

Public Law

April 2009

Public Law

April 2009

195-428

Comment

When the private lawyer should go public

Sir Louis Blom-Cooper Q.C.

Analysis

Bias: malfunction in judicial decision-making

Sir Louis Blom-Cooper Q.C.

The Universal Declaration of Human Rights: 60 years on

Francesca Klug

Democracy, supremacy and the “intergovernmental” pillars of the European Union

Danny Nicol

Civil liberties in modern Britain

Lord Steyn

Book Reviews

David B. Goldman: *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority.*

Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds): *Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs.*

Roger Hood and Carolyn Hoyle: *The Death Penalty. A Worldwide Perspective.*

Christopher McCrudden: *Buying Social Justice: Equality, Government Procurement and Legal Change.*

Ian Leigh and Roger Masterman: *Making Rights Real: The Human Rights Act in its First Decade.*

Philip Coppel: *Information Rights.*

Comment

Analysis

Articles

Settlement in Judicial Review Proceedings

Varda Bondy and Maurice Sunkin

Judicial Review of Non-Statutory Executive Powers after *Bancoult*: a Unified Anxious Model

Margit Cohn

Judging the Judges under the Human Rights Act: Deference, Disillusionment and the “War on Terror”

Aileen Kavanagh

A Defence of Concurring Speeches

James Lee

Regulation Revisited

Anthony Ogus

The Impact of the Human Rights Act on the House of Lords

Sangeeta Shah and Thomas Poole

Current Survey

International Survey

Government and Politics Journals

Book Reviews

Copies of articles from *Public Law* and other articles, cases and related materials can be obtained from DocDel at Sweet & Maxwell's Yorkshire office.

Current rates are: £6.95 + copyright charge + VAT per item for orders by post and DX.

Fax delivery is guaranteed within 15 minutes of request and is charged at an additional £1.15 per page (£2.15 per page outside the UK).

For full details and to order contact DocDel on:

• Tel 01422 888 019

• Fax 01422 888 001

• Email sweetandmaxwell.docdel@thomson.com

• Go to <http://www.sweetandmaxwell.co.uk/our-businesses>

Please note that all other enquires should be directed to Sweet & Maxwell, 100 Avenue Road, London, NW3 3PF; Tel 020 7449 1111; Fax 020 7449 1144.

www.sweetandmaxwell.co.uk



SWEET & MAXWELL

Editorial Committee

Editor	Andrew Le Sueur <i>Professor of Public Law, Queen Mary, University of London.</i>
Book Review Editor	Nick W. Barber <i>Fellow and Tutor in Law, Trinity College, Oxford.</i>
Current Survey Editor	Ian Yeats <i>Senior Lecturer in Law, Queen Mary, University of London.</i>
International Survey Editor	Richard Cornes <i>Senior Lecturer in Law, University of Essex, Associate Member, Landmark Chambers, London.</i>
Editorial Assistant	Kyela Leakey <i>Of the Middle Temple.</i>

Sir Louis Blom-Cooper, Q.C.
Of the Middle Temple.

Paul Craig, Q.C.
*Professor of Law in the University of Oxford and
Fellow of St John's College.*

Terence Daintith
*Of Lincoln's Inn, Emeritus Professor of Law,
University of London.*

Gavin Drewry
*Professor of Public Administration, Royal Holloway,
University of London.*

Evelyn Ellis
*Of the Middle Temple, Emeritus Professor of Public
Law, University of Birmingham.*

Roger Errera
*Conseiller d'Etat (hon.), Former Member of the
Conseil supérieur de la magistrature.*

Lord Lester of Herne Hill, Q.C.
Of Lincoln's Inn.

Clive Lewis, Q.C.
Of the Middle Temple.

