] that the public action will be put into operation against a member of the *police judiciaire* who can by any stretch of the imagination be regarded as guilty only of an error of judgment in the execution of his office or of an "excess of zeal". The excesses which in fact go unpunished occasionally appear in evidence at the Cour d'Assises, especially when that court is concerned with cases *en révision*; these excesses are extreme and are as abominable to French sentiment as they would be judged to be by an English observer.

The police in France being thus not amenable to any public

[6] But such prosecutions have taken place, and the victim has obtained reparation as *partie civile*: *e.g.*, *Dion c. Gautier et Dubois*, Bourges 9 Mars 1950, J.C.P. 1950. II. 5594. Arts. 483 ff. Code Instr. Crim. apply. And see the current *affaire Grangé*, Trib. Civ. Seine, 12 Dec. 1956, J.C.P. 1957. II. 9694.

process, you have in France the consequence you would expect—an extreme lack of public confidence in the police. That lack of public confidence appears to me to be justified. You will find in France a high degree of undirected public anxiety in respect of the police, and of desultory attempts to procure a remedy. A deliberate effort has no doubt been made in the proposed new code of penal procedure; but the independent observer will judge that that effort is as unlikely as its predecessors to be effective. The French reformers appear to the English observer inexplicably reluctant to take in respect of the police the one step which it would by him be supposed that both their own experience in respect of the executive generally at the Conseil d'Etat and the English experience in respect of the police have shown to be necessary and sufficient: namely, effectively to subject the police function to the supervision of a competent court. I would ask you to consider this national inhibition on the part of the French, which seems to us so odd, and to reflect whether there may not be other national inhibitions, more familiar to yourself, which would seem as odd to the French.

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The third member of the comparison is the French court—the Conseil d'Etat—and the French executive. I shall endeavour to restrain my admiration for the Conseil d'Etat within reasonable limits of time; but your peril is considerable, because my admiration is great. The merit and success of the Conseil d'Etat as a court may be most succinctly described by saying that it has established as regards the executive generally in France the kind of relationship which the courts in England have established as regards the police. That analogy is, I think, correct. It is, nevertheless, an insufficient one. The activity of the Conseil d'Etat much more resembles the general activity of the common law, in the days now long gone past, when the common law was young and vigorous, when the English courts were willing and ready to act as courts and to extend their jurisdiction, when the writs were fashioned which made our fortune and when the judges, creating and inventing the common law, acted, as it seems to me, with the degree of authority of which we find the match to-day at the Conseil d'Etat.

The Conseil d'Etat consists to-day of two roughly equal groups: the *section du contentieux*, upon the one hand, and four *sections administratives* upon the other—the body of *conseillers*, some fifty of them, meeting in *Assemblée générale* about once a week. To the fifty *conseillers* are added about fifty persons in each of the descending grades of *maîtres des requêtes* and *auditeurs*. The Con-

seil d'Etat was re-created by Napoleon in 1799 to give himself centralized control and oversight of the French executive. In the original scheme the *Assemblée générale* and the *sections administratives* were not merely dominant—they constituted the entirety. What has become the *section du contentieux* was no more than an afterthought—a mere committee to which individual complaints were referred for report. To-day the *section du contentieux* is a distinct entity, an independent court rendering directly judgment after legal process *inter partes*, without report to the *Assemblée générale*.

It is this astonishing development which finds a parallel only in the earliest phases of the common law itself. You will discover at the Conseil d'Etat all kinds of analogies to the common-law processes. For example, the elaboration of case law. The law applied by the Conseil d'Etat is the law invented solely by the activity of the Conseil d'Etat. Indeed the Conseil d'Etat's law is more purely case law than the common law today is or has been for an exceedingly long time. It is a law having certain constant principles no doubt, but nevertheless highly indeterminate in content, reacting and capable of reacting to the rapidly changing demands of the perpetual administrative innovations. I especially admire the extreme plasticity of the process which as a court the Conseil d'Etat uses—to determine, for example, the kind of answer and the degree of answer which in the particular case it will require from the department concerned in respect of the particular complaint before it. Again, to match that plasticity we must go back a long way in our own history. The inventiveness of the Conseil d'Etat can be matched only by the inventiveness of the common law itself. Reflect for a moment on the audacity of the concept of the common custom of the realm—a custom that never was on land or sea, the mere imagination of the judges devised to oppose the only custom that really existed, the local custom: a standard of behaviour imposed by the judges which so far destroyed existing custom that the common custom of the realm became the common law of the land. And that other standard which the common law still uses—the reasonable man: that also is no more than the incarnation of a figment of judicial speculation, an admirable and most beneficent figment. The inventiveness of the Conseil d'Etat is as great, and greater: it is certainly more pertinent to the modern scene. The essence of its achievement, I would say, is that, with a remarkable mixture of prudence and audacity, it has invented the standard of the reasonable administrator and to this standard so invented by

it it required and requires the actual French administrator to conform.

