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Introduction

The functions of the law seem to have developed dramatically since the days of Miss Emma Hamlyn.

What I seek to show in this book is that many fundamental choices for society are now made, and probably have to be made, not by the legislature, not by the executive, but by the courts. This requires the courts not merely to apply existing legal rules, but to develop the law. In doing so, the courts will necessarily be making value choices, and often balancing competing values, especially where they are confronted with conflicts between them.

For example, in the moral sphere, acute problems arise on the ostensibly sacrosanct right to life: what is its scope? The duty to protect and respect human life may conflict with our conceptions of human dignity. What then should be the response of the courts to the issue of euthanasia?

Many examples of competing values have their origin in the idea of fundamental rights. Especially over the past fifty years, it has become widely accepted in Europe that the protection of fundamental human rights is a principal function of the courts. But often fundamental rights are not, despite the language sometimes used, absolute and unqualified. Freedom of speech may conflict with the right to privacy; currently, there is vital debate about the limits on the fundamental right to practise a religion. So the courts, necessarily, have to strike the balance.

In the sphere of economic policy, we need again to seek to balance competing values: we need to consider, for example, how to reconcile free trade with employment protection, or with protection of the environment. Here too, as we shall see, the courts have to take a leading role.

Choices between competing values thus have to be made by the courts. But where do the values come from – in an increasingly multicultural and pluralist society? What role do values play, and should they play, in shaping the law? And does the law, in turn, have a role in shaping values?

In the past, it was assumed that fundamental decisions were made by a sovereign ruler, and the rules applied by the courts.

In recent years, as final decisions have become more complex, as rules have been shown to be flexible, as principles have emerged to qualify the strict application of rules, so sovereignty seems in some areas to have passed to the courts, and we can speak, if not of the sovereignty of judges, then perhaps of the sovereignty of law. Hence the title of this book.

The theme raises many issues. Some of them, of course, can only be outlined in this book, but they will, I hope, encourage interest in, and debate on, issues of much importance for our society.

Let me then, I hope as an appetizer, outline some of the questions which arise:

1. Is it desirable that courts should have this role? And how far is this role increasingly inevitable?

2. What are the advantages of courts taking final decisions on these issues? What are the difficulties, and what are the dangers?
3. How do courts take their decisions? How far are they, and how far should they be, influenced by existing social values? How far does the law, in turn, influence and help to form social values?
4. At what level should courts take these decisions: how far at the national level, how far at the European level, how far at the global level? To what extent can European answers be given? How much can we learn from other European systems? Or even seek global answers? To what extent should courts look at the experience of courts elsewhere in the world?

These questions arise from the changing functions of law, as the courts have often found themselves to be the ultimate arbiter where goals or values conflict.

In some legal systems this is by no means a novel theme. In the United States, in particular, it has long been taken for granted, and especially for the US Supreme Court. The debates in the United States are rather about the processes of reasoning by which courts should reach, and justify, their decisions: should they, for example, seek to determine the 'original intent' of the US Constitution and seek to give effect to that? Or should they treat the Constitution rather as an evolving instrument, to be adapted to changing circumstances and to changing values?

In the United Kingdom, by contrast, the role of the courts in determining or shaping policy seems rather new.

Historically the most important issue was perhaps the issue of sovereignty – or, in effect, whether the 'sovereign' was, by apparent contradiction, subject to any legal limitations.

Sovereignty

For our purposes, sovereignty can be regarded, historically, as having two aspects: international and internal. In the West, and in particular in Europe, there emerged after the Middle Ages the concept of independent, 'sovereign' States: countries which were not subject to legal rules in their dealings with each other, other than the most basic rules which they could be deemed to have accepted voluntarily. International law, which regulated the behaviour of States, was confined to 'customary' law and treaties. Customary law was limited to rudimentary principles which simply reflected the existing practice of States: for example, the principle that treaties must be observed (*pacta sunt servanda*). Treaties were pacts, or agreements, which the State had concluded voluntarily and by which it was bound by its own consent.

While States were sovereign in their international relations, it was also assumed that within each State there was a 'sovereign' law-maker, more or less unlimited by law.

Whatever may have been the case in the past, it seems clear that sovereignty is no longer a viable concept for explaining either the role of the State in international affairs or the internal arrangements of a modern State.

Internationally, it is not viable on the political level: no State today, even the United States, is able to act independently. Nor is it viable legally: all States actually accept today the

constraints of international law, although they may differ about what it requires.

Internally, the traditional concept is equally defunct. Partly, this is a consequence of the previous point: the powers of the State, internally also, are limited by international constraints. But sovereignty is no longer a useful model even where there are no external limits on domestic action. Politically, it has been replaced by some form of the separation of powers; often, with powers divided between legislature, executive and judiciary. Legally, it is difficult, if not impossible, to identify today a State in which a 'sovereign' legislature is not subject to legal limitations on the exercise of its powers.

Moreover, sovereignty is incompatible, both internationally and internally, with another concept which also has a lengthy history, but which today is widely regarded as a paramount value: the rule of law.

The rule of law

The notion of the rule of law also has a long and fascinating history.

The notion that there is a basic or fundamental law (confusingly sometimes known as a higher law) can be traced back for many centuries. The essential idea is that the ordinary laws, even those made by the 'sovereign', are subject to fundamental law, and can therefore be held invalid if they transgress it.

