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PLANNING INQUIRIES – THE NEW DIMENSION

THE MAJOR INQUIRY - A NEW APPROACH

by

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A NEW APPROACH

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Introduction

In this Paper I shall try to look at the public local inquiry not as an isolated phenomenon but in its context as part of the development of our constitution. The British Constitution is a living organism, constantly adapting to new needs; if the process of adaptation stops, strains are set up which can lead to a break. The purpose and function of the public inquiry may be undergoing a change, and it is important to understand the nature of that change, and to go with it positively. So I pose the question, what is the role of the public inquiry?

Historical origins

Matters which are today the subject of ministerial decision and public inquiry were originally all dealt with in Parliament. In the eighteenth and nineteenth centuries a mass of private and local Acts of Parliament were passed to authorise what we now call public works of all kinds - canals, sewers, gas, water, electricity, roads, railways and so forth. These Bills were subjected to a Parliamentary process very like a public inquiry. They came before a Select Committee of each House of Parliament, at which proponents and opponents of the Bill were heard, often represented by Counsel. Witnesses were called and cross-examined, and submissions were made. It is significant to note in connection with the argument I shall be making later that in these Bills the need for the project and 'policy' generally were always relevant issues.

Eventually the burden of work became so great that Parliament began to hive off the authorisation of these public works, giving the decision to ministers of the Government, and requiring them to hold a public inquiry before reaching a decision. There were various intermediate stages, such as the Provisional Order procedure, which involved Parliamentary confirmation of a ministerial order, but these fell out of use, and the familiar public inquiry procedure became standard. The public inquiry has proved a very successful institution, and has been adopted when procedures were required in new fields of governmental decision-making, such as town and

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country planning. It is a British invention, and is much admired by countries which do not have it, for example our partners in the EEC.

The present position

Generally speaking the public inquiry system works well, provided the dispute is one between opposed local interests. In such cases, the Minister can appear truly independant, and can act as sole arbiter of the public interest. Thousands of public inquiries are held each year, and their outcomes give no cause for public concern.

There is however one class of case in which the system is now facing a dangerous loss of public confidence, and risks breaking down altogether. The characteristics of this class are not easy to define, but they appear to be: (1) that the project has national and not merely local implications, (2) that it is highly controversial, (3) that its proponent is not truly independant of the Minister and (4) that its proponent can deploy resources greatly superior to those of the project's opponents. The classic examples are the motorway schemes of the last ten years or so. For much of that time the Ministry of Transport was merged with the Department of the Environment. Accordingly it was a Road Construction Unit of the DoE that promoted the scheme, an Inspector appointed and paid by the DoE who presided over the inquiry, and the Secretary of State of the self-same DoE who received the Inspector's report and almost invariably decided that the scheme should go ahead. When not only professional campaigners, but the headmaster of an ancient public school and a university professor, resort to civil disobedience to disrupt a public inquiry in order to prevent it being held at all, something has evidently gone wrong.

The fact is that the general public saw these inquiries as nothing but an expensive ritual, designed only to supply window-dressing for a foregone conclusion. They offended the sense of fairness which is deeply ingrained in our traditions. But the discontent is not limited to motorway inquiries, and it has many other causes. One is the advance of technology in the second half of our century. Public works are often much larger, more complex and difficult to understand; also they affect more people than the traditional gasworks or waterworks. Further, people are much better educated than they used to be; they no longer believe that ministers and

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their advisers have a monopoly of judgment of the public good; more and more people today want to be consulted and to participate in the decisions which affect their lives. There is also considerable disenchantment with technology. Too many great public works, hailed as boons and blessings when first constructed, have proved to have unforseen and undesirable consequences. There has also been a profound change in public attitudes towards the environment. Where, less than a generation ago, the obvious benefits of material progress and growth were weighed only against the cash cost of achieving them, there is today a much greater awareness of other costs - and risks - which cannot be measured in money: costs to our descendants, costs to other living things, costs to the landscape, costs to the quality of life, and costs to social structures and institutions.

Other factors causing loss of confidence are connected with the procedures of the large public inquiry. One of these is the use of the 'salami technique'. This consists of breaking up a project into its parts, and holding separate inquiries into the parts. Once the early parts are approved, the decision on the subsequent parts is pre-empted. At no stage is the project and its consequences looked at as a whole.

