

BOOK REVIEW

Power of Persuasion: Essays of a very Public Lawyer

Sir Louis Blom-Cooper,
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*His Honour Richard Bray**

Sir Louis Blom-Cooper has had a distinguished career as QC, Chairman of Inquiries, advocate of Human Rights and campaigning author. This book is a collection of essays on topical and controversial issues. As one would expect of the author, he constantly expresses individual views and challenges orthodox opinion. The essays cover such diverse subjects as judicial review, Human Rights, the need for a new Homicide Act, trial by jury, criminal sentencing and penal policy, media freedom and regulation of the Press and include a number of diverting tales from his life at the Bar and pen-portraits of leading judges. It is only possible within the scope of this review to comment on some of the essays.

Chapters 1 and 2 are essays on the subject of judicial review and the debate between proponents of judicial restraint and activism. Sir Louis takes as his starting point the FA Mann lecture of Lord Sumption in 2011. In it he discussed the issue of the separation of powers and posed the question “How far can judicial review go before it trespasses on the proper function of government and the legislature in a democracy?” Lord Sumption argued that the courts have gone outside the legitimate region of reviewing the application of governmental policy to individuals and have embarked on a review of policy itself. This lecture, delivered soon after his appointment direct from the Bar to the Supreme Court, caused a number of judicial eyebrows to rise. In a hostile critique of the lecture¹, Sir Stephen Sedley, former Lord Justice of Appeal, argued that a true analysis of the cases quoted by Lord Sumption showed that the judges were not in fact trespassing on the policy making functions of government but merely seeking to give effect to the principle expressed by Lord Hoffmann in the *Alconbury* case that what is in the public interest is for the legislature and ministers to judge, but that when ministers or officials

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¹ Stephen Sedley ‘Judicial Politics’ [2012] 34 *London Review of Books* No 4 15.

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make decisions affecting the rights of individuals they must do so in accordance with the law. He ended with an implied rebuke that Lord Sumption's central allegation of repeated judicial intrusion might itself be seen as a political intrusion into the business of adjudication by judges.

Sir Stephen, while a judge, was well known as an expert in judicial review and a supporter of the Human Rights Act². I remember attending a judicial seminar soon after the introduction of the Act. The course included a number of exercises relating to bail applications. I ventured the view that such applications could be perfectly well managed under the present provisions of the Bail Act and the common law, without reference to the Human Rights Act. Sir Stephen rather sharply responded by saying that the whole process of granting bail would be transformed by the Human Rights Act. I am happy to say that in the years following the Act bail applications were dealt with exactly as before!

In these essays Sir Louis suggests that the argument for judicial restraint, supported by Lord Sumption, may rest upon a misinterpretation of the concept of the separation of powers. It should more properly be described as the distribution of powers. The legislature, the executive and the judiciary are separate institutions but their powers are shared and not discrete. Thus the courts do not merely step in to strike down executive acts or decisions which are outside their powers given them by statute, but also take part in the law making process. When a statute is ambiguous or obscure the court will seek to interpret the statute. Any statute must by definition be ambulatory and require replenishment over time. Here the courts are recognisably secondary legislators. They may also step in where the legislature has failed to pass laws that are needed. Such actions by the courts are not a trespass upon the functions of government but an expression of the court's duty towards "peace, order and good government" as expressed by Lord Mansfield back in 1762³.

Sir Louis also refers to the introduction of the Human Rights Act as giving the judges express encouragement to activism. After 2000 the courts were empowered to declare any acts or decisions of ministers or civil servants as incompatible with Articles of the Human Rights Convention, and thus invite parliament to reform the legislation. This compromise with the legislators, affirmed the apportionment of powers, not their separation.

Sir Louis has a distinguished record as a campaigner for the abolition of the death penalty and subsequently for reforming the laws of Homicide. It has long been accepted that the Homicide Act 1957 which introduced

² 1998 brought into force October 2nd 2000.

³ *R v Barker* (1762) 96 ER 196 1 Wm Bl 352.

the defence of “diminished responsibility” was an illogical and messy attempt at compromise. Since then attempts to reform the law have been obstructed by successive governments frightened by possible public backlash. In Chapter 7 Sir Louis prints the text of a submission made by himself and Professor Morris to the Law Commission in which they advocate a single homicide offence⁴. The Law Commission had supported a two-tier approach, the first tier being limited to the more serious offence of deliberate homicide. Sir Louis points out that this is an arbitrary distinction. Why should intention rather than any other factor or factors be determinant of the seriousness of the offence? Applying the principles of Occam’s razor, he argues that it would be simpler to have one single and comprehensive offence of homicide. This would be capable of including the present offences of causing death by dangerous driving and causing death in breach of the Health and Safety Act. The creation of a single offence would of course involve the abolition of the mandatory penalty for murder, long sought by jurists and campaigners. The sentencing tribunal could look at all the surrounding circumstances to judge the seriousness of the offence and any mitigating features before passing sentence.