The *section du contentieux* as the organ of the Conseil d'Etat has inserted itself into, and is at the heart of, the French administrative process and there, acting judicially, it means and does business. The control which the Conseil d'Etat exercises is not a merely external control—it is not merely whether the act is *intra vires* or *ultra vires*, not even in the subtler sense of *détournement de pouvoir*, the use of a lawful power for an improper purpose (which, after all, in days gone by was operative also in English courts). The Conseil d'Etat is concerned with the supervision of the *intra vires* act itself, in that way of which the Judges' Rules are a faint reflection. It is in the act so done that they require the French administrator to conform to the pattern of behaviour which they have instituted. If he deviates from that pattern they will annul his act, on the ground that it constitutes a "violation de la loi et des principes généraux du droit"—principles which, lock, stock and barrel, they have invented for themselves. I cannot translate these words—they carry with them notions of fair dealing, decent behaviour, respect for existing rights and natural justice if you like: provided that "natural justice" does not call to your mind the vagaries of the English courts and the distinction between quasi-judicial and purely administrative acts. With distinctions of that kind, as limiting their competence, the Conseil d'Etat has nothing to do. It is with the acts of the executive that they are concerned, of every sort, judicial, legislative or administrative, or quasi any of them: though they may devise for each of them that type of process of control which they regard as being most appropriate and efficient.

You must avoid importing other English notions also. You must not suppose that the Conseil d'Etat either is, or is regarded as being, hostile to the administrator. Of course not. It is no more hostile to the administrator than the English court is hostile to the police. Dicey was far more reasonable when he questioned whether the subject could reasonably expect to get justice and a fair hearing from a court which is in some sense an official court. The answer to that very pertinent question is to be found in the experience of the French citizen. He is satisfied that the individual does get justice, and there is warrant enough for his sense of satisfaction. However right Dicey may have been to question the probability, the fact is that the individual's rights are amply safeguarded. What has happened is that, though not hostile to the administrator, the Con-

seil d'Etat has developed a personal concern for the public service. It has a sense of responsibility for the due performance of that service—indeed amongst its principles the most fundamental may well be the paramount need of the orderly continuity of administration. I venture to suggest that the characteristic of the English scene is the English court's sense of irresponsibility—total as I see it—for the due performance of the public service: it is because the Conseil d'Etat has, by way of contrast, a sense of responsibility for the administration and because it believes that in the interests of the administration itself there should be a standard of behaviour it goes on to require and publicly to enforce that standard, to the advantage (as I would suppose) of the administration itself and to the extreme benefit of the citizen.

What may perhaps be regarded as surprising—what would be astonishing if it occurred in England to-day—is that a central executive body such as the Conseil d'Etat should not only have evolved a separate organ for receiving complaints—please note the deliberate informality of the terms I use: receiving complaints—against ministers and departments and public authorities, but should have been willing to deal with those complaints in the light of day, and to develop a fully judicial process for their public investigation. The receiving organ has become in every respect a court. It uses a *procédure contradictoire* (words which for a Frenchman would have all the overtones that a "fair hearing" has for us), the parties can be represented by counsel if they will, and public judgment giving reasons is delivered. And, moreover, established custom requires that the judgment, if adverse, should specifically advert to every formulated ground of complaint (*moyen*) raised in the plaintiff's pleadings. It is this willingness to develop a separate organ and to adopt public judicial process for the despatch of that organ's business which constitutes one of the secrets of the Conseil d'Etat's success. And, again, the parallel which suggests itself is the development of those other committees of another council which became the Courts of Exchequer, of Common Pleas and of King's Bench.

