THE HAMLYN LECTURES

Thirtieth Series

LIBERTY, LAW AND JUSTICE

Sir Norman Anderson

A STEVENS Publication

LIBERTY, LAW AND JUSTICE

by

SIR NORMAN ANDERSON

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The concepts of liberty, law and justice, and the extent to which they serve to guarantee individual freedoms, form the central theme of the 1978 Hamlyn Lectures. Sir Norman Anderson examines the legal framework within which fundamental rights may be exercised in an important contribution to current discussion.

Divided into four lectures, the work commences with an analysis of the relation of law to individual liberty today. In the second lecture, the author weighs up the prospect of incorporating a Bill of Rights into the Constitution of the United Kingdom. He looks at the American Constitution and considers the Universal Declaration of Human Rights and the European Convention.

Anti-discrimination legislation is explored next. Enactment of the Sex Discrimination Act 1975 and the Race Relations Act 1976 aroused sharp controversy and the likely effectiveness of these measures remains problematic. In a detailed exposition of the background to these statutes, comments of many leading authorities are reviewed. Limitation of human rights is dealt with in the final lecture. The degree of freedom enjoyed by Britain's Press is compared with that obtaining in the United States. There is a survey of the much-criticised Official Secrets Acts and forthright views are offered on a wide range of censorship questions.

Awareness of the ever increasing intervention of law on all aspects of daily life, and the conflicts of interest thereby created, has never been greater. Publication of this carefully researched treatise is therefore especially appropriate and will be welcomed by everyone concerned with the human rights debate.

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THE HAMLYN TRUST

The Hamlyn Trust came into existence under the will of the late Miss E.W. Hamlyn, who died in 1941. In 1948 the Chancery Division of the High Court of Justice approved a Scheme for the administration of the Trust, paragraph 3 of which sets out the object of the charity and is quoted on page 2, below.

The first Chairman of the Hamlyn Trustees, Dr. John Murray, served from 1948 to 1964. The second Chairman, Sir Norman Anderson, succeeded him in 1964 and retired from the Trust in 1977. It is therefore appropriate that the Thirtieth Series of the Hamlyn Lectures should be given by Sir Norman Anderson, and that the Trustees should record their appreciation of the leadership given by Sir Norman during his fruitful term of office.

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The Thirtieth Series of Hamlyn Lectures was delivered in March 1978 by Professor Sir Norman Anderson at the University of Bristol.

March 1978

AUBREY L.DIAMOND,
Chairman of the Trustees.

INTRODUCTION

IT was nearly 30 years ago that the first series of Hamlyn Lectures was given, in 1949, by Mr. Justice Denning (as he then was). This was just eight years after the death of Miss Emma Warburton Hamlyn at the age of 80; and only one year after the approval, by the Chancery Division of the High Court, of a scheme for the administration of a Trust to which the residue of her estate, which had been bequeathed in terms which have been described as "somewhat vague," were to be devoted.

The first Chairman of the Hamlyn Trustees, Dr. John Murray (at first Principal of the University College of the South-West, and subsequently Vice-Chancellor of what had then become the University of Exeter), had the privilege of having known Miss Hamlyn personally; but when I succeeded him in 1964 she was to me only a legendary figure. So, when my fellow Trustees paid me the wholly unexpected compliment of asking me to give these lectures in the year after my retirement from the Trust, I hoped to be able to honour her memory in a more adequate way than the brief foreword to successive volumes that I had so often signed. It seems, however, that no portrait or photograph is available for reproduction, and material for a pen portrait is scanty in the extreme. The only description I have been able to obtain has been kindly provided by Mr. Malim, for many years Clerk to the Trustees, as a result of a call he recently made on Miss J. Hamlyn — whose father, Mr. Douglas Hamlyn, was first cousin to Mr. William Bussell Hamlyn, our benefactress' father, and who used from time to time to send his coach over to Torquay, where Mr. William Hamlyn practised as a solicitor, to bring both father and daughter over to lunch.