Then there is the disparity of resources as between proponents of a scheme and its opponents. Big public inquiries especially on technical subjects can be immensely expensive for participants. The promoters are backed, directly or indirectly, by tax-payers money; the opponents have to raise their own funds from what their supporters can afford. The disparity in resources also manifests itself in access to information. The normal inquiry procedures do not ensure that enough information is disclosed to objectors, long before the formal inquiry opens, to enable them to meet the proponent's case on anything like equal terms.

Experiments

In recent years there have been three 'experiments' in new procedures for inquiry into the large, national projects which we are discussing.

The first was the Roskill Inquiry into the siting of the Third London Airport. This was an extra-statutory inquiry set up by the Government in 1968, with seven Commissioners chaired by

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Mr Justice Roskill. A special five-stage procedure was devised for the Commission, and using that procedure the Commission spent from mid-1968 to the end of 1970 searching for the 'best' site for the Airport. It began with 78 possible sites, which it gradually narrowed down to four. In the end six members of the Commission recommended that the airport should be sited at Cublington in Buckinghamshire; the dissentient member, Professor Colin Buchanan, recommended that the airport should be sited at Foulness on the Essex coast. After further debates in Parliament and the press, the Government decided against the majority recommendation, and chose Foulness. But in the event the decision was never carried out:air passenger traffic ceased to grow at the rates officially forecast, and larger airplanes came on the market that could carry more passengers with fewer aircraft movements. The Third London Airport proved not to be needed at all, at least not then.

In many ways the new procedure for the Roskill Inquiry held great promise. The five stages offered opportunities for thorough study, and the Commission was empowered to undertake its own research. It was not constrained by any limitation to town and country planning matters.

With the benefit of hindsight, two matters stand out as the causes why the experiment failed. The first was that, after only three weeks of the inquiry, the Government expressly excluded from the Commission's consideration 'the economic case for construction of a Third London Airport', as well as questions of national (as opposed to regional) airports strategy. Thenceforth, the need for building this airport somewhere in the south-east was to be presumed, and those objectors who challenged it were ruled out of court. But for this restriction the Commission might well have been able to report that the airport would not be needed in the then foreseeable future.

The other main cause was reliance on the Commission's cost-benefit analysis as the principle tool for determining which was the 'best' site. In summary, there were two difficulties here. First, the benefit of the airport had to be presumed, and all the Commission could do was to find the site with the minimum net costs; they could not have concluded, even if it has been the case, that the costs at any or all of the sites outweighed the benefits. Secondly, the attempt to put everything into money terms, such as the value of a Norman Church, was, to put it mildly, unconvincing.

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The second experiment was the Planning Inquiry Commission. Also in 1968, the Government introduced new statutory provisions for a special type of planning inquiry, displaying several of the features of the procedure devised for the Roskill Inquiry. In the event this new procedure was still-born; no PIC has ever been appointed. The reason, given in a speech in September 1978 by the then Secretary of State for the Environment, Mr Peter Shore, was this: -

> 'The system (of PICs) envisaged a two-stage procedure, the first being investigatory and the second consisting of one or more public local inquiries. In my view the investigative proceedings are bound to lead the Planning Inquiry Commission to conclusions, by whatever means the proceedings may be conducted. Yet at the second stage, ie at the local inquiry, arguments of policy and principle on which they will already have formed a view are bound to be put to them as well as the more local issues, and I do not think that people will feel that they would get a fair hearing. There is now way round this problem.'

There is much substance in that view - not because the procedure has two stages, but because the statute requires the second, local inquiry to be carried out by an Inspector who must have been one of the Commissioners at the first stage. Moreover, the views on 'policy and principle' that he will have formed may at that time not yet be known, nor will any other institutions, such as Government or Parliament, have had the opportunity of considering these matters, or taking any decision about them.

Within the statutory PIC procedure, there is indeed no way round this problem. It can only be resolved by interposing a decision in principle, by Government and Parliament, between the two stages, and then placing the second stage in the hands of someone who takes no part in the first.

For the cases with which I am concerned in this Paper, PICs have another demerit. For them, as for the ordinary local planning inquiries, the 'trigger' is an application for planning permission (or its equivalent): they cannot be appointed until the project is far enough advanced for its proponent to have taken that step. As I shall explain later, that is often a good deal later than the best time for starting such an inquiry.

