INTERVIEW

Thomas Cox and Julian Grenfell***

OUT OF THE MOTH-BALLS

TOM Cox and Julian Grenfell spoke with Baron Oliver of Alymerton, a member of the Privy Council from 1980 and a Lord of Appeal from 1986 until he retired in 1992. He was in Australia to deliver the fourth annual oration to the Institute of Judicial Administration in Sydney.

Lord Oliver was asked about his early legal education and about his time at Lincoln's Inn.

Lord Oliver: You cannot, at the moment, at any rate, be called to the English Bar unless you first of all join one of the four Inns of Court of which we have four - Middle Temple, Inner Temple, Gray's Inn and Lincoln's Inn - which you join as a

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The authors would like to thank the Hon FR Fisher QC, formerly of the Federal Court of Australia, for his assistance in recording the interview.

matter purely of choice. Usually it depends on which has the better scholarships for the time being. For those who do not feel that they are in line for scholarships it is a question of where their chums go, largely. And after you have been there for, I think, three years now and taken some rather serious exams - they used to be less serious in my day but they are now really rather fierce - you can get yourself called to the Bar.

My legal education consisted of going to Trinity Hall in Cambridge where I took a law degree. I was once introduced in Malaysia by a very nice young man who was obviously concerned to expatiate on my virtues and said "Lord Oliver went to Trinity Hall where he got a double first". And then he thought that this palpable clown before them obviously required some explanation, so he added - "His father was Professor of Law there!"

So from there I went into the army and after I came out, after the war, I went back to University for a year and then went to Lincoln's Inn. I was called to the Bar in 1948.

JG: **So, at the Inns, they don't have formal classes any more, as they used to?**

Lord Oliver: No, that is perfectly true. The organisation of legal education has not been on the basis of classes run by the Inns for years now but on classes run by a body which was set up by the Inns - the Council of Legal Education - which covers all four Inns and which gives a series of lectures and tutorials for the Bar exam, and the course there is compulsory. You cannot get called to the Bar without now going through the Council of Legal Education course at the Inns of Court School of Law. So, in effect, what it has done is to centralise what was previously done on an Inn

basis in the very old days. But, that has been the situation since the beginning of the twentieth century.

TC: **How has the House of Lords been affected by the advent of the European Community and, consequently, by the establishment of some sort of European legal unity?**

Lord Oliver: Now, I am not quite sure where to start with that question. I think one has to go back to Britain's accession to the European Community and the ratification and adoption of the Treaty of Rome in 1972. The immediate consequence of that, from the legal point of view, was the enactment of the European Communities Act. It is a very short statute but it contains a number of very vital sections. Section 2 particularly, I think, is the one with which we are concerned in the context of this question, and that provides, in sub-section (1) (and I'm editing it a bit), "all such obligations from time to time created or arising by or under the treaties" (and that means the Treaty of Rome) "as in accordance with the treaties are, without further enactment, to be given legal effect or used in the United Kingdom, shall be recognised and available in law and be enforced, allowed and followed accordingly". So, the effect of that is that you introduce European law, in effect, as part of English law automatically, and there is a further provision that if there is a conflict between domestic law and European law it is the European law which prevails. So, at one stroke, you've introduced European law into England and, of course, that affects the House of Lords vitally. And, I think, to give you the best example of how it operates is the recent *Factortame* case decided last year.[1] This, I think, will

1 *R v Secretary of State for Transport; ex part Factortame* (No 2) (1991) 62 (12) Common Market Law Reports 589.

probably answer your question better than an exegesis of European law.

There is a provision in the treaty which is to this effect - if a question of European law arises, the European Court can give a consultative opinion upon it, and if the question arises in a court of appeal from which there is no further appeal, then that final court of appeal is obliged, if required, to submit the question to the European Court and would be bound by the answer, under the treaty, which the European Court gives. There is also a provision in the treaty which entitles every citizen of any country within the community to establish freely a business, and that in effect usually means a corporate business, in any other part of the community so that if, for instance, a German wants to set up a company in England, there is no way we can stop him. He is entitled to do it. And that is where we set the scene for the *Factortame* case.