Gillian S. Morris
*Of the Inner Temple, Professor Associate,
Brunel University.*

Colin Munro
*Professor of Constitutional Law,
University of Edinburgh.*

Danny Nicol
*Professor of Public Law,
University of Westminster.*

Lord Pannick, Q.C.
*Of Gray's Inn and Fellow of All Souls College,
Oxford.*

Adam Tomkins
*John Millar Professor of Public Law,
University of Glasgow.*

Public Law

Notes for Contributors

- The Editor of PUBLIC LAW welcomes enquiries from intending contributors about items that may be suitable for publication, whether as Articles (generally no more than 9,500 words), or as Analysis Pieces (normally up to 4,000 words in length).
- Submission of Articles or other contributions will be held to imply that they contain original unpublished work and are not being submitted for publication elsewhere. No liability is accepted for loss or damage to material submitted.
- The Editor requests that submissions be made via email. A style sheet is available on request.
- Footnotes should be kept to a minimum and numbered consecutively throughout the text with superscript arabic numerals. Wherever relevant and appropriate, reference should be made in footnotes to previous articles that have appeared in PUBLIC LAW.
- Authors should provide the biographical information in the form in which they wish it to appear in PUBLIC LAW.
- Proofs will be sent to authors who undertake to check them and return them without delay.
- Copyright in all pieces accepted for publication remains with the contributors, and the publishers acquire publication rights. If all or any part of an Analysis Piece or Article is reproduced elsewhere, the author should acknowledge PUBLIC LAW as the original place of publication.

Editor

Andrew Le Sueur
Department of Law
Queen Mary, University of London
339 Mile End Road
London,
E1 4NS
Tel.: 020 7882 5146
Fax.: 020 8981 8733
Email: a.lesueur@qmul.ac.uk

Book Review Editor

Nick Barber
Trinity College
Oxford
OX1 3BH
Tel.: 01865 279957
Fax.: 01865 279911

Since its creation in 1956, *Public Law* has been and continues to be the only British journal devoted to publishing scholarly articles, reviews and surveys that analyse and comment upon leading issues of constitutional and administrative law in the United Kingdom and abroad (especially in Europe, U.S.A. and the Commonwealth).

SWEET & MAXWELL



THOMSON REUTERS

International Survey

Editor: Richard Cornes

Senior Lecturer in Laws, School of Law, Essex University; Barrister and Solicitor of the High Court of New Zealand; Associate Member, Landmark Chambers, London

 France; Italy; Life-sustaining treatment; Withdrawal

Correspondents: Australia & South East Asia—Prof. Cheryl Saunders & Christopher Tran (Centre for Comparative Constitutional Studies, The University of Melbourne, Australia); Canada—Prof. Jean-François Gaudreault-Desbiens (Université de Montréal, Canada); France—Roger Errera (Conseiller d’Etat honoraire) & David Marrani (Essex University, England); Germany—Prof. Dr Beate Rudolf (Freie Universität, Berlin); India—Shubhankar Dam (Singapore Management University, Singapore); Israel—Prof. Suzie Navot (Colman Law School, Israel); Italy—Prof. Susanna Mancini (Faculty of Law, University of Bologna); Italy & EU—Luca Paladini (Jean Monnet Fellow, European University Institute & Faculty of Law, University of Bologna); New Zealand & South Pacific—The Public Law Group (Faculty of Law, The University of Auckland, New Zealand); South Africa—Profs. Christina Murray and Richard Calland (Democratic Governance and Rights Unit, University of Cape Town, South Africa); Scandinavia and the Baltic region—Prof. Eivind Smith (Department of Public and International law, University of Oslo, Norway); Spain—Prof. Marian Ahumada Ruiz (Universidad Autónoma de Madrid, Spain); United States—Prof. Vicki Jackson (Faculty of Law, Georgetown University, USA), Prof. Richard Lazarus (Director of the Georgetown Supreme Court Institute, Georgetown University Law Center) & Tina Drake Zimmerman (Supreme Court Institute Fellow); Correspondent at large—Charles Banner (Landmark Chambers, London, United Kingdom).¹

Editor’s introduction

In January, 1992, Eluana Englaro, of Lombardy, Italy, was involved in a car accident. She suffered severe injuries and for the next 17 years remained in a vegetative state. On February 9, 2009, she died. Her death came four days after doctors began (pursuant to court orders) to remove life support. A decade ago

¹ Where appropriate specific authors of the contributions from Australia & South East Asia, France, New Zealand & South Pacific, and South Africa, are indicated below.