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The third 'experiment' was the Windscale Inquiry.

Although the project for the construction of a nuclear fuel reprocessing plant by British Nuclear Fuels Ltd ('BNFL') at Windscale, Cumbria, had already been in preparation for several years, it did not become public knowledge until a formal planning application was submitted to the Cumbria County Council in 1977. Public concern was then such that the Secretary of State for the Environment 'called in' the application for his own determination. BNFL asked for an urgent decision, because a prospective contract to reprocess Japanese nuclear wastes might be lost if there was delay. Because of that urgency, the Secretary of State decided to hold an ordinary statutory local planning inquiry, but to adapt it so as to allow considerations wider than the normal 'planning matters' to be taken into account; in particular, the terms of reference were drawn widely enough to allow the 'need' for the project to be considered.

Although, in theory, this opened the Windscale project, and nuclear matters generally, to public scrutiny, the procedure of a statutory planning inquiry proved in many respects inadequate for the importance and demands of this subject matter. Many criticisms were advanced at the time, and afterwards. Here, we shall concentrate only on those directed at the planning inquiry procedure itself.

First, the fact alone that the inquiry was held under the Town and Country Planning Acts inevitably limited its scope. Although the terms of reference were wide enough to cover the 'need' for the development, the Inspector felt bound to confine the inquiry to the questions of reprocessing at Windscale, and not to consider the effects of that operation on the future of the nuclear industry as a whole. This produced a typical example of 'salami politics': the reprocessing plant would produce plutonium, whose only uses are as an explosive for nuclear weapons, or as fuel for fast reactors (its use as a fuel for thermal reactors being possible, but inherently uneconomic). Reprocessing therefore effectively creates a 'need' for fast reactors, but this was regarded as being outside the inquiry's scope, and left over for some future inquiry, eg that for CDFR - or even a later one for a programme of several fast reactors.

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Secondly, the inquiry could not even be appointed without the 'trigger' of a planning application. This meant that the proponents of the scheme had a head-start over the objectors in the preparation of their case, an advantage compounded by the disparity of resources between them. That in turn limited the ability of many of the objectors to present the best possible case, and to back their critiques with independant research results. In the case of statutory planning inquiries, that disparity could only be reduced by some form of public funding for objectors, a proposal that has been a subject of discussion for some time.

Next, the fact that a specific planning application was being considered constrained the inquiry to reach a single 'yes/no' conclusion (should planning permission be granted or not?), rather than to investigate many factors, and to clarify the range of options and their consequences.

Also, the existence of a pending planning application generates pressure to arrive at a decision. The Windscale Inquiry was conceived in haste and conducted in haste. Too short notice of the inquiry was given, and the objectors had insufficient time to prepare their cases. The inquiry itself was taken at great speed, sitting five days a week in a remote part of the country, continuously for almost five months without a break from June to November 1977. This meant that the objectors did not have enough time to digest the information supplied by BNFL, much of which only emerged in the course of the inquiry. Constant attendance at such a long inquiry was also difficult for many objectors.

Another disadvantage flows from the fact that planning inquiries tend to be closely modelled on trials in our law courts. These have certain distinctive features; in particular, that they are 'dramatic .... unique and unrepeatable .... single and indivisible'. But unlike legal trials, planning inquiries are not preceded by a lengthy period during which the parties are compelled to exchange relevant documents and information. This can create several difficulties. For instance, much important information about the proponents' case at Windscale came out piecemeal as the inquiry went on. Some essential information - for instance the BNFL evidence on safety-related incidents at Windscale and the

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possibility of using plutonium in thermal reactors - emerged only at the end of the inquiry, when it was too late to subject it to any real examination. Again, the need to programme the inquiry meant that frequently one objector's witnesses were interposed between those of other objectors, thus breaking up the sequence and coherence of the different objectors' cases.

Other problems arise from the adversarial nature of a planning inquiry. Unlike the Roskill Commission the Windscale Inquiry had no investigatory capacity of its own. Although the Inspector ordered some limited research to be carried out (eg on plutonium levels in the Ravenglass Estuary and the results of eating local fish), its value was limited because of the short time in which it had to be done.