One of the difficulties with this proposal, recognised by Sir Louis lies in defining the requisite mens rea for the all-embracing single offence. Sir Louis suggests that it must be proved that the accused “demonstrated a serious failure to achieve the standard of care objectively to be expected of a reasonable person”. Thus, as he admits, proof of guilt in criminal homicide would approach the norm of strict liability. As a Judge I would not look forward to explaining that definition to a jury!

In Chapter 9 Sir Louis turns his attention to trial by jury. It is clear that he is not an admirer of the jury system. He admits that he came to it late after long practice in the civil courts. He points out that Magna Carta, traditionally regarded as the foundation of English liberties, did not establish a right to trial by jury (rather, the essence of Magna Carta being “One Baron, one vote”).

He begins by dismissing as hyperbole and exaggeration many of the classic defences of the jury system by such authoritative figures as Lord Devlin:

“It is the lamp that shows that freedom lives”
And Baroness Kennedy:

⁴ Law Commission, *A New Homicide Act for England and Wales* (Law Com No 177); The argument of Sir Louis Blom-Cooper and Professor Terence Morris.

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“The jury tradition is not only about the right of the citizen to elect trial but also about the juror’s duty of citizenship. It gives people an important role as jurors, as stakeholders in the criminal justice system”

It has to be said that Sir Louis is himself by no means averse to tendentious language when he describes the jury as:

“The high point, the apotheosis of amateurism. As such it is potentially a recipe for incompetence and unbridled bias” or

“The verdict of the jury is an oracular utterance, devoid of any overt ratiocination”

Sir Louis is right to say that in discussing the system, the important question is whether trial by jury provides as good or better quality of justice than other modes, and not whether it can be justified on social and constitutional grounds.

He makes a number of valid points. Firstly that there is no constitutional or any general form of right to trial by judge and jury, only a general obligation to submit to it in indictable cases. The defendant when charged in such cases has no choice but to submit to trial by jury.

Secondly, the jury does not give a reasoned verdict. Such a verdict, in the civil courts, would fall foul of Article 6 ECHR. In *Taxquet v Belgium*⁵ the Grand Chamber, although it declined to favour any established mode of trial, declared that the system must produce a “reasoned verdict”.

Thirdly, the method by which juries reach their verdicts cannot be tested or reviewed because research into their secretive workings is forbidden.

Sir Louis suggests that many of the judges today conducting such trials express doubts about the operation of the jury system (at least in private).

As a former circuit judge with nearly 30 years’ experience of sitting in the Crown Court I have to take issue with Sir Louis on this point. There is no evidence or study which suggests that verdicts of juries are intrinsically less reliable than those of any other tribunal. He himself quotes the study of the Runciman Commission in 1993 which revealed that judges and prosecuting counsel thought that jury convictions ran contrary to law or evidence in only 2% of cases.

⁵ (2012) 54 EHRR 26.

Ultimately Sir Louis falls back upon the old and patronising argument that the professional lawyer is imbued with a sense of “judiciality” by reason of legal training and education, whereas the juror lacks such a skill and cannot be expected to properly test the credibility and reliability of witnesses and other evidence. I would argue that jurors, with their diversity of background and experience are perfectly able to make common sense judgments on the reliability of evidence and certainly as capable as judges. Elsewhere in these essays⁶ Sir Louis refers to some “immensely clever judges and barristers” who when assessing evidence “exhibit the attributes of a man who has his feet firmly planted in mid-air”.

Most of the so-called miscarriages of justice in jury trials in recent years have been cases where the jury have been prevented from seeing or hearing evidence, for example by non-disclosure by the police or prosecution or through intervention by the judge. More recently there has been a tendency to allow the jury to see and assess for themselves more of the surrounding evidence (for example hearsay evidence and previous convictions)⁷. The cases show no indication that juries have been unable to make balanced judgments as to the relevance and reliability of such evidence.

I agree with Sir Louis that there is a strong argument for creating some exceptions to the general principle of jury trial for indictable offences. Serious Fraud is such an example. In this field the jury’s experience is likely to be very limited. There is need for professional expertise and understanding of complicated financial transactions.

My experience of trial by jury in such cases has not been positive. An enormous amount of unnecessary paperwork is generated by the photocopier and by the fact that lawyers tend to get paid according to the number of pages in the court bundle. Once the trial has started it may needlessly be prolonged by the sitting of so-called Maxwell hours (half-day sittings first instituted by Lord Phillips in the Maxwell case) and by clouds of forensic dust raised by defence counsel. As the trial drags out jurors lose interest and absence through “sickness” becomes more frequent. Sir Louis makes a cautious recommendation that the defendant in such cases should be entitled to elect to waive the right to jury trial. In practice very few defendants (after advice from their lawyers) would make this choice unless they intended to plead guilty. A better course would be for the judge to decide the mode of trial having heard representations from prosecution and defence.