If laws which conflict with the fundamental law are invalid, the question then of course arises: by whom can the laws be held invalid? The most prominent illustration again

comes, historically, from the US system, in the famous Supreme Court case of *Marbury* v. *Madison* in 1803.[1] The US Constitution contained no provision for judicial review of legislation enacted by its supreme legislature, the US Congress. But Chief Justice Marshall, finding a conflict between a statute enacted by the US Congress and the Constitution, considered it 'the essence of judicial duty' to follow the Constitution.

This was a leading milestone on the road to what is today called 'constitutionalism': the idea, found in those systems which accept judicial review of legislation, that the constitution – or equivalent constitutional principles – is the fundamental law which entitles the courts to set aside even the laws enacted by democratic legislatures.

Judicial review of the constitutionality of legislation has a dual justification in the US system. First, there is the notion of the Constitution as the supreme law, so that its rules prevail over ordinary legislation. Second, there is the federal system, under which powers are divided between the US Congress and the State legislatures, each being the supreme legislature (subject to the ultimate control of the courts) within its own field of competence.

In turn, such a federal system almost inevitably, it would seem, comports two consequences. First, because the separate legislatures are coequal, there is no true 'sovereign' to be located within the system. Second, there is a need for an independent system of adjudication, to resolve disputes over the respective competences of the 'central' legislature and the

[1] *Marbury* v. *Madison* 5 US (1 Cranch) 136 (1803).

State legislatures. That points to the need for a court with an appropriate 'constitutional' jurisdiction.

In the United Kingdom, by contrast, there have traditionally been no legal limits on the sovereignty of Parliament: even today, the only exceptions are those entailed by membership of the European Union. There is otherwise no judicial review of Acts of Parliament; indeed the term 'judicial review' has been expropriated by administrative law to refer exclusively to review of the executive – a government minister, for example, or a local authority where it is alleged that they have acted unlawfully; and the expression 'judicial review' is now used as a technical term to denote the application to the court for a remedy for such unlawful administrative action.

The meaning of the rule of law

The rule of law is today universally recognized as a fundamental value. But there is not universal agreement about what it means. Nor is there agreement about how it can be reconciled with other, competing values: notably, with the requirements of democratic government.

There are two aspects of the rule of law: formal and substantive. Formally, the principle requires that the exercise of power – and thus all acts of the public authorities – is, with narrow exceptions, subject to review by the courts to ensure that the exercise was authorized by law. This aspect of the rule of law is also known as the principle of legality.

I had intended to say a good deal, in this introductory chapter, about the evolution of the substance of the rule of law and its significance today. But on reflection, I prefer, if I can put

it that way, to let it speak for itself. What the rule of law involves and requires will, I hope, emerge very clearly from this book.

It will certainly become clear that it cannot coexist with traditional conceptions of sovereignty.

What I hope should result from this book is that the rule of law embodies certain values which seem, at least in Europe, widely accepted as essential to modern social and political life; and that we shall be able to identify some of those values.

But we shall look also at other areas where fundamental value choices have to be made by the courts.

The scope of our subject is therefore broad, but that may be appropriate for the Hamlyn Lectures. And we may even find that there are links that can be made between the values embodied in the rule of law and other fundamental social and ethical values which the courts have to take into account.

Finally, it is appropriate, today, to look at the United Kingdom in its European setting. Both the European Convention on Human Rights and European Community law have given UK law a new dimension – as was anticipated by Leslie Scarman in his 1974 Hamlyn Lectures 'English Law – The New Dimension'. I will suggest that the European dimension has been, and remains, a valuable input, reinforcing the fundamental values of English law.

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The rule of law in Europe

The two European systems: an outline

The two European systems I have referred to in the previous chapter – the European Convention on Human Rights and European Community law – are very different from one another in their substance, and they operate in very different ways. But each, as we shall see, has an important role in reinforcing the rule of law; moreover, by a combination of chance and design, they complement one another.

To summarize in the briefest terms: the European Convention on Human Rights, first conceived in 1950 with much input from the United Kingdom, is binding on the currently forty-six member States of the Council of Europe. The European Court of Human Rights, based in Strasbourg, hears cases brought mainly by individuals, occasionally by corporations, exceptionally even by governments, alleging breach of the human rights guaranteed by the Convention. Cases can be taken to Strasbourg only after all domestic channels of redress have failed. The judgment of the Court, if it finds a breach, is binding on the State against which it is given, and the Court may award compensation.

The European Community, which had its origins also in 1950, now the European Union, is a union of currently twenty-seven Member States. It was initially set up with primarily economic functions, but with political aspirations. It

now has competence in many fields, and in most of those fields Community legislation is applied within the Member States. In some areas Community legislation is directly applicable within the Member State, side by side with domestic law; in other areas Community legislation is transposed by national Parliaments into domestic law. It is applied by the domestic courts.

Because Community law (both Community legislation and the Community Treaties) is largely applied within the Member States by the national authorities, and must be applied uniformly throughout the Member States if it is to be effective, the final word on its interpretation rests with the Court of Justice of the European Communities, based in Luxembourg. The European Court of Justice (ECJ), as it is often known, has a wide jurisdiction. In the development of the law, the most important head of jurisdiction enables it to give rulings, at the request of national courts, on the meaning and effect of Community law.

National courts at all levels are free to make references, and when doing so they suspend their own proceedings to await the answers to the questions they refer. National courts of last instance are obliged, under the EC Treaty, to make a reference, if a decision on the question of Community law is necessary to enable them to give judgment.

This reference procedure can be contrasted with the Strasbourg system, where the route to the European Court of Human Rights is open only after all 'domestic remedies', as they are termed, have been exhausted. But the requirement to exhaust domestic remedies is appropriate to the Strasbourg Court, which is essentially an international court – although one with a remarkable jurisdiction – and a court which does