Miss J. Hamlyn remembers her cousin as "Edwardian," and as wearing long, dark dresses and "large, dark hats with semi-herbaceous borders for trimming." She was "quite a character,"

"autocratic rather than otherwise," and "very intellectual." She had studied law, and she insisted that the testamentary directions in her will should be precisely as she had herself drawn them. She came from a well-known Devon family which can trace its lineage back to William the Conqueror; she was well-versed in literature, music and art and a frequent visitor to Europe and the Mediterranean; she was particularly interested in comparative jurisprudence and ethnology; and she was a great admirer of the law and institutions of her own country. So it is not inappropriate that paragraph 3 of the Scheme for the Hamlyn Trust should provide, somewhat quaintly, that:

> "The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European Countries including the United Kingdom and the circumstances of the growth of such Jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them."

This substantially retains Miss Hamlyn's own wording, except that she referred to "the Common People of this country," "our country," etc. But the fact that she coupled "this country" with "the chief European Countries" was taken to indicate that it was the United Kingdom as a whole, rather than England alone, that she had in mind.

How far the Trustees have succeeded in fulfilling the purposes of the Trust it is difficult to say. Apart from one donation to linguistic research they have confined their attention to the law, and a number of attempts have been made to interest the general public (or "the Common People"!) more widely in this subject

by means of talks in schools, a plan for Sixth Form study, and a variety of popular lectures. But the major emphasis has always been on the delivery and publication of an annual series of lectures, which have become well known in the legal profession and have at times received considerable notice in the press.

It will come as no surprise to any lawyer that, when Mr. Justice Denning was invited to give the first Hamlyn Lectures, he chose as his subject "Freedom under the Law." Since then, a wide variety of topics has been covered. Some of these have been broadly jurisprudential in scope and treatment. Others have been devoted, whether wholly or primarily, to the field of criminal law, or to some special aspect of the law or legal history of this country. And yet others have turned to European or Comparative Law, or to the influence of English Law in Commonwealth, or formerly Commonwealth, countries.

This very heterogeneous list of subjects may well raise the question of what principles have guided the Trustees in planning these annual lectures. The answer is that they have tried to interpret the objects of the Trust in a way that is liberal and flexible rather than narrow and rigid. Sometimes they have chosen what seemed to them the most appropriate subject and then selected a suitable lecturer, while at others they have invited a particular lecturer and left the choice of subject largely to his or her discretion. They have also tried to ring the changes both in regard to the type of subject (wide-ranging or specific, popular or specialist, descriptive or critical) and to the lecturer concerned (whether from Bench, Bar, Law Society or the Universities).

Lecture One

LIBERTY, LAW AND JUSTICE TODAY

IT will be noted that the subject I have chosen for this thirtieth series of Hamlyn lectures — *Liberty, Law and Justice* — might almost be regarded as coming round full circle to that of the first series of all — *Freedom under the Law.* In these Mr. Justice Denning, as he then was (and I should like to take this opportunity to pay tribute not only to the length and distinction of Lord Denning's judicial career, but to his unswerving determination that the law should always be so interpreted as to promote justice and enhance the liberty and legitimate interests of private citizens), emphasised "the fundamental principle in our courts that, where there is any conflict between the freedom of the individual and any other rights or interests, then no matter how great or powerful those others may be, the freedom of the humblest citizen shall prevail." But he recognised that this "freedom of the individual, which is so dear to us, has to be balanced with his duty," and that this balance had "changed remarkably during the last 100 years." Previously, he said, "the freedom of the individual carried with it a freedom to acquire and use his property as he wished, a freedom to contract and so forth: but these freedoms were so much abused that in our time they have been counterbalanced by the duty to use one's property and powers for the good of society as a whole."

Then, after contrasting the situation in some foreign countries where "this duty has been carried to such a pitch that freedom, as we know it, no longer exists," he declared that "what matters in England is that each man should be free to develop his own personality to the full: and the only duties which should restrict this freedom are those which are necessary to enable everyone else to do the same." Whenever these interests are finely balanced, however, he insisted that the scale must always go down on the side of freedom. And he tried to show in

his lectures how the English law had, in the past, kept the balance between individual freedom and social duty, and also how it should continue to keep the balance in the contemporary social revolution, "drawing on the experience and laws of other European countries for the lessons we can learn from them."