The second critical factor is that this developed organ, though separate and distinguishable, nevertheless remains a part of the original body. The *section du contentieux* is truly a section of the Conseil d'Etat. The business of the Conseil d'Etat, in the *sections administratives* and pre-eminently at the *Assemblée générale*, at which the *conseillers* from the *section du contentieux* assist, is to advise the government and the executive. Indeed, this business of

advising before the act is by the Conseil d'Etat regarded to be its primary business. Judge at the *contentieux* of the act when done, it is also, in its other capacity, the confidential and most highly skilled adviser not only of the act to be done but of the manner in which the act condemned at the *contentieux* is to be re-done. There is at the Conseil d'Etat a most thorough-going duality of function. This duality does create within the body a tension which is not sufficiently appreciated. The containing of this tension within the body is vital: it is of the last importance that the corporate spirit of the Conseil d'Etat should remain strong enough to contain this tension *within* itself; for it is, in my opinion, mainly because it remains a part of the Conseil d'Etat that the *contentieux* can confront the peccant administrator with the authority and competence with which it does confront him.

The Conseil d'Etat is not a government department—it is the supreme administrative co-ordinating authority. It consists of an elite of the most able and most experienced administrators in France. It has in the French administrative system a position much more evidently more pre-eminent than has, for example, the Treasury in the English system. It is this body which has developed not merely a conscience but a judicial conscience. It is to the censure of this body that the aggrieved citizen defers the act of the minister or the department of which he complains. This is not a body to which the defendant minister or department can suggest, as is powerfully suggested to the English court, that it should not intermeddle with matters which it does not understand. The Conseil d'Etat is fully conscious of the extent of its competence and it is as conscious of its own authority. As part of the Conseil d'Etat the French court is within, and involved in, the administrative system to an extent which is difficult to express. It is really unreasonable to attempt to imagine a divorce between the Conseil d'Etat and the administrative system: it is, so to speak, of the definition of the *chose administrative* that it pertains to the Conseil d'Etat. This cuts both ways: the peccant department is not permitted to claim that it can avoid the supervision of the Conseil d'Etat *au contentieux*; but the Conseil d'Etat will not dismiss a department with an injunction to go hang itself—as the English court gives the impression of doing only too jauntily when opportunity offers. The Conseil d'Etat has a high sense of responsibility towards the administrative thing which it regards as its own. It requires the administrator not merely to act but to act in the due process of administration and according to a standard of propriety determined by the Conseil d'Etat; and

if at the *contentieux* it will publicly sanction any departure from that standard by visiting the act with nullity or assessing an appropriate compensation, more privately, as adviser, it will come under a duty to exert itself to see that a remedy is discovered for the future avoidance of such lapses.

There are one or two misunderstandings which I should endeavour to correct, even in this summary sketch. The Conseil d'Etat is not a constitutional court, such as the United States Supreme Court: it does not pass upon the validity of acts of Parliament. Parliament is as sovereign in France as it is in England. The French Parliament could no doubt subvert the *principes généraux du droit*, and with them what is known to the Conseil d'Etat as *la légalité républicaine*—if it so willed and if it used words sufficient to express its will. But it is most unlikely that it would so do. The Conseil d'Etat, in one of its capacities, is the draftsman of, and the consultant on, every government bill submitted to Parliament, so that at least it would be fully apprised before the event of any such drastic proposal. Moreover, the Conseil d'Etat will authoritatively construe for the administration the meaning of the act which it has drafted and might well use towards counsel who attempted to attach to an act so odd a sense the words attributed to Hengham.[7] Every act of Parliament evidently should be construed, and is construed, within the framework of *la légalité républicaine*—which requires inter alia that administrative authorities should act as administrative authorities: that is to say, subject to the supervision of the Conseil d'Etat.

The Conseil d'Etat not only admits the sovereignty of Parliament, it is highly respectful of it. No act of the Conseil d'Etat in any way touches the responsibility to Parliament of a minister as minister. Indeed, process at the *contentieux* facilitates the control which Parliament can exercise over the policy of the minister; for as a result of disentangling the questions of fact in a judicial inquiry and requiring from the minister or his department when answering the complainant a statement of the reasons of their action, the policy of the minister appears the more unmistakable for Parliament's control. This can be seen clearly enough from an examination of *Barel*'s case (May 28th, 1954, Rec. 109), which I have elsewhere analysed.[8] The doctrine of ministerial responsibility as developed by civil servants in this country is highly peculiar. So far from

[7] "Ne glosez point le statut: nous le savoms meuz de vous, quar nous les feimes." Y.B. 33 and 35 Edw. I (Rolls Series), 83.

