THE USE OF STANDARDS IN THE ENGLISH LEGAL SYSTEM

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L'UTILISATION DES STANDARDS DANS LE SYSTEME JURIDIQUE ANGLAIS

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Professor Bergel, in kindly inviting me to this Conference to contribute a paper on this subject, has conferred a double honour : on me personally, and on my country, because many would doubt whether the English *have* a legal system. Withoout a precise Constitution, and without systematic Codes of law, we have not so much a legal system as the slow deposit of centuries of legal growth. We tend to feel our way, rather than to plan it. Perhaps as a consequence, our great jurists, with one or two notable exceptions, have been historians rather than theorists, or analysts. But it is splendid to be made to think. The idea of "standards" appeared to be novel as a basic factor in our jurisprudence, and I had to ask Professor Bergel what exactly he meant. That matter cleared up, you can imagine my mortification when I recollected that in 1976 the "International and Comparative Law Quarterly" had contained an article by me entitled "Human Rights in the United Kingdom - International Standards".

I recollected something else as well : that the international instruments had themselves "internationalised" - or so we English say - many existing rules of English law upholding the rights of the individual. In other words, the "international standards" were already present in the English common law and a few statutes beginning with Magna Carta - and we never knew it !

So, if I turned the table round again, I had the cue for this paper. I propose to give you a survey - it will be telescopic, there is no time for more - of six factors, or concepts, that have strongly influenced the development of our law, and which have been the sources of certain standards deviving from outside it. In support I shall cite a few judicial decisions, some of them recent. When I have made this survey, I shall put down my telescope, and give you a near view of a few standards set up by modern statutes.

I take my initial stand on the foundations of the whole structure, the common law. I mean the early common law, the common customs of the country, declared in the judgments of the courts and the writings of the jurists. As time went on, and the judges began to find the customs of a feudal society inadequate for a country turning to commerce, they began to look to the law of nature for inspiration. This meant the divine law to begin with, but later, with the influence of Grotius, it meant reason. The concepts of *Natural Justice*, based on reason, have been, and remain to this day, a potent influence on English law. They are especially to be seen in matters of procedure, where fairness is the governing standard. Any issue of a judicial of quasi-judicial character must be settled in accordance with such classic maxims as *nemo judex in parte sua*, and *audi alteram partem*. The Chief Constable of Brighton, for instance, had been tried and acquitted

by a criminal court, but his conduct as chief of police had been strongly criticised by the judge. The Brighton Borough Council dismissed him. There had been a hearing ; but precise charges had not been communicated to the Chief Constable, nor had he been summoned to answer. The dismissal was held invalid on this account (1). Up to date is a case arising out of the miners' strike two years ago, in which the court emphasised that the "standards of fairness are immutable", and must be upheld "despite the heat of industrial warfare" (2).

My first set of standards, then, supplementing the common law, are those of Natural Justice. My second source of standards, which not so much added to the common law as upset it, is *Equity*, following the dictates of conscience. The conscience was supposed to be the royal conscience, the keeper of which was the Lord Chancellor, at first an ecclesiastic. But the Lord Chancellor kept something else, more concrete than the king's conscience, the king's seal, which he could affix to a royal command. By this means he was able to provide a remedy for injustice in circumstances in which the common law courts were unable to do so. There thus evolved many important concepts of English law, especially the trust. Thomas would give or sell land to Edward for the "use" of his nephew Robert. The common law courts knew nothing of a "use" - according to them the land was Edward's. But it was unconscionable that he should keep the benefit of it, and the Lord Chancellor compelled him to hold the land in trust for the nephew. Equity, increasingly intervening in many areas, was administered in its own courts. Naturally a battle developed with the common law courts, and Equity was the victor. The standards of Equity prevailed from Coke's time, but the courts were not themselves unified until 1873. Conscience was, it must be admitted, an elastic standard. John Selden, writing towards the end of the seveteenth century, declared in effect that Equity varied with the length of the Canhcellor's foot (*Table Talk*). But it evolved into well-settled rules, and its standard has recently been stated to be that of "a conscience slightly more sensitive than the average". That may possibly be true of the royal conscience today. What the great Lord Chancellors of the past would have said - and what the one of the immediate past would say - to that "slightly" I hesitate to suggest to an international gathering.

My third source of standards is the customs followed by merchants and seamen in the course of international trade. These went to form what we call the *Law Merchant*. It fell to the lot of Lord Mansfield, Chief Justice of the King's Bench from 1756, to

(1) Ridge v. Baldwin (1964) AC 40.
(2) McLaren v. National Coal Board, Times, Feb. 29, 1988.

adjudicate on legal disputes arising out of our increasing foreign trade. To help him he would summon a special jury of merchants from the City of London to tell him what the practice of the traders was. He adopted the unusual course of at times inviting them to dinner for the purpose, at his house near Lincoln's Inn. One could hardly have a more vivid example of the influence of outside standards on the law. Based on usage, expectancy, common sense and straight dealing, the Law Merchant wholely met the requirements. Our Commercial Court remains a highly successful court, acceptable alike to British and foreign litigants.

