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"OUR LADY OF THE COMMON LAW"

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1. The law reporters are the worker bees of the law; they take the seeds of principle from one authority to the next; and so new law is made from old. This is the very alchemy of the common law. So it seems fitting that the common law should be the theme of this lecture. My title, a little florid, perhaps, for modern taste, is that of an address given by the great American jurist, Justice Benjamin Cardozo, to the first graduating class of the St John's Law School in 1928.

2. I am going to talk about the methods and morality of the common law; and describe the relation between the two. But this is not an essay in natural law, an idea which, though venerable, is to my mind unproductive: it either means law is given by God, in which case it is an article of faith speaking only to the faithful – but law must speak to everyone; or it is a kind of intuitive ethic, which is religion without the divine. In either case natural law implies an unsettling want of *choice* as to what the law should be. Nor am I about to offer an essay for or against positivism, an expression to which so many meanings have been attributed that the academic lawyers who are responsible should be ashamed of themselves[1]. I am concerned, I repeat, only with

[1] See the plethora of meanings attributed to "positivism" in the Notes to the 2nd edition of Hart, *The Concept of Law* (Oxford) (p.302).

the common law of England. I am going to suggest that the methods of the common law possess an inherent moral force. I will say what these methods are. They are fourfold: evolution, experiment, history and distillation. These elements operate together, in constellation with one another. Generally they involve what may be described as reasoning from the bottom up, not the top down. And I will explain why their dynamic is not only logical and reasonable, but moral.

3. First let me give an account of these methods themselves. As a generality, we all know that the common law proceeds by the use of precedent, and it is with precedent – the rule of *stare decisis* – that I will start.

4. Ever since the Practice Statement of 1966[2] the House of Lords, and now the Supreme Court[3], have of course *not* been bound by their own previous decisions. Even so the Practice Statement says that their Lordships will "[treat] former decisions of this House as normally binding". That however is a loose expression: a rule that decisions are "normally binding" is not with respect coherent. What is meant is that the House will normally follow such decisions. That is not a rule of precedent but a rule of practice; and indeed, in practice the House has departed from previous decisions only rarely and cautiously[4].

5. The Court of Appeal, which is *de facto* the last court for the determination of most points of law in England and Wales, is of course bound not only by decisions of the Supreme Court but also by previous decisions of its own[5]. By contrast the High Court, though bound by the Supreme Court and the Court of Appeal, does not bind itself[6]. Now, I do not suppose that the rules of precedent were evolved or designed to work as an integrated whole; but in looking for the methods and morality of the

[2] [1966] 1 WLR 1234.

[3] *Austin v LB of Southwark* [2010] UKSC 78, paragraphs 24 and 25.

[4] See for example *Knuller v DPP* [1973] AC 435.

[5] The leading case on *stare decisis* in the Court of Appeal is *Young v Bristol Aeroplane* [1944] KB 718.

[6] See (in relation to the Divisional Court) *R v Greater Manchester Coroner ex p. Tal* [1985] QB 67.

common law the combined effect of these precepts is worth considering as a single structure, a coherent system of *stare decisis*. If the High Court bound itself, the law would either ossify or there would be excessive calls on the Court of Appeal. If the Supreme Court bound itself, unjust and outdated law would persist – as was occasionally found before the Practice Statement – subject only to the possibility of legislative change. But if the Court of Appeal did *not* bind itself, the sacrifice of certainty would be unacceptably high. As it is, a balance is struck. It exemplifies the general balance which the common law strikes between certainty and adaptability. This general balance is a child of common law's methods, and it represents a large part of its genius.

6. And so this balance, struck by these different rules of precedent, constitutes a signal part of the contribution which is made by *stare decisis* to the methods of the common law; but this is not the only virtue of precedent. It produces a yet more subtle effect. It is that every principle has a tried and tested pedigree. It is refined out of what has gone before, and never constructed from untried materials. And therefore every principle has deep foundations. In the *GCHQ* case in 1984[7], to which I will return, Lord Roskill quoted a letter from the great legal historian F W Maitland to Dicey:

> "'[T]he only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law'[8]. Maitland was in so stating a greater prophet than even he could have foreseen for it is our legal history which has enabled the present generation to shape the development of our administrative law by building upon but unhampered by our legal history."