[8] Executive Discretion and Judicial Control (Hamlyn Lectures: Sixth Series) (Stevens & Sons, London, 1954) pp. 22 ff. and *passim*.

facilitating control of ministerial policy by Parliament, it results, under cover of that responsibility, with the occasional sacrifice of an over-conscientious minister, in a real irresponsibility of the civil servant, the beneficiary of the doctrine.

Regretfully I cannot spend more time on the Conseil d'Etat. It is an inspiring example; and it is an example that it is inspiring. The Conseil d'Etat shows that a court can cope with executive discretionary powers to the advantage as much of the administration as of the citizen in a modern state: if it is an appropriate court and uses the right instruments. I would sum it up by saying that the Conseil d'Etat is a court, but it is not a court in a corner of its own playing a complicated and irrelevant game of noughts and crosses: it stands in the center and at the heart of the business; it deals and intends to deal with the substance of the matter, exercising an effective power, aware of and responding intelligently to the critical problem of contemporary society—which is, as I understand it, the proper operation of the complex administrative organization required in the modern state to secure as much to the community as to the individual the rights and interests appropriate to each.

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That leaves me with the fourth member of my comparison: the English court and the English executive. Perhaps the less I say about this matter the better. It is not to me a pleasing topic, though perhaps in this company there is less cause than usual to give heed to merely prudential reasons. In any event the subject is one eminently within your corporate experience, Mr. Junior, and I may properly leave you to your own reflections upon it.

For my part I experience a sense of dismay when I turn from the Conseil d'Etat to look for an equivalent English court. The operation of the relevant English court can, I believe, best be described by putting a negative in front of every proposition I have made concerning the Conseil d'Etat. What most perhaps dismays me is my sense that when the English courts to-day come to cope with a minister exercising a discretionary power given to him by Parliament, instead of showing that authority and confidence and sureness of touch and determination to deal with the substance of the matter—which they have I think from time to time elsewhere shown and which with a no doubt foolish romanticism we rather expect them to show—they exhibit a degree of deference and of obsequiousness which is to me repulsive. What did you think of the recent case of *Ellis* v. *Home Office*,[9] where, you will remember, the Court

[9] [1953] 2 Q.B. 135.

of Appeal eventually allowed the defendant to claim state privilege for a document which the court (and everybody else) perfectly well knew, as a matter of fact though not from evidence before them, in no way touched the public safety of the state? It is no doubt unpleasing that the manoeuvre should be permitted of using a privilege established for the protection of state interests to secure the immunity of a department from an action in tort—it certainly *is* to me unpleasing that an English court should be less effective than a Scottish one[10]—but I found infinitely more unpleasing, as an exhibition of impotence, the petulance of the Court of Appeal in simply blowing off steam (if I may use the expressive and inelegant phrase of a member of this Society).

I have no desire to raise any great questions of state—such as, for example, whether there ought to be a residuary arbitrary and unexaminable power in the executive: a question which after all caused the civil wars of the seventeenth century. Perhaps there ought to be. In the community in which we have the good fortune to live there is perhaps no immediate and overwhelming danger in the existence of a residuary arbitrary power beyond the scrutiny and jurisdiction of the established courts—provided, which I regard as an essential proviso, that arbitrary power is required visibly and manifestly to be exercised in an arbitrary manner. What is infinitely more dangerous is the false pretence of a rule of law—the false suggestion that there *is* an established court which can and does exercise an effective jurisdiction. It is to the existence and the extent of that false pretence that I would call your attention. Is it still possible with any degree of intellectual honesty to suggest that the executive is in England effectively subject to the jurisdiction of the established courts as to the use and application of the enormous powers now vested in them? If the executive *is* a law unto itself (whether or not it *should* be), it is, I think, essential that that fact be admitted and recognized. It was from the recognition of the fact that the French executive was a law unto itself, so far as the ordinary tribunals were concerned, that French administrative law came into being.

Without therefore moving any great question of state, may I simply call your attention to the change in the temper of our courts? I propose to do so by merely juxtaposing a quotation from *Entick* v. *Carrington*[11] to one taken from *Liversidge* v. *Anderson*.[12] Of this

[10] See *Glasgow Corporation* v. *Central Land Board*, (1956) S.L.T. 41 (H.L.). And see further *Whitehall* v. *McLauchlan* or *Whitehall*, Times Daily Newspaper, Dec. 1st, 1956, and the leader thereon.