⁶ Ch 8 Criminal Justice on Trial 209.

⁷ See the Criminal Justice Act 2003.

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In Chapter 13 *Crime and Justice: a shift in perspective*, the author takes a radical look at the issue of the criminal justice system and crime control. He asks the question whether a criminal trial is a necessary forum to deal with the wide variety of criminal activity. He points out that criminal justice today is time-consuming, that the outcome is problematic and penal sanctions are costly and cumbersome. He deplores the politicians' rhetoric of law and order and its judicial reflection in the recent statement of the Lord Chief Justice⁸ that sentences passed by the criminal courts were obliged to focus on the reduction of crime. In the author's view the criminal courts should focus exclusively on ensuring a fair trial and abandon any notion that they are involved in society's grappling with problems of criminality.

The implication of this argument is that sentencing can be appropriately dealt with by some other tribunal or public body specifically concerned with crime control and public policy. I have some sympathy with Sir Louis' view. What should be the basis of sentencing by a judge? When sentencing should he apply social or philosophical principles, or should he rely upon his discretion and experience in the courts, or should he be required to sentence in accordance with strict written guidelines? Over the years I have attended numerous judicial seminars on sentencing. I have never heard the classic issues of penology such as deterrence, retribution and rehabilitation specifically being discussed. Until recently, sentencing was always regarded as a matter for the discretion and experience of the judge subject to any relevant legislation and review by the Court of Appeal. The decisions of the Court of Appeal were notoriously idiosyncratic, depending upon the composition of the court. It would often be said by a judge, not entirely in jest, that though his sentence had been upheld by the Court of Appeal he still felt it to be right! Although in principle a sentence can only be reduced by the Court of Appeal on one of three grounds – that it was wrong in law, wrong in principle or manifestly excessive, in practice these principles are not adhered to and very frequently not even quoted in the judgment of the court. I have conducted a study of a large number of recent appeals against sentence. I found that the most common ground given for interfering with the judge's sentence was that it was "somewhat too long". This is of course a long way from the "manifestly excessive" test and no ground upon which the Court of Appeal can validly interfere with sentence.

Recently a new player has entered the field: the Sentencing Guidelines Council. This is made up of both lawyers and lay members.

⁸ *R v Monteiro* [2014] EWCA 747.

They have issued so-called sentencing guidelines for the majority of offences. These in practice form a sort of grid whereby the judge can pass his finger down the grid and select his sentence. In justification of this process it is claimed that it brings consistency to sentencing. Such a guide to sentencing may be of some help, for example to the commercial judge sitting in the Crown Court or Court of Appeal for the first time, but it can surely be no replacement for the discretion and experience of the judge obtained through many years of sitting in the Crown Court.

In a number of chapters Sir Louis includes lively anecdotes of his life at the Bar, famous cases such as *Rondel v Worsley*⁹ and the trial of James Hanratty and pen-portraits of famous judges. Chapter 33 is devoted to Lord Denning. To those of us who cut our teeth in the law in the '70s and early '80s Lord Denning was a giant who made long-lasting contributions to the development of the law in promissory and proprietary estoppel and in many other fields. Sir Louis' description of him is as a "judicial misfit" is therefore disappointing. He views him as judge who allowed his own private views on the merits of a claim to override legal rules and principle. This seems to be based least in part upon a number of cases in which he appeared unsuccessfully in front of him including the rather hum-drum case of *Lake v Essex County Council*¹⁰ which he quotes in extenso, and upon the doubtless jocular remarks made by Lord Denning to the author at lunch in Middle Temple Hall after the case. Most barristers of my generation will have reminiscences of Lord Denning. My favourite does not relate to an incident in court but to a cricket match in which I played for the Bar against a village team on the ground next to Lord Denning's home in Hampshire. He invited us all in for lunch and insisted on being introduced to my wife and each of my young children. On another occasion, when I had injured my finger taking a catch, he wrote a personal letter of sympathy.

The book ends with a delightful chapter on Academics and Practitioners. Sir Louis traces the development of the links between academics and those practising in the courts from the time in his early days when it was only possible to cite a textbook as legal authority if the author was deceased, to the present day where academic lawyers such as Lord Goff, Lord Justice Beatson, Lady Hales and Lord Sumption have been appointed to the High Court Bench. The development of modern law is now an interplay between legal commentary and law in action. In his conclusion Sir Louis paints a picture of the continuing pilgrimage of the

⁹ [1967] 1 QB 443.

¹⁰ [1979] IRLR 241.

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two professions together developing a legal system in a modern liberal democracy.

This chapter ends a book which is a stimulating and thought-provoking read for practitioners and academics alike.