7. But even the part it plays in honing our law over time is not the limit of precedent's subtlety. Consider how *stare decisis* works case by case. First you have to find the *ratio decidendi* of the previous judgment: the statement of law which decided the case. A statement of law which was not necessary for the earlier decision is not *ratio*

[7] [1985] 1 AC 374, 417C-D.

[8] Lord Roskill gives the reference: Richard A. Cosgrove, *The Rule of Law; Albert Venn Dicey; Victorian Jurist* (1980), p.177.

and therefore not binding; a statement of law which is *ratio* but which can be said not to apply to the case in hand is not binding either – at least, not for the purpose of the present case, which will accordingly be distinguished on its facts from the earlier authority. These rules look quite rigid. A stranger visiting the common law from the universe of the civilians, where there is no principle of *stare decisis*, might be forgiven for thinking that their application is an almost mechanical process. It is nothing of the sort. Some precedents plant their seed, as it were, much more fruitfully than others; and it is certain that the ascertainment of a principle's scope, the reach of its precedent effect, is not a value-free exercise. It has a dynamic of its own. In *Lagden v O'Connor*[9] in 2003 Lord Hope said this about the rule, established in *The Liesbosch*[10], that the damages for which a defendant is liable cannot be increased by reason of the claimant's impecuniosity:

> "It has been doubted whether Lord Wright was laying down a rule of law or was simply saying that the loss claimed was too remote in that case. If he was laying down a rule of law, the decision has scarcely ever been followed. It has frequently been distinguished or confined to its own facts. As time has gone by the rule has been more and more attenuated, to such an extent that it is on the verge of extinction. The respondents submit that it should not be followed in this case. They say that the time has now come for the House to depart from it." (paragraph 52)

And that is what the House did. With some delicacy, Lord Hope said this at paragraph 61:

> "It is not necessary for us to say that *The Liesbosch* was wrongly decided. But it is clear that the law has moved on, and that the correct test of remoteness today is whether the loss was reasonably foreseeable."

8. Because of the Practice Statement, their Lordships' House was of course free to depart from *The Liesbosch* even if the rule there stated was *ratio decidendi* and the case before the House could not be distinguished. But Lord Hope[11] could find only

[9] [2003] UKHL 64.

[10] [1933] AC 449.

[11] Paragraph 53.

one decision of the Court of Appeal which had followed *The Liesbosch*: *Ramwade Ltd v W J Emson & Co Ltd*[12] in 1987, and that was "an isolated instance, and it is hard to find any other examples. The trend of the authorities has been almost always in the contrary direction".

9. Other precedents, of course, flourish like the green bay tree: consider the famous *Wednesbury*[13] case, all about Sunday closing at a cinema in a Midlands town. Lord Greene MR, Somervell LJ and Singleton J reserved their decision over a November weekend in 1947. It did not, I think, attract enormous attention at the time. Its significance as a major text in what we now call public law was not at first appreciated; no doubt because (if you agree with Lord Devlin, writing in 1956[14]) the English courts had lost the power to control the Executive. These were dark days for the law. But the courts recovered the power to control the Executive. They did so through a series of seminal decisions of the House of Lords in the 1960s[15] and procedural reforms to Order 53 of the Rules of the Supreme Court in 1977. Once that happened, *Wednesbury* was rediscovered and became the leading authority on the reach of the judges' power of judicial review. It is perhaps ironic that Lord Greene had said in his judgment[16]:

> "This case, in my opinion, does not really require reference to authority when once the simple and well-known principles are understood on which alone a court can interfere with something *prima facie* within the powers of the executive authority..."

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[12] [1987] RTR 72.

[13] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. See my essay on the *Wednesbury* case in the *festschrift* for Sir William Wade, *The Golden Metwand and the Crooked Cord*, eds. Christopher Forsyth and Ivan Hare, Clarendon Press 1998.

[14] 8 *Current Legal Problems* (1956), 14.