Such, in his view, was the position in 1949. But much has changed in the intervening years, and I believe the time has come to make a new assessment of how far this balance between individual liberty and the control of law has been maintained in this country and in those other parts of the world to which the influence of our law has spread — and, indeed, how much we have learnt, or should learn, from the experience and the laws of other countries. In 1949 the Hamlyn lecturer could still affirm: "By personal freedom I mean the freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons. Despite all the great changes that have come about in the other freedoms, this freedom has in our country remained intact." But the citizen's right to say what he will (which, even in 1949, was by no means unfettered) is very considerably restricted today, in the interests both of particular sections of society and of the community at large — *inter alia* by legislation designed to prevent racial and sexual discrimination; and his right to "go where he will on his lawful occasions" has been compromised, to say the least, by the growing power of trade unions, with their picket lines, blacking, and closed shops. Even in 1949, it is true, Mr. Justice Denning emphasised that personal freedom

> "must be matched, of course, with social security, by which I mean the peace and good order of the community in which we live. The freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief. Every society must have the means to protect itself from marauders. It must have powers to arrest, to search, and to

> imprison those who break the laws. So long as those powers are properly exercised, they are themselves the safeguards of freedom. But powers may be abused, and, if those powers are abused, there is no tyranny like them. It leads to a state of affairs when the police may arrest any man and throw him into prison without cause assigned ... It leads to the hated Gestapo and the police state. It leads to extorted confessions and to trials which are a mockery of justice. The moral of it all is that a true balance must be kept between personal freedom on the one hand and social security on the other."

This is very true; and in 1949 our lecturer felt able to conclude: "It has been done here, and is being done." But are we in a position to make so confident an affirmation today?

What is crystal clear is that this same ideal must remain our goal and must continue to challenge, and judge, any failure to achieve it. Liberty is still a cause for which men are willing to fight and die; and to fetter individual freedom by unnecessary, and often unenforceable, restrictions is to provoke their opposition and revolt. Even the enlightened provisions of the Welfare State may serve to restrict freedom and stifle initiative to an unacceptable degree; and it may be questioned whether personal liberty and initiative can ever be adequately fostered and guaranteed in a *wholly* socialist state, without the safeguards of a mixed economy, a party system, freedom of the media, and some alternative to the monolithic state control of education. Restrictions on individual liberty for purely bureaucratic or doctrinaire reasons can never be justified, for in a free society the role of law should never be primarily to restrict, but to protect; and it should restrict only in so far as this is necessary for the protection of those who need it. This clearly means that no one can be allowed to "do his own thing" at the expense of other individuals or of the community as a whole; for a doctrine of liberty which is purely individualistic belongs to a bygone age.

It is obvious, too, that in some circumstances people need to be protected from themselves, for today we certainly cannot go the whole way with John Stuart Mill in his famous dictum that "the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others." This is, of course, partly because of an increased awareness that "no man is an island," and that drug addiction (to take a single example) almost inevitably affects the lives, and often the pockets, of others. But it is also due, to quote Professor H.L.A. Hart, to our greater knowledge

> "of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent. Choice may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion; or under pressure from others of a kind too subtle to be susceptible of proof in a law court. Underlying Mill's extreme fear of paternalism there is perhaps a conception of what a normal human being is like which now seems not to correspond to the facts."[1]

The competing interests of contemporary life are, moreover, so diverse and interdependent that an ever increasing intervention by the law seems to be inevitable. The basic problem is where to draw the line, or how to maintain a proper balance between individual liberty and legal control. Even those who prize their freedom most highly should be prepared to accept such restrictions as can be seen to be both necessary and just. But there can be no synthesis of liberty and law without justice; for in the last resort it is only justice that can be the arbiter of the circumstances and extent to which law may encroach on liberty, particularly in an era characterised by a widespread demand that everyone should be free to go his own way, on the one hand, and by an unprecedented spate of legislative regulations, on the other.