[11] (1765), 19 State Trials 1030. [12] [1942] A.C. 206.

case, however notorious, I wish to say nothing except to recollect, for it is a great honour to this Hall, that Lord Atkin vehemently dissented. Lord Atkin said, you will remember, that he had "listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I"—which incidentally is an innuendo highly defamatory of the Court of King's Bench. But one of those arguments, the most thorough-going of them, was adopted by at least one of their lordships, and he reproduced it as part of his own opinion in these words: "It is relevant to consider", said he, "to whom the emergency power of detention is confided. The statute has authorised it to be conferred on a Secretary of State who, by reason of his position, is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office and who has access to exclusive sources of information. In a question of interpreting the scope of a power it is obvious"—may I stress this word "obvious"—"it is obvious that a wide discretionary power may more readily be inferred to have been confided to one of high authority and grave responsibility." In *Entick* v. *Carrington*, you will remember, it was a similarly august personage, the Secretary of State, who had issued the general search warrant—surely, a more august personage, for he was then singular of his species. Lord Camden was faced with the identical argument, though, as was appropriate, it was more elegantly put, namely, "that it is necessary for the ends of government to lodge such a power with a State Officer". In his unregenerate day Lord Camden felt able quite tersely to reject that argument with the words: "The Common law does not understand that kind of reasoning nor do our books take notice of any such distinctions". We would, I think, have been in a happier condition if our courts had continued not to be able to understand that kind of reasoning.

The *Liversidge* pronouncement is the perfect apology of, for example, *lettres de cachet*: persons of high authority and grave responsibility also issued them. What would have become of the present control of the police power if two hundred years ago the same argument had been acceptable to Lord Camden? Is it really a sufficient distinction that then it was the prerogative and that now it is the parliamentary power which is in question? In both the claim was made for the arbitrary exercise of power—the nature of the exercise, I venture to suggest, is much more relevant than the origin of the power to be exercised. However, it is the fact only that needs your attention here—namely, that there has been the change which is evidenced by the juxtaposition. It is in my view ominous that

the courts should become respecters of the ministerial person to the extent to which they have been willing to become. It would have seemed to me more decent to have required of a minister because of his grave authority at least that degree of propriety which is exacted of the humblest constable. And I am sure that we would have been in a happier condition if the judges had had resolution enough to suggest that it was as salutary for government departments as for the police force to have rules of conduct enforceable by the courts.

It has been suggested that the *Liversidge* case, however inexcusable, is explicable as having been decided by a tribunal subjected to the stress of war. That explanation is much more charitable than warranted. In these piping days of peace, the House of Lords has done even better. The latest achievement is *Smith* v. *East Elloe R.D.C.*,[13] decided at the end of last term; and again it is honourable in this Hall to notice that Lord Reid (as well as Lord Somervell) dissented. The majority was willing to hold that a compulsory purchase order, or the confirmation thereof, by the Ministry of Health was valid and effective even though it might have been procured corruptly in bad faith and by fraud—that is to say, that the court was precluded even from inquiring into the allegation of fraud. That an English court should be willing to hold itself unable to give a remedy against a ministry to the subject complaining even of fraud is not an exhibition calculated to excite my admiration either for the state of the law or for the sense of the court concerned. Indeed, so to hold the court had to accept a view of the nature of a juridical act which may, temperately, be described as prehistoric. Fraudulent, corrupt or malicious, the ministerial act is for the House of Lords none the less of perfect efficacity because the right formula has been employed. I wonder what terms we should use to describe a modern system of law, were it not our system, which gave to words and forms a magical efficacity of this sort. Prehistoric I called it: but I think we should have to go back really a long time before we could resurrect predecessors as insensible as that.

Scarcely anybody, I suppose, would argue that *Smith*'s case is creditable: it is hard enough to suppose it credible. What however is to me almost equally distasteful is to note how technical, formal and merely legalistic is the approach of the English court in these matters generally—even I mean when they do not hold themselves debarred from all inquiry. In *Woollett*'s case,[14] for example, where the court of first instance, reversed on appeal, managed to declare

[13] [1956] 2 W.L.R. 888.