[15] Note in particular *Ridge v Baldwin* [1964] AC 40, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[16] At 231.

10. So there are precedents which prosper and there are precedents which falter and fail. Or, as I put it earlier, some precedents plant their seed more fruitfully than others. This suggests to me what may be a useful analogy, provided it is not pressed too far. Consider the process of natural selection – Darwinian evolution. The strongest, the best adapted, the fittest are most successful at establishing their own future through succeeding generations. The theory of evolution tells us this is true of species. I think it is also a truth about common law principles. The principles which survive, through generations of precedents, are the laws best fitted for their environment; just as the plants and animals which survive, through generations of *flora* and *fauna*, are the species best fitted for theirs. Here I may anticipate just for a moment what I will say about the morality of the common law's methods. Because legal principles may be described (however roughly) as norms or rules, the survival of the fittest in their case is a kind of *moral* success. The environment in which they must survive is an unruly one. It is the order of relations between man and man and between citizen and State. Over time, if – a big if, no doubt – freedom, reason and fairness are cornerstones of the State's political philosophy, the effect of *stare decisis* is to hone and refine the law to reflect these cornerstones, to give them concrete form, and to make them more and more robust in their unruly environment. This is a moral process; that is to say, it is a process which enhances conscientious dealings between man and man and between citizen and State.

11. You will recall my introduction: the methods of the common law are evolution, experiment, history and distillation. This legal version of natural selection suggests the first element, evolution. It is closely related to the second, experiment, which is supported by another analogy to which I will come directly. To do so I must look at the methods of the common law a little more widely, beyond the confines of the doctrine of precedent.

12. In the first of his lectures on the Nature of the Judicial Process, published by the Yale University Press in 1921, Benjamin Cardozo quotes this description given by an earlier American writer, Munroe Smith[17], in 1909:

> "In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined."

13. This description pays no tribute to the doctrine of precedent. But it is illuminating nonetheless. Note those words "the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice". It is surely not fanciful to suggest that Munroe Smith's formulation recalls the approach of another philosopher (a very distinguished one), a generation or so later, to quite a different problem: the nature of scientific discovery. Professor Sir Karl Popper developed a theory of scientific discovery whose towering importance has been consistently recognised since its first publication in 1934[18]. It is that science proceeds by postulating hypotheses which are only good so long as they are not disproved. Popper held that as a matter of logic no number of positive outcomes at the level of experimental testing can confirm a scientific theory, but a single counterexample is logically decisive: it shows the

[17] Munroe Smith (d. 1926) was a distinguished legal academic at Columbia University. He was managing editor of *Political Science Quarterly* for many years.

[18] *The Logic of Scientific Discovery*, 1934.

theory, from which the implication is derived, to be false. The rigour of scientific method consists in its hypotheses being tested for falsity.

14. If the point is not pressed too far, Popper's falsification theory offers something of an analogy, not with the whole of the common law's method, but with Munroe Smith's description of its tentative, experimental aspect: just as Darwinian evolution offers something of an analogy with the doctrine of precedent. Both illuminate to some extent the workings of the common law. They offer the first two elements, evolution and experiment, in our fourfold methodology.

15. But these analogies are about facts; the law is about norms. I must say a little about this distinction. Propositions of science are obviously propositions of fact (when they are true); they are about what is the case. Propositions of law are not. I have already disavowed participation in the arid debate about what is and what is not law, and the often futile controversy between positivism and natural law. It will do for my purpose to note, as I have already suggested, that propositions of law may in the broadest sense be called rules, and are thus normative. All such rules are imposed or permitted by the State, but they include rules of different kinds. Adjectival law includes rules of evidence and rules of procedure. There are rules about status – marriage, nationality and the like. There are rules which condition the procurement of a legal result, such as the formalities attached to the making of a will or a contract for the sale of land. However though I think the common law's methods and morality are of more general application, I am principally interested for present purposes in laws which are prescriptive rules of conduct. These fall into (at least) two classes. First there are negative rules of conduct, prohibitions: what you must not do. The paradigm is the substantive criminal law. Secondly there are positive rules of conduct, requiring those affected to conduct themselves in a particular way. The paradigm is the set of compulsory standards imposed on public officials by our public law.