So the inevitable question is: "What is justice?" — for it is far from easy to define this elusive and somewhat nebulous concept. It is simple enough, of course, to discover what men in different countries and periods have called justice, and even to detect and enunciate certain principles which emerge from a study of concrete examples of the settlement of disputes, in widely different times and places, in a way which may be regarded as just. These principles will necessarily be very general in their terms: but so are the general rules of the common law. In both cases, moreover, a certain substance and precision may be given to these terms by a scrutiny of the particular instances which have led to the formulation of the principles in this way. But if it is said that justice, like Natural Law, is no more than a high sounding ideal which is of little practical relevance as a criterion in the modern world, I shall hope to show that it is in fact a concept which is still active and relevant in various contexts and systems of law. If, moreover, it is alleged that justice is a purely relative term, I shall answer that, while the concept of justice may be imprecise at its edges, it can be shown empirically to have a core of substance which is tolerably clear and vitally important to the maintenance both of individual liberty and of that social cohesion which law seeks to foster.

Some of the problems that confront us with new urgency today are suggested rather than solved by a perusal of the lectures of 1949. At that time our lecturer could put a paramount emphasis on the efficacy of the writ of habeas corpus; could contrast "the evil days when the judges took their orders from the executive"[2]; and could conclude, triumphantly: "But the people of England overthrew the Government which so assailed their liberties, and passed statutes which gave the writ its present power. Never thereafter have the judges taken their orders from anyone."[3] Now it is perfectly true, of course, that the writ of habeas corpus is still a major bulwark of our liberty, and that the judges do not take their orders from the Crown or, in any direct sense, from the executive. But in his Hamlyn Lectures of 1974[4]

Lord Justice Scarman (as he then was) emphasised that even the common law (which "antedates Parliament and the legislative process," represents "customary law developed, modified and sometimes fundamentally redirected by the judges and the legal profession," and "has, in theory, no gaps or omissions") could not, "by its own process of development, meet all the challenges of change in society." So the remedy had to be found in the legislative intervention of Parliament and statute law. For a time lawyers occasionally claimed the right to challenge the validity of Acts of Parliament; but this phase soon passed, "suppressed effectually by the power of Parliament speaking with the authority of the sovereign and the consent of the Lords and the Commons" — although the modern English judge, he says, "still sees enacted law as an exception to, a graft upon, or a correction of, the customary law" (consisting, as this does, of the principles of both common law and equity). As a result, while he "gives unswerving loyalty to the enacted word of Parliament," he "construes that word strictly, in its statutory context, and always upon the premise, usually unspoken, that Parliament legislates against the background of an all-embracing customary law."[5]

There can be no doubt, then, that the judges today no longer take orders from anyone other than Parliament; but it is equally clear that they are bound by an Act of Parliament, provided that this is sufficiently explicit, unequivocal and comprehensive in its terms. Resistant though law and judges are to external pressures, "whether barons or trade unions, Kings or government departments, or even Parliament herself"[6], it remains true, in Lord Scarman's words, that "when times are abnormally alive with fear and prejudice, the common law is at a disadvantage"; for it cannot ultimately resist the will of Parliament, however "frightened and prejudiced" this may be.[7] The classic example of this is the case of *Liversidge* v. *Anderson*, when the Law Lords, under pressure of war, accepted an interpretation of Regulation 18B which Lord Atkin described as "fantastic," and

an argument which he thought could have been addressed "acceptably to the Court of King's Bench in the time of Charles I."[8]

The political and judicial situation in South Africa provides a poignant illustration of this point. By contrast with a number of other countries in the contemporary world, the legal traditions in South Africa are such as to ensure that, whatever may be the case in the magistrates' courts, in the superior courts persons of all races have normally (until recently, at least) received a fair trial, although under a substantive law which is, in many respects, a parody of justice. In his Hamlyn Lectures of 1967 Mr. Justice Schreiner could state that "the real case against apartheid at the present day is not that there is inequality in the administration of the law, for in general there is not," but that the law itself is both harsh and unfair.[9] Then, after referring to the pass laws, to "the extensive powers of banning possessed by the Minister of Justice under the Suppression of Communism Act 1950 and various tightening-up amendments," and to several other examples of executive discretion, he observed:

> "All these drastic orders are made under the express authority of laws which are in form unexceptionable and the validity of which cannot be challenged on any ordinary legal grounds. Nevertheless they severely interfere with the liberty of the individual without any court having made an order against him in pursuance of a legal rule or precept alleged by the state to have been contravened. The Minister or official acts on information that is not tested in a court of law and may well be wrong. There is no doubt, in my view, that these statutory provisions and the action under them infringe the Rule of Law. This does not mean that there has been any illegal executive act for which the person affected can obtain the relief that would certainly have been available to him if the Acts had not authorised the interference with his liberty. For, it must be repeated,