The European Community, as a result of a lot of hard bargaining between the various states, established a system of fishing quotas so that Great Britain, for example, could fish for so many tons of cod, and so many tons of hake and so on, and the same for other countries. The Spaniards, who have only just recently joined the Common Market, were not really satisfied with their quota because it didn't give them the amount of hake that they wanted. So they hit on the bright device of using their right to free establishment to set up companies in Great Britain, buy trawlers, register them as fishing vessels and, because they were then British companies with British fishing vessels operating under the British flag, they were entitled to fish against the British quota even though they were crewed entirely by Spaniards, controlled by Spaniards and were landing their catches in Spanish ports. Now, as you may imagine, the rough

fishermen of Hull and Falmouth were pretty concerned about this because they found that their quotas were being reduced by the amount that the Spaniards were taking, so they complained very vigorously to the Minister of Agriculture and, ultimately, to counter this, legislation was introduced in the form of a new *Merchant Shipping Act*. There was a special provision in the Act under which the Secretary of State was empowered to give licences to fishing vessels to fish under the British flag. But you could not register a fishing vessel under the British flag unless it was owned, effectively, to the extent of 75% by persons who were permanently resident in England. Secondly, it had to be crewed 75% by persons resident in England, and there were various conditions which could be attached to a licence about dropping their catches in English ports.

The Spaniards were a bit miffed about this so they shot off to the European Court and complained that Britain was in breach of its obligations under the Treaty of Rome. They applied at the same time for judicial review of the Secretary of State's decision to deregister under the Act the vessels which were currently held by them through these companies which they had established. Also, on the application for judicial review they asked for an injunction to restrain the Secretary of State from revoking the licences or, alternatively, obliging him to grant licences contrary to the provisions of the Act. And, at first instance, their claim succeeded. The Secretary of State appealed to the Court of Appeal who unanimously reversed the decision down below, saying that there was no jurisdiction in a court of law in England to restrain the carrying into effect of a British Act of Parliament. Juristically, that sounds unexceptionable. The Spaniards then appealed to the House of Lords and we came to the conclusion, indeed, that as a matter of English law it was perfectly right - you could not get an injunction

in the Queen's courts to restrain the Queen, in effect, from carrying into effect a provision enshrined in an Act of Parliament passed by the Queen and Parliament. But, the whole question had not yet been decided by the European Court as to whether we were in breach. This was purely an interlocutory provision. But the European law, as developed by the Court in Luxembourg, has laid down a principle that every state must have an effective remedy for people whose rights under European law have been infringed. So the question was, interlocutorally - suppose the European Court did ultimately decide that Britain was in breach of its treaty obligations and the legislation had to be revoked - how were the Spaniards to be protected in the meantime? They were out of business because they couldn't use the fishing vessels. Some of them had already sold their vessels, at a great loss because, of course, the result of the Act was to throw an enormous number of vessels and trawlers on the market. We thought that we had to send off to Europe the question whether, as a matter of European law, the House of Lords was obliged, notwithstanding that under English law you could not grant an injunction against the Crown, to provide interlocutory relief and if, of course, that was so as a matter of European law, it was then imported into our law and would take precedence. So, predictably, the answer came back that "Yes, you are so obliged".

So, we now have the position where the House of Lords had to grant an injunction to restrain the Secretary of State from carrying into effect a public general Act of Parliament. A more startling exhibition of the transfer of sovereignty is difficult to imagine. The result has been, of course, that the offending legislation has now been repealed and replaced by another Act of Parliament, another *Merchant Shipping Act*, with provisions which in fact do now comply. But, it does

not get over the fact that you are going to end up with Spanish and Cornish fishermen throwing iron bars at each other.