Fourth, *Necessity*, as justifying action otherwise against the law, or for which the law does not provide. The standard is objective, an invisible, incalculable force compelling the law to its will. But the judge will say when it is so strong as to do that. When the court had before it two shipwrecked men and a youth, adrift in a boat 1000 miles from land, no food, no reasonable prospect of help, and the men killed and ate the youth, it refused to say that they were excused by necessity (3). As against that, a motorist accused of reckless driving was this year allowed to justify himself on the ground that he was avoiding a threat of death or serious uinjury to his passenger (4). In the political field, necessity will enable the filling of a vacuum, on the ground that *salus populi suprema lex*. There has been more than one instance of this in recent years before Commonwealth courts. On the island of Grenada there was no government, *de jure* or *de facto* ; but there was, luckily, the Queen's representative, the Governor-General, but with no constitutional powers. He legislated by proclamation, setting up various institutions. He was held to be entitled to do so by necessity (5).

Fifth, *Public Policy*, characterised by a judge in 1824 as a "very unruly horse, when once you get astride it you never know where it will carry you" (6). The modern judge has learned to manage it better. Public Policy prohibits a man from benefiting from his own crime, as where the representative of a suicide suing on a life policy which expressly covered death by suicide did not succeed (7). But where a widow sued for compensation on account of the suicide of her husband following an accident for which the company sued was responsible, public policy did not prevent her from succeeding (8). The "public good" (a cognate expression) was defined for the purposes of the Obsence

(3) R. v. Dudley and Stephens (1884) 14 QBD 273.
(4) R. v. Conway, Times, July 29, 1988.
(5) Mitchell v. DPP (1986) LRC (Const.) 35.
(6) Burrough J. in Richardson, v. Mellish 2 Bing. 229.
(7) Beresford v. Royal Insurance Co Ltd (1938) AC 586. Suicide is no longer criminal.
(8) Pigney v. Pointers Transport Services Ltd (1957) 2 AER 807.

Publications Act 1959 as the "interests of science, literature, art or learning, or other objects of general concern". The standard has lately been said to be "what the right-thinking member of the community" thinks. The issue of public policy was raised this year in a case presenting "fundamental difficulties as between, on the one hand, the privacy which every individual (is) entitled to expect, and the freedom of information on the other hand" (9).

I have kept until my sixth and last what is perhaps the English legal standard *par excellence*, that of the *Reasonable Man*, the man "on the Clapham omnibus", so designated by Lord Bowen (10). He is the man "sound of judgment", and by what are taken to be his standards are decided disputes depending on the taking of care. Although to the reasonable man there has occasionally been attrituted (it is said) the agility of an acrobat and the foresight of a Hebrew prophet, he is not expected to have the courage of Achilles, the wisdom of Ulysses, or the strength of Hercules. But he is not the same thing as the average man, for conduct that is customary, normal, may not always be adequate. In the case of the cross-channel ferry disaster the court said that the "fact that the behaviour of the master (of the ferry boat) conformed to standards which were regarded as safe by most, if not all, of his fellow captains, did not preclude his behaviour falling short of the standard of care required of the reasonably prudent cross-channel ferry master" (11). The concept imposes an objective test, not that of the personal disposition of the man in the case. I shall return to the reasonable man in my conclusions.

Here then are six leading influences on the general English law acting by reference to certain standards. We must now take what is in contrast a myopic look at some English statutes.

Now our statute book, as many will know, is to be measured by the yard - or, these days, by the metre. Since the First World War the number of Acts our Parliament has passed year by year has increased in an almost geometrical progression. I cannot deal with all of them. If I were to try to do that, I should no doubt find myself in the situation of the elderly peer who dreamed that he was speaking in the House of Lords,and woke up to find that he was. The subject does not, it seems to me, lend itself to a fruitful, much less a stimulating, study. One can say that, with the growth of the duties legislation has imposed on public authorities and private persons, there can be discerned some increase in the use of exterior tests of quality or quantity, or standards. Some of these of course answer to international

(9) Stephens v. Avery, Times, March 1, 1988.
(10) See McQuire v. Western Morning News Co Ltd (1903), 2 KB 100.
(11) In re The Herald of Free Enterprise, Times, Dec. 17, 1987.