Finally, the long-standing practice of planning inquiries requires the appointment of a single Inspector, sitting if necessary with expert assessors, who do not however participate in the report and recommendations. For a major project with complex, controversial and long-term implications, that places an impossible burden on a single person. It also reduced the credibility of the result since it enables critics to blame an adverse outcome on the personality and alleged prejudices of the Inspector.

For all these reasons, the Windscale Inquiry seems to have shown that, however wide the formal terms of reference and however good the original intentions, the procedures of a statutory local planning inquiry are not suited for the investigation of projects of this kind.

The New Approach - a 'Project Inquiry'

From what I have said so far, one conclusion stands out: neither the conventional, statutory local planning inquiry, nor it seems a Planning Inquiry Commission is a suitable forum for investigating the many-sided national, let alone international, implications of some very large projects, especially if they involve new or complex technology, and more especially still if they are promoted by some agency that is close to the Government. Some other forum must therefore be found.

As a quite separate issue, there are today also mounting calls for more open government. These include proposals for some new procedures for submitting central policy-making in general to more profound, critical and expert scrutiny than is provided by present arrangements. The new Select Committees of the House of Commons have that object, for instance. However, Select Committees do not meet the need for public participation, nor do they meet the need for full consideration of the implications of a policy at the stage when it is beginning to be formed.

What is wanted, it is suggested, is a thorough and public investigation of these large, national projects before they have reached the stage of a decided policy. For want of a better word, such an inquiry can be called a 'Project Inquiry'.

The principle purpose of a Project Inquiry should be to investigate, impartially, thoroughly and in public, the need for the project, the benefits which are claimed for it, and the costs and risks of all kinds which it will or may entail - in short, all the foreseeable economic, social and environmental implications and repercussions of the project, which may go far beyond its direct impact. The Project Inquiry should consider all feasible alternatives, and should give people who are not themselves involved in the decision-making process a wide range of opportunities for contributing relevant material to it, and at the same time help to inform them about the project and its implications. The primary objective should be to ensure that all the assumptions, material facts and arguments are brought out, tested, and fully and fairly discussed.

As examples of the kind of case for which a Project Inquiry might be suitable, one can cite the Pressurised Water Reactor, the Commercial Demonstration Fast Reactor, the new proposal for a Third London Airport, the Severn Barrage, a Channel Tunnel and perhaps major mineral workings.

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It is crucial to the success of a Project Inquiry that it should be appointed at the right time. There is no point in holding it too early, when the project is no more than a gleam in the potential developer's eye. But if its is held too late, when the project has gathered substantial momentum, when an adverse decision would mean a good deal of investment and commitment would need to be abandoned, the decision may be pre-empted. Wherever possible, a Project Inquiry should not be held until the project is far enough advanced for there to be a high probability that it will result in a formal planning application in the foreseeable future. At the same time it should be held before the investment in resources, and commitments in policy terms, are so substantial to make it difficult to retract from the project.

The Project Inquiry should be established extra-statutorily, like the Roskill Commission, rather than under the framework of specific legislation like the Town and Country Planning Act. It should be appointed by the Government, or the Government Department most concerned, and it should comprise a group of Commissioners representing a sufficient degree of expertise coupled with the maximum of impartiality. As the procedure envisaged is far removed from that of the courts of law, it would probably be best not to have a judge or lawyer in the chair, though a suitably independant lawyer could well make a useful contribution as a Commissioner. The total number of the Commission might range from about 7 to 10; the much larger numbers of a Royal Commission would be inappropriate. Clearly much turns on the choice of the individuals forming the Commission. In order to secure the maximum public confidence in the Inquiry, and in its outcome, effective consultation should take place with all interested parties, and with Parliament, on the choice of the Commissioners.

The terms of reference of the Commission should be as wide as possible. It is axiomatic that 'need' should be included. The whole purpose of the Inquiry is to investigate and assist in policy formation.

The Project Inquiry should be conducted in two distinct and successive stages: a stage of investigation, followed by a stage of argument.

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The stage of investigation should be 'inquisitorial' rather than 'adversarial' in character. The Commission should itself control and take an active part in this stage. It should establish and define the questions which require to be answered, and should assemble and distribute all the factual information required for proper consideration of the issues. It should have the power and resources to undertake investigations and research itself, if necessary. This stage will be conducted in writing between the parties, with regular and probably frequent informal meetings to review progress. It is one of the main purposes of this stage to make sure that the parties start the second, or adversarial, stage with equal resources in terms of information, and to elminate the need to use the adversarial stage for the purpose of extracting facts.