TC: **In recent years the House of Lords has come under close public scrutiny for what have been described as political decisions, for example, the Spycatcher case, *GCHQ* and the GLC case. Do you think that the Judicial Committee of the House of Lords has a political role?**

Lord Oliver: No, it should not be influenced by political considerations at all. However, you cannot, within a developing system of law, really make any decision which does not have some political implications. Any decision which rests, to any degree, upon a conception of what public policy requires must, I suppose, ultimately be said to have some relation to politics because, inevitably, the two are connected. But you cannot ask your court to ignore entirely public policy and say "Oh well, if it takes into account public policy, it's acting as a political court". That makes a nonsense. So, to that extent, yes.

TC: **In taking into account such public policy, Professor John Griffith in his book *The Politics of the Judiciary*...**

Lord Oliver: Ah yes, I thought you were going to ask me about Professor Griffith.

TC: **...argued that superior court judges are destined by their position to be both illiberal and to support state power over individual liberty. Do you think that this is fair criticism?**

Lord Oliver: No. (laughter)

TC: **That's it? (incredulous)**

Lord Oliver: That's it. (laughter)

JG: **You mentioned at the start that you have now retired from the Judicial Committee of the House of Lords. Does that mean that you still sit in the legislative part of the House of Lords?**

Lord Oliver: It means that I am entitled to. As a matter of fact, I still sit (on the Judicial Committee) from time to time by invitation, as what is irreverently known as a "moth-ball judge" or a "retread". If, for instance, they're short of numbers, they recruit retired people up to a certain age, I don't think they have anyone sitting beyond the age of 80, it is purely a voluntary matter, and one comes back on a daily basis. I have sat this year on two cases in the Lords and two in the Privy Council since I retired. And I hope that when I get back, I shall be invited to sit again from time to time. It keeps up an interest.

But, as far as the legislative part of it goes, one remains in the House of Lords, we always sit on the cross-benches if we take part in debates at all and yes, I shall be at liberty to attend debates and speak and vote if the spirit moves me, and the spirit is likely to move, I think. Most law Lords, and retired law Lords, contribute where any legal subject is involved. At the moment there is a Bill, before Parliament which has had its second reading in the Lords, to reduce the retirement age of the superior judiciary from 75 to 70. I think that is a good thing myself. I retired at 70! But not all my colleagues agreed with me. But that, in itself, is not particularly controversial, but it is also accompanied by legislation to cap the amount of the judicial pension and to require a period of 20 years service before a full pension is served. This is obviously a considerable disincentive to people to take judicial appointment particularly among the successful practitioners who, if they want to get their full

judicial pension, would have to get on the band-wagon at 50, which is rather young for this purpose. I do not know whether it will pass or not. It is meeting considerable opposition.

It is also accompanied by what many of us regard as a rather sinister provision, which is that a judge may be invited by the Lord Chancellor of the day and I say nothing about the present Lord Chancellor because I am sure he would not even dream of doing such a thing, but some future Lord Chancellor might decide to invite selected judges to serve for an extra period of five years. But you can see the implications in that, can't you, in judicial review cases? It would enable the Lord Chancellor of the day to invite particular judges to serve on for a further five years and, thus, in a sense, distort the Bench. So I think that will meet with considerable opposition. But, for the moment, it is all under debate.

TC: **On the matter of reform of the legal profession, the cost of legal services and litigation in Australia is currently under review by the Senate Standing Committee on Legal and Constitutional Affairs. England, of course, in recent years has undergone a number of such reviews culminating in the Green Papers published by the Lord Chancellor, Lord Mackay, in 1989 which effectively heralded the end of self-regulation for the legal profession in England. Do you think that this change was for the better?**

Lord Oliver: No. I am a great believer in the old American West thesis, "If it ain't broke, don't fix it". I asked, in a paper which I wrote for the Lord Chancellor (and I was not alone in this) and in the debates, what was conceived to be wrong with legal education and with self-regulation and I never received an answer. I thought self-regulation was working perfectly

well. I could see that there was a case and, indeed, it is not a thing that I ever felt was worth going to the gallows for, a case for giving solicitors rights of audience in the superior courts (the Bar has been deeply opposed to it) but I have always felt myself that if the Bar could not hold its own against the solicitors' profession then it does not deserve to have any monopoly.