[14] [1955] 1 Q.B. 103.

invalid a ministerial certificate, it was said: "This Court is precluded from considering the case on its merits. It has perforce only to consider it on technical grounds; for the only points which counsel have been able to raise against these proceedings are, I fear, technicalities." Yet what Mrs. Woollett was in fact complaining about was that, after diverse ministerial declarations and shifts, her land had been taken from her without any reason having been adduced to her. And again in *Benney*'s case,[15] where the ministerial order finally *was* quashed, the *ground* upon which it was quashed had no rational relation to the merits or demerits of the case.

How has it come about that the English courts should show themselves so impotent when dealing with the executive? How come they to be so niggling, trivial and irrelevant? Consider for a moment how fantastic it would seem to a person trained in another system of law that the efficacy of the high prerogative process of certiorari should depend upon the *form* in which the inferior tribunal has chosen to record its decision. Surely the substance of the matter which the divisional court is called upon to investigate is whether the inferior tribunal has behaved judicially or not. Whether the order recorded by that tribunal is technically a speaking or a non-speaking order has surely nothing to do with the substance of the matter. Yet the form of the order, which is beyond the control of the divisional court, will in large measure determine the efficacy of certiorari.

The field is enormous. My business tonight is merely to recall your attention to some of its more salient peculiarities. I shall leave you to your contemplation of them with this query. If the courts when dealing with the acts of the executive behave as they do behave, would not you also, if you were a civil servant, exert yourself, as he does, to see that the relevant statute or regulation is made, in his expressive and inelegant phrase, "really judge-proof"? I think I would.

* * *

The purpose of this comparison is to aid your own reflection. And in any event I have more than abused your patience. I must, however, add a warning. The fact that I am an admirer, and a great admirer, of the Conseil d'Etat does not mean that I suggest an attempt should be made to transplant the institution. I doubt that that is possible, even if it were desirable. If we are conscious of a lacuna in our system, we have something far more difficult to do — to discover that method of filling the lacuna which is *appropriate*

[15] [1955] 2 Q.B. 140.

to *our* system. And I rather suspect that there is for us no ark of salvation other than the High Court. It is admittedly an odd sort of ark, but so no doubt was Noah's. If to the critical eye, unenlightened by the requisite degree of faith, it appears in a most material particular to be markedly unseaworthy, we can perhaps find some reassurance—I am not sure that I do—in the thought that it has survived other floods. It has merited our gratitude, it deserves our respect and it surely holds our affection; but the merely calculating reason suggests that it would be a good idea to refurbish some of its timber and even to consider whether it might not be totally recaulked.

The Presentment of Good and Lawful Men

There is no part in all the excellent frame of our constitution which an Englishman can, I think, contemplate with such delight and admiration —nothing which must fill him with such gratitude to our earliest ancestors —as that branch of British liberty from which, gentlemen, you derive your authority of assembling here on this day.

The institution of juries, gentlemen, is a privilege which distinguishes the liberty of Englishmen from that of all other nations; for, as we find no traces of this in the antiquities of the Jews, or Greeks, or Romans, so it is an advantage which is at present solely confined to this country; not so much, I apprehend, from the reasons assigned by Fortescue, in his book *de Laudibus, cap.* 29, namely, 'because there are more husbandmen and fewer freeholders in other countries', as because other countries have less of freedom than this; and, being for the most part subjected to the absolute wills of their governors, hold their lives, liberties, and properties, at the discretion of those governors, and not under the protection of certain laws. In such countries it would be absurd to look for any share of power in the hands of the people.

And, if juries in general be so very signal a blessing to this nation, as Fortescue, in the book I have just cited, thinks it—'A method, says he, 'much more available and effectual for the trial of truth than is the form of any other laws of the world, as it is farther from the danger of corruption and subornation;'—what, gentlemen, shall we say of the institution of grand juries, by which an Englishman, so far from being convicted, cannot be even tried, nor even put on his trial in any capital case, at the suit of the crown, unless, perhaps, in one or two very special instances, till twelve men at the least have said on their oaths that there is a probable cause for his accusation? Surely we may, in a kind of rapture, cry out with Fortescue, speaking of the second jury, 'Who then can unjustly die in England for any criminal offence, seeing he may have so many helps for the favour of his life, and that none may condemn him but his neighbours, good and lawful men, against whom he hath no manner of exception?' (Henry Fielding, A Charge Delivered to the Grand Jury at the Sessions of the Peace held for the City and Liberty of Westminster, on Thursday, the 29th of June, 1749)