16. These two classes, negative and positive, are permeable; they are not hermetically sealed. But they will do as a broad distinction. It is in connection with the latter class in particular that I would invite your attention to the force of Munroe Smith's "working hypotheses, continually retested in those great laboratories of the law, the courts of justice", and the analogy I have suggested with Popper's theory of scientific discovery, the testing of a hypothesis for falsity, which as I have said gives us the second element in our fourfold methodology: experiment.

17. Consider now the *GCHQ* case in 1984, in which the Minister for the Civil Service, without prior consultation, issued an instruction forbidding staff at the Government Communications Headquarters from belonging to national trade unions. I choose it because it has much to teach of the methods of the common law. The case deals with two major creations of the common law: the royal prerogative power, and the judicial review jurisdiction. First, the prerogative. A question in *GCHQ* was whether exercise of the Crown's prerogative power was subject to review in the courts. It was contended for the Minister, as Lord Fraser of Tullybelton summarised it[19], that "prerogative powers are discretionary, that is to say they may be exercised at the discretion of the sovereign (acting on advice in accordance with modern constitutional practice) and the way in which they are exercised is not open to review by the courts". Here, then, was a question whether, in context, our public law imposed compulsory standards on public officials *at all.* But the case did not involve the exercise of the prerogative directly. The Minister's instruction had been given under the Civil Service Order in Council 1982. The Order in Council, not the instruction, was a direct exercise of prerogative power. So there was a second issue: the Minister submitted that "an instruction given in the exercise of a delegated power conferred by the sovereign under the prerogative enjoys the same immunity from

[19] At 397H.

review as if it were itself a direct exercise of prerogative power"[20]. Lord Fraser observed[21] that the first proposition advanced by the Minister was "vouched by an impressive array of authority", which he proceeded to summarise. However he went on to state[22]:

> "In the present case the prerogative power involved is power to regulate the Home Civil Service, and I recognise there is no obvious reason why the mode of exercise of that power should be immune from review by the courts. Nevertheless to permit such review would run counter to the great weight of authority to which I have briefly referred. Having regard to the opinion I have reached on Mr. Alexander's second proposition, it is unnecessary to decide whether his first proposition is sound or not and I prefer to leave that question open until it arises in a case where a decision upon it is necessary. I therefore assume, without deciding, that his first proposition is correct and that all powers exercised directly under the prerogative are immune from challenge in the courts. I pass to consider his second proposition."

After observing[23] that "[t]here seems no sensible reason why the words [sc. of the instruction] should not bear the same meaning whatever the source of authority for the legislation in which they are contained", Lord Fraser cited *R v Criminal Injuries Board ex parte Lain*[24], which showed that the actions of a tribunal established under the prerogative might be controlled by judicial review, and *R v Secretary of State for Home Affairs, ex parte Hosenball*[25] in which Lord Denning MR had stated[26] that

> "if the body concerned, whether it be a minister or advisers, has acted unfairly, then the courts can review their proceedings so as to ensure, as far as may be, that justice is done".

[20] 397H-398A.

[21] 398B.

[22] 398F-H.

[23] 399C.

[24] [1967] 2 QB 864.

[25] [1977] 1 WLR 766.

[26] At 781.

Lord Fraser concluded[27], in agreement with Glidewell J at first instance,

> "that there is no reason for treating the exercise of a power under article 4 [of the instruction] any differently from the exercise of a statutory power merely because article 4 itself is found in an order issued under the prerogative."

It followed, said Lord Fraser, that "some of the reasoning" in two earlier cases was unsound, although the decisions might be supported on a narrow ground specific to them.

18. Lord Brightman, like Lord Fraser, left review of the direct exercise of prerogative power to be considered in a case in which the issue had to be decided. But their other Lordships waded a little closer to the deep end. It is not perhaps entirely clear whether Lord Diplock was addressing the first issue identified by Lord Fraser as well as the second when he stated[28]:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review."