But what I think is much more controversial is the proposal which was enshrined in the Green Paper and, I think, still is open under the statute, to extend the right of audience beyond legally qualified people. It has not gone to that yet, I don't know whether it will but my colleague Lord Griffiths is heading a sort of quango of laymen and lawyers which is considering the terms upon which solicitors, for instance, ought to be trained for appearance as advocates. I have no doubt that that will ultimately come about. Actually, solicitors have got considerable rights of audience already. The danger, I think, that one sees in this, and it may be able to be overcome, is of the large firms of solicitors opening up advocacy branches and then tying their clients as they come in to using the advocacy services of the firm rather than having free access to the Bar as a whole. If that occurs on a big scale, it might, I think, (a) reduce the quality of advocacy which would be very serious from the point of view of the Bench, and (b) restrict the client's choice of the advocate whom he would like to represent him at the trial. One can see all sorts of difficulties possibly coming up. I don't know whether they will or whether they won't. What I am very concerned about is anything which would have the effect of reducing the standard of assistance that the court is likely to get, and I don't think that this is a thing that many people appreciate, you know. Until you've actually sat as a judge, you really don't have any idea of what a lonely occupation it is and how very much dependent

you are on those chaps in front of you. None of us is omniscient. We don't, particularly nowadays as the law is becoming more and more complicated, know the whole of the law, and certainly in England (I think it is less clear here and in New Zealand) we have really no assistance in looking up the law apart from the advocates themselves. Here the judge has his associate who is legally qualified and who can do a certain amount of research for him. We have to do our own. And my criticism of the English system is that we have inadequate opportunities for doing research particularly in relation to extra-territorial authorities and, possibly, to academic assistance. One of the difficulties of doing your own research is that you waste an enormous amount of time reading stuff that is probably not going to be of any use to you in order to mine that one nugget which may be buried underneath all this. Now, the advantage of having a research assistant of some sort is that he can do all that spade work and the judicial time, which is pretty scarce anyway, does not get wasted on it. So, I am very apprehensive that the standard of advocacy may be reduced, and that the Bench won't be getting the assistance that they have been entitled to demand up to date.

TC: **The reviews also brought about the passage of the *Courts and Legal Services Act* 1990 (UK) which introduced, amongst other things, a limited form of contingency fee arrangements, and opened up both conveyancing and probate work to non-solicitors. Have these changes affected the profession much and, if so, how?**

Lord Oliver: I don't think that I can answer the question because the Act has not been in operation long enough for anyone to tell. It has certainly, I think, had an effect on conveyancing and, so far, as I can see, what is happening is that a lot of solicitors

are reducing the size of their conveyancing departments, with the result that you get a certain amount of redundancy among solicitors who lose their jobs and have to look elsewhere. There is conveyancing being done by the banks and the mortgage companies, this is a very controversial field, I am not sure whether that has yet been introduced but the idea was that you should be able to have what is called a "one-shop" operation, which is all very well and fine until you consider what the implications are. Because, if you are going to get all your conveyancing done by a mortgage company, who is going to advise you on the purchase? Who is going to advise you on what sort of insurance company you should go to? Ah, well, it is the mortgagee but he is probably running the insurance company and then he is collecting commission on the insurance, and so on. Certainly, we had a good deal of evidence from Scotland, in particular, where this was, I think, introduced earlier so that there was a lot of tying-in of transactions when going to particular companies. There were a number of cases where we had evidence that people with existing insurance policies were being compelled, for instance, when they bought a new house, to relinquish their original insurance policy to their considerable loss, and take on new policies, with the result that there was a fresh commission payable, with a different company. That sort of thing was just the sort of worry we have about throwing conveyancing open beyond the solicitors' profession. At the same time, I am not sure how far this has had the effect of reducing the conveyancing costs, that was the idea behind it. Certainly, I believe, where this has happened in the United States, it has not had that effect at all, conveyancing costs have risen, I think, to about 7% of the purchase price. But I think it is too early to say what the result has been in the United Kingdom.