obligations, such as those imposed by the Hours of Employment (Conventions) Act 1936, the Sex Discrimination Acts 1975 and 1986, and the Race Relations Act 1976. Schools are to be "sufficient in number, character and equipment to afford ... such variety of instruction and training as may be desirable in view of different ages abilities and aptitudes" (Education Act 1944 s. 8) ; housing is to be "fit for human habitation" (Landlord and Tenant Act 1985 s. 8), and must contain "standard amenities" as prescribed (Housing Act 1985 s. 209) ; dismissal from employment must be "fair" (Trade Union and Labour Relations Act 1974 Sch. 1 para. 6) ; the "transport needs ... of Greater London" are to be fulfilled having regard to "efficiency, economy and safety of operation" (London Regional Transport Act 1984 s. 2). The Data Protection Act 1984 uses the conception of reasonableness a number of times (e.g. s.9, s. 32). As to social behaviour, a person must not be "drunk on a vehicle" (Sporting Events (Control of Alcohol etc) Act 1985 s.1). "Drunk" is left undefined. The standard can hardly be that of the reasonable man. It must be something between that of Dr Johnson's bookseller, who "got a large fortune by trade", but "was so habitually and equably drunk, that his most intimate friends never perceived that he was more sober at one time than another", and that of the man described by our only Lord Chancellor to have been canonised, Thomas More, who (More said) was "so dowsy drunk that he could neither stand nor reel, but fell down sow-drunk in the mire".

And that reminds me that as a nation we love animals, especially dogs and horses, ruly or unruly, and we have standards for their accommodation, food and so forth (Breeding of Dogs Act 1973, Riding Establishments Act 1964).

By way of conclusion to an exposition which I am aware does not match in learning those already given, and no doubt to come, I return to the "reasonable". The Clapham omnibus still runs - a 19 - and indeed shows signs of running amok. The standard of reasonableness seems to be taking over large areas of English law. Without trying to be in the least exhaustive, I give you the following :

1) Wherever the law imposes a duty of care, the standard of care required is that which should be shown by the reasonably careful person, company, bank (12), ferry master etc. This imposes a standard external to the party involved. It has long been the standard in tort.

2) It can now be found in contract. The Unfair Contract Terms Act 1977 is shot through with requirements of reasonableness. In

(12) Barclays Bank plc v. Quincecare Ltd, Times, March 2, 1988.

particular, liability for negligence for loss or damage cannot be excluded by a contract term or notice unless it "satisfies the requirement of reasonableness" (s. 2). More widely, in a case from Scotland this year it has been held that where a contract has been made requiring a condition to be fulfilled "to the satisfaction" of one of the parties, that party must, in determining whether he is satisfied, act reasonably (13).

3) In the administrative field, a public authority with power to decide any question, or take other action, must act reasonably (14). It has recently been held that it is reasonable for an electricity board to impose on a householder a requirement that, his house having been burgled, he should bear the loss of the money stolen from his meter, and be responsible for repairing it (15).

4) In the quasi-judicial field similarly, where the rules of natural justice, requiring fairness, must be observed.

5) In the legislative field also, where the bye-laws of a local authority will be annulled if not reasonable (16).

6) I have given you instances from the statutes. I will give you a further - lethal - example, from the Trade Union and Labour Relations Act 1974 Sch.1. para (8) : "... the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee".

The effect of all this is to increase the control by the courts, which is no doubt a good thing - or would be if litigation in our courts were not so ruinously expensive. All routes lead to the judicial forum, often by way of our new remedy of "judicial review", by means of which we have, after all these years, caught up with the Conseil d'Etat and similar institutions in the civil law countries. The truth is that the man on the Clapham omnibus has been displaced by the judge on the Holborn Underground. One cannot, can one, think of a man - or a woman, let us not forget them - being more reasonable than a judge ? Yet judges may differ about what is reasonable - though not, we may hope, by the length of their feet. And, as Lord Coleridge once pointed out, if a case depending on the reasonable man is decided one way by a judge of first instance, and the opposite way by the Court of

(13) Gordon District Council v. Wimpey Homes Holdings Ltd, Times, June 24, 1988.
(14) Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1948) 1 KB 223.
(15) R. v. Midlands Electricity Board, Ex parte Busby; Times, Oct. 29, 1987.
(16) Kruse v. Johnson (1889) 2 QB 91.

Appeal, the first judge has been put "out of the pale of reasonable men", he is not a man "sound of judgment".

The way out of that dilemma I leave to the judges themselves. But if I may intrude my own view for a moment, I do feel a little unhappy about our increasing reliance on the concept of reasonableness, especially in a statute. If the rule imposed by a statute is no more precise than that a piece of conduct must be reasonable, or fair, is the legislation worth very much ? The civil law countries, I believe, get on well without using the term "reasonable". I may add that my misgivings about our use of the term, on the ground of its vagueness, are shared by two distinguished English lawyers who have recently suggested that "reasonableness" should in part be replaced, in the field of administrative action, by three substantive principles : proportionality, legal certainty and consistency (17).

To go into that would take me too far : but one can sense some new standards appearing.

(17) "Beyond Wednesbury : substantive principles of administrative law", by Prof. Jeffrey Jowell and Anthony Lester QC, (1988) Public Law 365, reprinted in (1988) 14 CLB 858.