> the Rule of Law is not a legal rule but a statement of principle."[10]

In point of fact the Appellate Division in South Africa, under Chief Justice Centlivres, nobly challenged the legislature, in *Harris and Others* v. *Minister of the Interior*[11], in regard to the Separate Representation of Voters Act 1951, which it declared to be "invalid, null and void, and of no legal effect" because it had been passed in a way that did not accord with the "entrenched provisions" of the South Africa Act 1909. But the Government won the battle by the dubious expedient of several legislative enactments; so now there is no ultimate judicial control over the legislative activities of a Parliament dominated by the National Party, which continues to uphold the system of apartheid that, in Mr. Justice Schreiner's words, "assumes that widespread inequality, almost invariably unfavourable to the non-whites, exists and is enforced or countenanced by law." Nor can the resultant legislation be excused by any alleged state of emergency, for there are no signs that this is "intended to be a temporary state of affairs." On the contrary, in recent decades this year's position has always been more restrictive than that of the year before, "and the process shows no sign of coming to an end."[12]

There are, of course, several ways in which attempts have been made, in different countries and at different times, to protect the private citizen from exploitation, oppression or injustice, from whatever quarter. One of those to which reference is most frequently made today is the concept of the Rule of Law cited by Mr. Justice Schreiner. Basically, this represents a shorthand term for a state of affairs in which the executive, and every other authority or individual, is answerable to the courts for any action which is contrary to the law of the land. The expression was first given prominence, it seems, by Dicey in 1885 in *The Law of the Constitution*, where he said that the "first meaning" of the phrase was that "no man is punishable or can be lawfully

made to suffer in body or goods except for a distinct breach of law established in the ordinary courts of the land." Fundamentally, then, a country where the Rule of Law prevails is one in which "the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint" is precluded.

So far, so good — however inadequate this definition may appear today to the International Commission of Jurists. But Dicey went on to qualify and define this concept in a highly characteristic and peculiarly English way when he insisted, first, that this must mean that "every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals"; and, secondly, that it was a peculiar virtue that in England "the general principles of the constitution (as for example the right to personal liberty, or the right of public meetings) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution."

The first of these qualifications reveals the deep suspicion with which Dicey regarded any special administrative court such as the French *Conseil d'Etat.* But Professor Hamson, in his Hamlyn Lectures of 1954 on *Executive Discretion and Judicial Control*, showed that it is not the existence of a special court seized with litigation in which the state is involved, but the spirit which prevails in such a court, on which the liberty and interests of private citizens depend. In point of fact there is a great deal to be said in favour of a special court, or an administrative division of the Supreme Court (as has recently been established in New Zealand), which can build up a distinctive expertise in such cases; and there is nothing whatever to suggest that the interests of Frenchmen are not safeguarded just as effectively by the *Conseil d'Etat* as are those of Englishmen by the ordinary courts of the land.[13] The basic threat to liberty and equal justice is

something far more fundamental than this: namely, the communist thesis that law is a system of social relationships which corresponds to the interests of the dominant class and is safeguarded by the organised force of that class, Rosenberg's dictum that law is what the Aryan man considers law, or the situation in South Africa in which the substantive law, rather than the way in which it is administered, is manipulated by a minority of the population to the manifest disadvantage of the majority; for in all such cases the resultant injustice is not limited to cases between the citizen and the state, nor confined to any particular court, but is all-pervasive.

Again, Dicey's second qualification betrays a characteristically English dislike of a written constitution. Even in Lord Denning's Hamlyn Lectures of 1949 one can sense, I think, not only an emphasis on the fact that the protection of the liberty and legitimate interests of the subject depend less on a precise definition of his rights than an effective remedy for any invasion of those rights — which is manifestly true, so far as it goes — but a certain satisfaction that both rights and remedies for the abuse of rights rest, in this country, on the common law, or judge-made law, rather than on any statutory enactment. But the history of the United States reveals the way in which an independent judiciary can exploit a written constitution (*e.g.* the "due process of law" clauses in the Fifth and Fourteenth Amendments); and Lord Scarman showed clearly, in his Hamlyn Lectures of 1974, that in this country the adequate protection of fundamental human rights by the courts could at any time be undermined or curtailed by some emotional, irresponsible or ill-considered enactment by an all-powerful Queen-in-Parliament which can, in the traditional phrase, do anything except make a man into a woman or a woman into a man (for this, it seems, is now the exclusive prerogative of surgeons). But an enactment by the Queen-in-Parliament today basically means an enactment by the House of Commons; and this, in practice, means that a Government which may have the support only of a minority of