There immediately follows the well known passage in which Lord Diplock reviews the three heads under which judicial review may be brought – illegality, irrationality and procedural impropriety. It is for this that the *GCHQ* case is best known. I will return to it after I have followed the reasoning on the prerogative.

19. A further passage[29] in Lord Diplock's speech, just after the tri-partite account of judicial review, suggests that he has the direct exercise of prerogative power in his sights. But Lord Scarman is in any event more explicit. I should cite the following passage[30]:

> "Like my noble and learned friend Lord Diplock, I believe that the law relating to judicial review has now reached the stage where it can be said with

[27] 400C.

[28] 410C.

[29] 411C-F.

[30] 407B-G.

> confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable..., the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. Without usurping the role of legal historian, for which I claim no special qualification, I would observe that the royal prerogative has always been regarded as part of the common law, and that Sir Edward Coke had no doubt that it was subject to the common law: *Prohibitions del Roy* (1608) 12 Co. Rep. 63 and the *Proclamations Case* (1611) 12 Co. Rep. 74. In the latter case he declared, at p. 76, that "the King hath no prerogative, but that which the law of the land allows him." It is, of course, beyond doubt that in Coke's time and thereafter judicial review of the exercise of prerogative power was limited to inquiring into whether a particular power existed and, if it did, into its extent: *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] AC 508. But this limitation has now gone, overwhelmed by the developing modern law of judicial review... Just as ancient restrictions in the law relating to the prerogative writs and orders have not prevented the courts from extending the requirement of natural justice, namely the duty to act fairly, so that it is required of a purely administrative act, so also has the modern law... extended the range of judicial review in respect of the exercise of prerogative power. Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."

20. Lord Roskill, too, seems to have addressed both the direct and indirect exercise of the prerogative power. He said[31]:

> "But fascinating as it is to explore this mainstream of our legal history, to do so in connection with the present appeal has an air of unreality. To speak today of the acts of the sovereign as 'irresistible and absolute' when modern constitutional convention requires that all such acts are done by the sovereign on the advice of and will be carried out by the sovereign's ministers currently in power is surely to hamper the continual development of our administrative law by harking back to what Lord Atkin once called, albeit in a different context, the clanking of mediaeval chains of the ghosts of the past: see *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 29...
>
> If the executive instead of acting under a statutory power acts under a prerogative power... so as to affect the rights of the citizen, I am unable to see... that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries."

[31] 417B-H.

21. These passages have quite a lot to teach about the methods of the common law. First, much attention and respect is manifestly given to past learning. I do not mean past learning as a rule of *precedent* – we are nearly twenty years on from the 1966 Practice Statement. *GCHQ* points to a broader truth. In citing Coke[32], Blackstone[33], Chitty[34] and Dicey[35], as well as later authority, their Lordships pay an implicit tribute to our constitution's virtuous power of continuity. Now, this is a powerful driver of the relative tranquillity of the British State. And it is a power driven by more engines than one; but a principal engine is the common law itself. This is the third element in the fourfold methodology of the common law: history. In this respect the law's wisdom is the wisdom of Edmund Burke's vision of society as a contract between the living, the dead and those who are yet to be born[36]. It is a feature of the law's method which may, I suppose, seem to stand in contrast to our second element, experiment, supported by the analogy with Popper's theory of scientific discovery, the testing of a hypothesis for falsity. But I do not think that is so. A hypothesis stands the test of time until there is a good reason to depart from it: in science, a factual reason based on evidence and experiment; in law, a normative reason based on social and political goods. It is a postulate of each of these worlds that change has to be justified. It was in praise of *stare decisis* that I quoted Lord Roskill's citation of Maitland's letter to Dicey; but Lord Roskill's gloss – "it is our legal history which has enabled the present generation to shape the development of our administrative law by building upon but unhampered by our legal history" – more clearly underscores the common law's general place as a foundation of our constitution's virtuous power of continuity. And

[32] In the citation from Lord Scarman set out above.

[33] *Commentaries*, 15th ed., vol I, pp. 251, 251. See Lord Fraser at 398B and Lord Roskill at 416H.