The contingency fee was very much opposed by the profession and by the judges. I don't know how far it has been taken on at all. It has been possible, long before this Bill, to have a limited form of contingency fee in Scotland and I understand it was very rarely resorted to there. But again, it is not a question I can answer at the moment.

TC: **The judges of the High Court of Australia appear recently to be trying much harder to make compromises in order to hand down majority judgements. The Privy Council, however, has moved in the opposite direction and has now abandoned its practice of delivering a single judgement in each case. Has this change been successful and what consequences has it had?**

Lord Oliver: I think it is a good thing. The Privy Council always used to give a single judgement, there was never any room for dissent and the result was occasionally that you got some pretty rum decisions. The *Strathcona* case probably does not mean much to you now (it was about 1926) but it produced some very rum consequences in contract which everybody regarded as an anomaly. I cannot remember what the case was about now. I know I was always brought up in my student days to regard *Strathcona* as being a case where the Privy Council had gone mad. The answer was that it had a very respectable Board as far as the English lawyers were concerned, Blainsborough was one of the Lords involved, and I heard afterwards what had happened was that the two Englishmen, both equity lawyers, were dragged, as it were, screaming to the altar, by their Scottish colleagues. Because they were not allowed to dissent, they were tarred with this terrible brush of having decided the case! How true that is, I don't know.

I think that it is a good thing, that there should be room for dissent, if it is wanted. We have had very few dissenting

judgments in the Privy Council. I think I have dissented on one occasion, or perhaps two.

TC: **Does the present practice create more work for lawyers?**

Lord Oliver: Those who are not altogether happy consider very carefully whether to dissent might not simply cause complications and are often prepared ultimately to go along with a judgment. For instance, particularly in tax cases, it does not do very much good to dissent and it merely complicates the decision for future cases if there is a dissenting judgment which might be thought to cast doubt on the statute concerned. On the whole, to dissent in the Privy Council is not a right very often exercised. In the Lords, there has always been room to dissent. I don't like the idea of a majority judgment becoming the judgment of the court as a matter of "horse-trading" between the judges. I know this is very much an American pattern. It is not one I like particularly. We have, it is true, gone over very much to the single judgement rather on the footing that, if the result is agreed and it is only a matter of putting it into different words, there is really not much point in five people all saying the same thing in a different language which will enable, what I think one Australian writer called, the "skilled priest" to get in among the judgements and find a good reason why the decision was not binding or was not totally satisfactory. I leave you to guess the identity of the "skilled priest".

You see, there was a time when a certain Master of the Rolls did not exactly see eye-to-eye with the House of Lords! (general laughter).

TC: **What did the House of Lords think of Lord Denning at the time?**

Lord Oliver: (laughter) You must not ask me. I was not in the Lords at the time. I was sitting with Lord Denning!

JG: **Certainly, Lord Denning is a famous figure around the Law School.**

Lord Oliver: Lord Denning was the greatest influence in dragging the common law into the twentieth century. He is a perfectly marvellous man, a wonderful character, a most daunting man to sit with because he has this instantaneous grasp and an ability to absorb and recite facts in cases without apparently taking any notes, which gives one a terrible inferiority complex sitting with him. I think he had a very healthy influence on things. One did not always agree with everything he said but his influence was immense and a good influence too.

TC: **The United States Supreme Court, in the case of Dr Humberto Machian, has just asserted that US agents may forcibly kidnap foreign nationals from their own country to stand trial in American Courts. Do you agree with this decision and would the House of Lords, in your opinion, allow undercover agents to kidnap suspected IRA terrorists from Ireland to face charges in Britain?**

Lord Oliver: My personal view is that I find the notion of forcibly and illegally bringing someone to a country for trial repugnant. Whether any or all of my colleagues would agree with that, I am not in a position to say. As a matter strictly of law, I suppose the argument would be that once a person who has transgressed is within the jurisdiction, then he becomes subject to the jurisdiction. But I cannot help feeling that our courts would be inclined to look at that with a good deal of suspicion and say "Well, if he's illegally and wrongfully within the jurisdiction, then he can't be deemed for legal

purposes to be here at all." I would be very doubtful if the American decision were followed in England.