the electorate, but a considerable majority in the House, can often force through the legislation it desires by means of a three-line whip or a threat of resignation — or, indeed, that the House may be unduly swayed by an emotional reaction to some particular situation. It is only under a written constitution or a Bill of Rights that certain fundamental principles and liberties can be entrenched in a way which ensures that they cannot be changed except by some special procedure (which may involve a specified majority or some other check on the ordinary Parliamentary process) or, at least, by the deliberate will and explicit decision of the legislature.

But the concept of the Rule of Law has in recent years been given a content by the International Commission of Jurists which is vastly wider than that accorded to it by Dicey — and which, it seems, continually tends to expand. At Athens in 1955, for example, the Commission was content to declare that:

1. The state is subject to the law.
2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.
3. Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges.
4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial."

The final resolution of the Delhi Congress in 1959, however, not only reaffirmed this statement but declared that the Commission: "Recognises that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free

society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised." And since then the concept has been even further elaborated, on the basis that specifically legal and political rights have very little meaning or relevance for those who are deprived of such basic needs as food, housing, employment and education. Thus the Rule of Law, in this new and dynamic form, is clearly an ideal to be worked for rather than a description of a state of affairs which is already existent, or which can be brought into being by legislative enactments alone. Indeed, it corresponds very closely to the Universal Declaration of Human Rights 1948, and similar declarations.

The concept of human rights, as this has developed and proliferated in the last three centuries, represents another attempt to protect the individual from injustice and oppression. Incongruously enough, it can be traced back, historically, to the doctrine of Natural Law, however little its contemporary champions may acknowledge its source. Yet there was a time when the idea of a Law of Nature, in one form or another, was almost universal. The customs of primitive peoples, in the West as well as the East, were almost always bound up with their religion, and a belief that their laws were divine in origin seems to go right back to antiquity. The doctrine of natural law in any sophisticated form, on the other hand, demands a considerable degree of philosophical thought; so it is not surprising that, in the West, it first appeared among the Greeks, where it can be found at least as early as Heraclitus of Ephesus. In him the doctrine was rooted in a conservative attitude of mind which found in the concept of a transcendent law the ethical foundation for the authority of positive law; but soon the same basic concept was used by the Sophists for radical and even revolutionary purposes, for they emphasised the discrepancies between the positive laws of the Greek city-states and the fundamental moral law which alone had any intrinsic value, and were the first to emphasise what came to be regarded as the natural rights of man.

And while the Sophists' views developed, among the Epicureans, into scepticism, the teaching of Heraclitus was elaborated by Socrates, Plato and Aristotle, each in his own distinctive way, and handed on to the Stoics, whose view may be summarised in the statement of Cicero that "True law is right reason in agreement with nature," which "summons to duty by its commands and averts from wrongdoing by its prohibitions." So "one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for He is the author of this law, its promulgator, and its enforcing judge."[14] But this, one must always remember, represents an orator's rhetoric.

The next major development was when the concept of natural law was re-interpreted by the Christian Church. To Thomas Aquinas, for example, natural law was not only what was contained in the Scriptures and the Gospel but, more specifically, the "eternal law" as this can be apprehended by rational creatures. In principle, therefore, it is accessible to unaided human reason, although he himself believed that "the light of natural reason, by which we discern good from evil," was in fact "the impression of the divine light in us." St. Thomas, moreover, following St. Augustine, affirmed that the validity of law depends upon its justice. So, since "in human affairs a thing is said to be just when it accords aright with the rule of reason," and "the first rule of reason is the Natural law," it follows that "if a human law is at variance in any particular with the Natural law, it is no longer legal, but rather a corruption of law.[15] In the Reformed theology, with its insistent emphasis on the depravity of human nature since the Fall, on the other hand, the place accorded to natural reason by the Schoolmen was taken, in part at least, by the doctrine of common grace — for the concept of the requirements of a divine law which are written on men's hearts[16] is unquestionably Pauline. But in England the influence of Hooker tended to preserve the doctrine of the Schoolmen, for he taught that man always had knowledge of