[34] *Prerogatives of the Crown* (1820) pp. 6-7: Lord Fraser at 398B.

[35] *Law of the Constitution*, 8th edn. p. 421 (Lord Fraser at 398B-C), 10th edn. p. 424 (Lord Roskill at 416F).

[36] Burke, *Reflections on the Revolution in France.*

it is because the common law founds this virtuous power that its method includes history.

22. The second, connected lesson we may learn from *GCHQ* about the methods of the common law reflects more directly the analogy I have drawn with Popper's theory. The growth of modern administrative law, like a new scientific result, required a change (at least, the beginnings of a change) in the old order. The courts must be astute, in Lord Roskill's words[37] not to "hamper the continual development of our administrative law by harking back to what Lord Atkin once called... the clanking of mediaeval chains of the ghosts of the past". And as Lord Scarman said[38]:

> "Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."

23. This insight – that now, the determinant in any instance of the judicial review jurisdiction is not the source of the power but its subject matter – reflects Munroe Smith's perception: case law as working hypothesis, continually retested in the laboratories of the law. It recalls our analogy with Popper's theory: it tests the existing hypothesis for falsity. It discloses the second element in our methodology: experiment.

24. *GCHQ* was not, of course, the law's last word on the prerogative. It was revisited in 1993 in a well known case in the Divisional Court about the prerogative of mercy: *R v Home Secretary ex parte Bentley*[39]. The applicant's brother was hanged in January 1953 for the murder of a police officer. His co-defendant, Craig, had fired the fatal shot; but Craig was only 16 and so did not face the death penalty. The applicant had campaigned for a posthumous pardon for her brother, and sought a judicial review

[37] At 417C.

[38] 407F.

[39] [1994] QB 349.

when that was refused by the Home Secretary of the day. Watkins LJ giving the judgment of the court said this[40]:

> "The [*GCHQ*] case... made it clear that the powers of the court cannot be ousted merely by invoking the word 'prerogative'. The question is simply whether the nature and subject matter of the decision is amenable to the judicial process...
>
> We conclude... that some aspects of the exercise of the Royal Prerogative are amenable to the judicial process. We do not think that it is necessary for us to say more than this in the instant case. It will be for other courts to decide on a case by case basis whether the matter in question is reviewable or not."

25. Miss Bentley's judicial review succeeded. Now, there is what might be called a benign slippage between *GCHQ* and *Bentley*, which exemplifies the common law's experimental method at work, and also uncovers the last element in our fourfold methodology: distillation. The judgment in the later case, *Bentley*, has nothing to say of the distinction, which exercised Lord Fraser in *GCHQ*, between a direct and indirect exercise of the prerogative. The report of the argument (Lord Pannick as he now is on one side, Richards LJ as he now is on the other) has nothing to say about it either. But we can see from what Watkins LJ said that the old hypothesis about the prerogative, laying emphasis on the source of the relevant power as a touchstone of jurisdiction, has even more clearly given way to the new: that it is the subject matter of the decision and not the legal source that determines jurisdiction. A new outcome – review of the prerogative: justified by a new principle – subject matter not source. Reasoning from the bottom up, not the top down. The law of the prerogative was further distilled: distillation is the fourth of the common law's methods.

26. Now let me turn back to *GCHQ* and its other major theme: Lord Diplock's review[41] of the three heads under which judicial review may be brought. Here we will see this last method – distillation – very clearly at work. As is well known the three heads of judicial review were illegality, irrationality and procedural impropriety. (They were

[40] At 363.

[41] [1985] AC 374, 410C-411C.

known to some of my pupils at the Bar, I fear with my encouragement, as Lord Diplock's three heads.) This was not new law. It was a distillation; it placed the now well established *Wednesbury* rule in a clear framework; it gave shape, and therefore principle, to the growing *corpus* of administrative law. This process of distillation possesses virtues beyond clarity, certainly beyond mere tidiness. It involves modification and adjustment. It helps expose potential gaps in the law: by articulating where the law reaches, it maps the way to where it may reach hereafter. You will remember that after naming the three heads of judicial review Lord Diplock added a footnote[42]:

> "That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community..."