The stage of argument will start only when the first stage is satisfactorily completed. This stage will take much the same form as the familiar public inquiry, with the important difference that all the evidence which is so laboriously led, cross-examined and re-examined at public inquiries will have already been put in long since, and will have become familiar to everyone taking part in the inquiry. In the case of a Project Inquiry, this stage will therefore take far less time, and cost far less money, than at an ordinary public inquiry. The principle purpose of this stage will be to enable all the parties to review the questions in which they are interested, and to address the Commission with their arguments about the inferences to be drawn from the material which has been assembled. Oral evidence by witnesses would only be admitted at the discretion of the Commission, and would be limited to cases where there is a clear issue about underlying assumptions, or credibility of factual conclusions on specific points. Cross-examination should be controlled by the Commission and confined to useful points; it is very doubtful whether honest differences of opinion between experts is best resolved by cross-examination. It may be that the Commission should have its own Counsel to attend this stage, and put questions to the witnesses.

At the end of this stage, the Commission will prepare its Report. It should be free to make recommendations, but these could well take the form of defining the options for a decision, together with an assessment of the advantages and disadvantages of each course. It should certainly not be constrained to provide a 'yes or no' answer.

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The Commission's Report should be followed by a period of debate in the media and in Parliament. It is clearly preferable if this is not influenced by any prior announcement of the Government's decision. That should follow at a later date when account can be taken of all that has come out in the general public debate on the Commission's Report.

I have necessarily dealt with this proposal for a Project Inquiry in a very summary way in this Paper. Those who are interested can find a much fuller exposition of the idea in the report of a joint committee of the Council for Science and Society, JUSTICE and the Outer Circle Policy Unit entitled "The Big Public Inquiry".

The changing constitutional role of the public inquiry

I can now return to the question I raised at the start of this Paper. What is the role of the public inquiry? What should its role be?

The conventional view is that the function of the inquiry is to inform the Minister's mind of the objections to a scheme so as to 'ensure that in reaching his decision he will have weighed the harm to local interests and private persons who may be adversely affected by the scheme against the public benefit which the scheme is likely to achieve and will not have failed to take into consideration any matters which he ought to have taken into consideration.' (per Lord Diplock in Bushell v Secretary of State for the Environment, 1980). Clearly if that is right then issues of policy must be excluded from the inquiry. In the Bushell Case, concerning the M42/M40 motorways, the House of Lords held not only that policy in the ordinary sense was excluded, but even the official methods of traffic forecasting could not be criticised because they fell within the province of policy. Effectively the House of Lords has ruled that the only subject matter of a motorway inquiry is the choice of route.

I doubt whether this decision in the long run will be of more than passing interest. It seems to me that the development of the public inquiry in our constitution has advanced too far for the clock now to be set back. Historically, the inquiry was instituted to take over the role of Parliament in private bill legislation, which included the consideration of policy matters. Increasingly the inquiry has in fact been used as a means of considering matters

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of policy, especially 'need'. It has been presented to the public as an instrument of participation, not just as a means of informing the ministerial mind. Objectors go to inquiries thinking that they can influence the decision; and when they conclude that they cannot (as with motorways) the system begins to break down. I think we should accept that the public inquiry has an important role to play in policy formation, and as a device for enabling the public to participate in decision-making.

The fact is that people everywhere in this country today want more say in the decisions that affect them, whether it be at their place of work or where they live. Voting every four or five years may have been sufficient participation in the eighteenth century, when the institution of Parliament and elections was developed. It is not enough today, when everyone has for several generations enjoyed the benefits of universal education. Nor is Parliament any longer a fully effective instrument for policy debate. Those interested in the realities of the Constitution know that Parliament is not the place where policy is made - the decisions emerge in the administration and in the party political caucus. The Government's majority and the party whip ensures the passage of most decisions through Parliament.

What I suggest is wanted, and what the Project Inquiry could achieve, is an extension of the debating function of Parliament into a wider public arena, open to all who want to take part. Something of this kind must develop if democracy is to be kept alive in a complex industrial society of the twentieth and twenty-first centuries.