"Law Rational," which embraces "all those things which men by the light of their natural understanding evidently know (or at leastwise may know) to be seeming or unbeseeming, virtuous or vicious, good or evil for them to do."[17] So natural law (whether regarded as divine law inscribed in the very nature and structure of the universe in such a way that it can, in part, be read off by the minds of rational creatures, or as an intuitive sense of what is right or wrong, just or unjust, divinely implanted in men's hearts) could be said to stand over against positive law — or the law decreed by rulers, enacted by legislators or evolved by judges — as the ideal of which the latter was, at best, only an imperfect transcription and, at worst, an impious distortion.

Such a concept seems distinctly exotic in the light of most contemporary theories of jurisprudence, particularly in Britain and America. Today the existence, character and content of divine law are usually regarded as exclusively the concern of the theologian, while any theory of natural law is commonly relegated to the sphere of the moral philosopher or the historian; and the current debate about the nature of law has tended to be pursued by lawyers on a very different plane. But in the Muslim world a belief in divine law which, ideally at least, is equally incumbent on both ruler and subject is still fundamental, however much the law has in practice been secularised; and the idea of an eternal law (which can, indeed, be defied, but never abrogated, by man) is common to the civilisations of India, South East Asia and China. Even in the sceptical West, moreover, the concept of natural law will not lie down and die, without survival and without progeny. In countries and periods in which the Rule of Law substantially prevails, it is true, the population at large, and the legal profession in particular, may be content to think almost exclusively in terms of positive law; but, so soon as a dictator comes to power and a regime of tyranny prevails, men's minds turn wistfully once more to some transcendental concept of law and justice by reference to which

obnoxious decrees, enactments and judgments can be tested and assessed. This phenomenon may be aptly illustrated by the situation which obtained in Germany before, under and after the Nazi regime. Before the advent of Hitler, German lawyers were in the vanguard of those "positive" jurists who insisted that the validity of any law must be judged by purely objective and legal, rather than subjective and moral, criteria. But under Hitler there was a palpable change of heart, since it soon became apparent that this view played all too easily into the hands of tyranny; and after the fall of the Nazi regime this attitude was not confined to academic discussions about jurisprudence but was even adopted by the courts, which on occasion refused to recognise Nazi decrees as law at all, however impeccable they may have been in their technical form.

Now it is largely a matter of semantics whether a grossly unjust decree, enactment or judicial decision is to be denied the status of law at all, or is to be regarded as an example of positive law which is so repugnant to any civilised conscience that it should never have been promulgated or obeyed, and certainly should no longer be recognised or enforced once the regime responsible for it has fallen. But, in either case, this is only an extreme example of the fact that it is by reference to a sense of what law *ought* to be, or what morality and justice demand — whether this is innate and intuitive, or conscious and reasoned — that we all assert that some laws and judgments are unfair or unjust. And it is this same basic principle, in the now much attenuated form of the principles of natural justice, which is still applied by the courts in this country in regard to the decisions of administrative tribunals and certain types of executive discretion, and which, under some such formula as justice, equity and good conscience, has played — and still in some measure continues to play — so significant a role in certain other countries in providing a source of law where no statute or custom exists, in admitting the widespread application of English law, or in excluding such rules or practices of indigenous law as may be

unacceptable to the courts. In addition, as we have seen, it is the doctrine of natural law, now so widely discounted by lawyers, which is the direct progenitor of a phenomenon of ever increasing significance in the contemporary world: the concept, and enforcement, of human rights. But this is such an important and complex subject that it must be reserved for my subsequent lectures.