The Act also provides for the constitution of a special court to try offences investigated by the NIA. The Chief Justice of the High Court will nominate a special judge, and the case is to be tried on a day-to-day basis. Appeals against the orders of the special court will lie to the Division Bench of the High Court and the appeals are required to be disposed of within three months.

Italy—saving a national airline—Alitalia’s 1996 restructuring plan and compliance with EC law—judgment of the Court of First Instance, July 9, 2008, *Alitalia-Linee Aeree Italiane s.p.a. v Commission of the European Communities* (T-301/01)⁸

 Actions for annulment; Airlines; EC law; Italy; Procedural impropriety; Reasons; Restructuring aid

On July 9, 2008, the Court of First Instance spoke for the second time on the validity of the 1996 restructuring of Alitalia in light of EU rules concerning state aid. The Court pronounced its first judgment in December 2000 (*Alitalia v Commission* (T-296/97) [2000] E.C.R. II-3871, hereinafter *Alitalia I*). In that ruling it annulled in part Commission Decision 97/789 [1997] OJ L322/44 which had found the 1996 plan to be state aid compatible with the internal market subject to certain findings and conditions.

The 1996 plan entailed the majority shareholder (IRI, an Italian state finance company) achieving Alitalia’s recapitalisation by supplying, in three tranches, a total of approximately €1,420 million. This the Commission considered to be a contribution of state resources within the meaning of the State Aid Rules and accordingly evaluated the proposal in light of the private investor test: this test asks whether in “similar circumstances a private investor of a size comparable to that of the bodies administering the public sector might have provided capital of such an amount”.

In order to respond to the judgment in *Alitalia I*, the Commission adopted Decision 2001/723 [2001] OJ L271/28, revising that part of its previous decision which the Court had annulled, though without repeating the whole procedure. The “new decision” declared once more that the 1996 plan was state aid compatible with the internal market and confirmed the undertakings set out in Decision 97/789.

The latest judgment of July 9, 2008 concerns Decision 2001/723, against which Alitalia brought a new action before the Court, complaining about, inter alia, a lack of reasons, certain other procedural defects, and the lack of an opportunity to state its case (defend its position) in the decision-making process leading up to the decision and, finally, the breach of the obligation to observe the judgment in *Alitalia I*.

This time the Court rejected Alitalia’s arguments and confirmed the validity of the decision. The Court stated that: the revised decision contained sufficient reasoning, in particular with regard to the determination of the proper rates

⁸ Luca Paladini.

of return on the investment (the preamble includes 20 recitals analysing the criterion of the private investor in a market economy); it rejected the contention that the decision was vitiated by procedural defects; and, finally, it held that the Commission had complied with the *Alitalia I*. Thus the judges confirmed that the 1996 restructuring plan was compatible state aid and that the undertakings imposed for its implementation were valid.

Arriving in July the judgment came at a tense time for Alitalia: the company was on the brink of being declared insolvent by the Tribunale di Roma. The remaining legal challenges to the restructuring (by for instance Air One) and the ongoing saga may now have been overtaken though by Alitalia's purchase by Compagnia Aerea Italiana, a consortium of Italian entrepreneurs and financial institutions (only a few of them have professional experience in air transport). The consortium has also purchased Air One and intends to create a "new Alitalia" (launching January 2009) with Air France also coming on board with a 25 per cent stake.