And of course proportionality, with a push from the law of the European Union and the advent of the Human Rights Act 1998, has come to occupy centre stage.

27. This process of distillation can be seen as itself a part, at least a facilitator, of Munroe Smith's "method of the lawfinding experts". As I said at the beginning, the four methods of the common law operate together, in constellation with one another. In the public law field the process of distillation has been busily employed in the years since *GCHQ*, building on Lord Diplock's formulation. The twin tides of Luxembourg and Strasbourg have swept *Wednesbury* away from the foreshore of the law. But though the tides started across the channel their flood is in the common law. Lord Cooke of Thorndon's trenchant observations about *Wednesbury* in *R (Daly) v Secretary of State for the Home Department*[43] in 2001 are well known:

> "And I think that the day will come when it will be more widely recognised that [*Wednesbury*] was an unfortunately retrogressive decision in English

[42] 410D-E.

[43] [2001] 2 AC 532, at paragraph 32.

> administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."

28. In all of this we can see the common law's methods at work. Let me draw them together from what I have so far said, and see what they have to tell us about the morality of the law. First, there is an affinity between our two analogies, and thus the first two methods of the four. The process of evolution which precedent represents – our first method – has a dynamic: its force as a legal rule is strong or weak according as the legal principle in question is strong or weak. The experimental process described by Munroe Smith and encapsulated by the comparison with Popper's theory – our second method – has the same dynamic, a dynamic represented, I suppose, by the contrast between those two very different cases, the *Liesbosch* and *Wednesbury*. Indeed I think our legal incarnations of Darwin and Popper come to much the same thing: while Darwin takes the shape of a compulsory rule, Popper has the form of experimental reasoning. As for the dynamic, the strength or weakness of any principle is tempered by the force of history, the law's third method, its role as an engine of the constitution's virtuous power of continuity. The first three methods promote and enliven the workings of the fourth: the distillation of the law, yielding ordered principle, giving space and time for further development. Evolution, experiment, history, distillation: these, then, are the methods of the common law, each in constellation with the others.

29. The moral effects of these methods depend, I acknowledge, on the temper of the State, which the law conditions but does not exclusively create. I referred earlier to freedom, reason and fairness as cornerstones of the State's political philosophy. If they are in their place as such, the methods of the common law give them force and focus. They make them more and more robust. This is, as I have said, a moral

process. It is a process which enhances conscientious dealings between man and man and between citizen and State. But it does not work by chance or faith. The four methods are the building blocks which allow the common law to construct a jurisprudence which is both conventional and innovative. It is conventional, conservative, though well beyond politics. The jurisprudence has this characteristic not only because history's place in the law is a large one, but because all four methods necessarily operate over time. Thus every principle has a tried and tested pedigree. It is refined out of what has gone before, and never constructed from untried materials. And therefore every principle has deep foundations. At the outset I attributed this feature to the first method: precedent, evolution. But in truth it is a function of all four.

30. However the jurisprudence of the common law is also innovative. Evolution and experiment invest it with a self-correcting quality. Through these four methods it digests social change and adjusts the law in the light of what it finds. But it is never *dirigiste*; it produces no new tables of the law from on high; it has no unique inspiration; it is not a single grand edifice. It is, if you like, more London than Paris. But as one generation succeeds another, with setbacks, false starts and dead ends no doubt in its way from time to time, it exerts a benign alchemy. We should celebrate this paradox: the weakness of the judges makes the law stronger. The judges are not elected. And they have no tanks to put on other people's lawns. Therefore they have not the pressure of populous appeal; but the force of what they do can only be supported by the public confidence. That is the setting, the framework, of the common law. It adds strength to the strength of the law's four methods. All these things together mean that our law is conventional but innovative, self-correcting, and historic. That is how and why it enhances conscientious dealings between man and man and between citizen and State.

31. Benjamin Nathan Cardozo thought Our Lady of the Common Law a hard mistress to please. So she is; she demands much of her acolytes; but her reward is the reward of every noble cause: it is to make you part of something much greater than yourself.

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