T018

Drawbacks of a Bill of Rights

The confusion that prevails over the role of judges in relation to political questions is illustrated by three items in a single issue of *The Times* (24 January 1978). In an article carefully analysing the relationship between Parliament and the courts the Labour MP for Penistone stresses that in the last resort Parliament must be able to overrule the arbitrary use of power by a member of the judiciary. In answer to questions on the detailed working of the new Race Relations Act, the Attorney General indicates that the Government is closely watching the efficacy of the Act, as applied by judges, adding however that no one he knows has ever doubted that the judiciary should be independent. Lord Scarman, a Lord of Appeal giving evidence before a House of Lords committee, calls for a Bill of Rights with the character of common law rather than statute law, so that judges can develop it case by case. He is unperturbed by the chairman's question whether 'non-elected judges' are the right persons for that task.

I submit that there is one point in all this, that goes to the heart of it. The essence of a Bill of Rights is to lay down broad formulations, which leave judges to decide cases as ***they*** think those broad formulations indicate. For example a provision simply forbidding 'cruel or unusual punishments' leaves the judge rather than Parliament to decide whether the birching of delinquent youths is politic or how far interrogation of prisoners should go. The parliamentary system, on the other hand, requires such points to be decided after full publicity and debate, by democratically elected representatives of the people. The parliamentary system has a further advantage, which this society[1] particularly values. It enables those affected by legislation to know in advance exactly what the rules are, rather than waiting for piecemeal judicial decisions. The latter depend, after all, on what events happen to occur, whether those affected by them are litigious, and whether they have the money and determination to pursue them to the higher appeal courts. It is true that, to work effectively, the parliamentary system requires an orderly statute book and well drafted legislation. The problems of achieving these are well known, but surely not beyond our capacity to solve. It also presupposes a truly democratic Parliament, but again despite the criticisms of it I submit that in essence our system provides this.

Judges should indeed be independent, but the more they are asked to take decisions of a political nature the more that necessary independence is threatened. It is surely for Parliament and no one else to decide ***in detail*** what the law should be on such emotive questions as how far race or sex discrimination should be penalised, exactly what types of punishment should be used against criminals generally, when and how encroachments of free speech should be allowed, whether closed shops should be penalised and so forth. It cannot be denied that the position has been given away to some extent by our adherence to the European Declaration of Human Rights. Let us ensure that it is not given away any further.[2]

---

[1] The Statute Law Society. FB, who founded the society in 1968 (see 1983(02)), was at that time its chairman.
[2] *The Times*, 26 January 1978.