Italy—validity of VAT amnesty—judgments of the Court of Justice, *Commission v Italy* (C-132/06), July 17, 2008, Grand Chamber and *Commission v Italy* (C-174/07), December 11, 2008, Fifth Section⁹

 Amnesty; EC law; Failure to fulfil obligations; Italy; Tax evasion; VAT

The Court of Justice has recently pronounced two judgments on the compatibility of the Italian VAT amnesty with EC law. The first judgment concerns the compatibility of the 1998–2001 tax amnesty (provided by a 2003 statute) with Directive 77/388 on VAT [1977] OJ L145/1 (the "Sixth Directive"). The second follows the first judgment's reasoning and concerns the compatibility of the same tax amnesty's extension with Directive 2006/112 [2006] OJ L347/1 (which replaced the Sixth Directive from January 1, 2007).

The Italian tax amnesty foresaw that taxable persons could regularise their fiscal position by paying a lump sum amount or a percentage of VAT for the periods in question. At the same time, the Italian tax authorities renounced claims to any assessment and verification for the tax years covered by the amnesty.

The Court decided that the amnesty infringed arts 2 and 22 of the Sixth Directive and art. 10 of the EC Treaty. In their reasoning the judges recalled that Member States must take all legislative and administrative measures appropriate for ensuring collection of all the VAT due in their territory, and to this end they are required to check taxable persons' tax returns, to calculate, and to collect the due tax. Clearly Member States enjoy a certain measure of latitude in performance of these administrative duties, but not to the extent of affecting both the effective collection of the European Union's own resources (VAT returns being regarded as in part destined as contributions to the European Union's accounts) and the principle of fiscal neutrality (according to which

⁹ Luca Paladini.

economic operators carrying out the same transactions must not be treated differently in levying of VAT).

That being so, the judges observed that the Italian amnesty is likely to favour persons availing themselves of the tax amnesty (approximately 800,000 persons applied for the tax amnesty in 2001—some 15 per cent of those with unpaid tax owing), because they have the chance to escape their obligations to declare and pay the normal amount of VAT (sanctions included), paying rather only a lump sum. Thus the amnesty disrupts the proper functioning of the common VAT system by replacing the obligation under the Sixth Directive to pay the due VAT with the new obligation to pay only a lesser lump sum. Further, by introducing differences in the way taxable persons are treated, the tax amnesty infringed the principle of fiscal neutrality and the obligation to ensure VAT is collected uniformly in all the Member States. Lastly, by addressing benefits to tax evaders, it obstructs de facto the prevention of tax evasion, which the Sixth Directive recognises and encourages as objective.

There are now two possible paths open to Italy. First, it could retrace its steps and carry out the assessment and collection of VAT for tax years 1998–2002 or, secondly, it could maintain the tax amnesties despite the judgments. In the former case it is possible that tax evaders who applied for the tax amnesties may bring actions asking for refund of the paid amounts. In the latter there would be the possibility of a new procedure under art.226 EC, that could bring a heavy sanction on Italy. These two judgments are a warning for the future to Member States against wide tax amnesties that make it advantageous to evade rather than make an accurate and honest initial declaration.

Italy—Parliament unsuccessful in petition to Constitutional Court to halt ending nutrition and hydration of a vegetative state patient—legislators accuse courts of usurping role of legislature—decision of the Italian Constitutional Court, Ordinanza 8 ottobre 2008, n.334¹⁰

 Death; Italy; Judicial decision-making; Life-sustaining treatment; Persistent vegetative state; Separation of powers; Withdrawal

On October 8, 2008, the Italian Constitutional Court rejected an appeal lodged by the Parliament against a ruling that allowed suspending artificial nutrition and hydration of Eluana Englaro, a 37-year-old woman who had been in a vegetative state for 17 years. This was a landmark decision in a country that is increasingly bitterly divided on ethically sensitive issues. There have recently been several controversial right-to-die cases and Parliament has proven unable to adopt clear and satisfactory legislation on euthanasia. According to the law in force, active euthanasia is expressly forbidden, but patients have the right to refuse treatment. The law is however not clear on whether only patients can decline treatment that will lead to their deaths, or whether family members can also decide to refuse treatment for unresponsive patients.

¹⁰ Professor Susanna Mancini.