I have just referred to the continued relevance and judicial application of the principles of natural justice as a survival, in an attenuated form, of the concept of natural law, for there can be no doubt that the former was derived from the latter. As Mr. Hedley Marshall has demonstrated[18] in an excellent monograph on this subject, the two terms were at one time used interchangeably. Lord Esher M.R., for example, defined natural justice as "the natural sense of what is right and wrong"[19], and Lord Mansfield C.J. referred to the ties of natural justice and equity[20] in a context in which, Marshall insists, the words natural justice were "clearly not used in their restricted modern sense but were synonymous with natural law; in the same way as the word 'equity' did not refer to technical equity, i.e. the equity of the Chancery Court, but to *jus naturale*: in other words 'natural justice' and 'equity' in this passage meant the same thing, i.e. natural law."[21]

It is clear, moreover, that the doctrine of natural law was itself accorded recognition and respect in our courts, in theory at least, until no very distant date. Marshall quotes, for example, a most interesting judgment in 1470 in which Yelverton C.J. declared: "We shall do in this case as the canonists and civilians do where a new case comes up concerning which they have no existing law; then they resort to the law of nature which is the ground of all laws, and according to what they consider to be the most beneficial to the common weal they do, and so also we shall do."[22] In much the same way as the *jus gentium* of Imperial Rome came to be identified with the law of nature, and this paved the way for the recognition of international law, so natural law

came to be regarded as part of the law of England, and it was by this means that Lord Mansfield C.J. was largely successful in getting the law merchant incorporated in the common law.

Until comparatively recently, indeed, natural law, like the common law, was regarded as superior to statute law. In this context Marshall quotes *Dr. Bonham's Case*, where Lord Coke C.J. in 1610 said that "it appears in our books that in many cases, the common law will controul Acts of Parliament and sometimes adjudge them to be utterly void; for when an Act of Parliament is against the common right and reason or repugnant or impossible to be performed the common law will controul it, and adjudge such Act to be void."[23] In particular, it was stated in 1614 in *Day* v. *Savadge* that "even an Act of Parliament made against natural equity, as to make a man judge in his own cause, is void in itself; for *jura naturae sunt immutabilia* and they are *leges legum*."[24] Similarly, in *Dr. Bentley's Case*, Fortescue J. declared that "Besides, the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any."[25]

Even as late as 1824, in *Forbes* v. *Cochrane*[26], Best J. argued — *obiter*, it would seem — that if it could be shown that slavery "is against the law of nature and the law of God," then "it cannot be recognised in our courts." None of the other judges, however, said whether they concurred in this statement, so Marshall remarks that "perhaps the doctrine of the supremacy of natural law was not really good law in 1824." In any case, it certainly did not survive very much longer; for in 1871, for example, Willes J. is reported to have said: "It was once said ... that if an Act of Parliament were to create a man judge in his own cause, the court might disregard it. That dictum, however, stands as a warning rather than an authority to be followed ... If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the courts are bound to obey it."[27]

Marshall concludes, therefore, that the term natural justice today means that part of natural law which relates to the administration of justice. In practice, moreover, it is largely confined to the two principles that "no man shall be judge in his own cause" and "both sides must be heard" (*audi alteram partem*); principles which are "so necessary for the fair administration of justice that they have been accepted as fundamental for this purpose" and are still regularly applied by the courts in regard to executive decisions and administrative tribunals. Yet such is the supremacy of Parliament today that even these basic principles of natural justice, as the law now stands, could at any time be suppressed — and, indeed, on occasion *have* been suppressed — by legislation which provided for this in explicit and unequivocal terms.

In other countries previously under British rule the concept of justice, usually under the formula "justice, equity and good conscience" or a number of closely analagous variations, has been much more extensively used and still retains a wide significance. In the Indian peninsula, for example, no responsibility was assumed by the East India Company up till the year 1765 for the administration of law outside the three Presidency towns of Madras, Bombay and Calcutta, where the Company's factories had been established, and where the Company had come to exercise authority from 1639, 1668 and 1698, respectively. It was not until 1765, when Clive received the grant of the Dīwān (or fiscal administration and civil justice) in Bengal from the puppet Mogul Emperor in Delhi, that the Company's sway began to extend outside these Presidency towns. And at much the same time, but by a more dubious title, the Company received the grant of the Nizāmāt (or criminal jurisdiction), which was at first exercised under very indirect control. Initially, for instance, the practice was for a Muslim Law Officer to write a *fatwā*, or legal opinion on the case, at the bottom of the record. Next, the Company's judge would consider whether this opinion seemed to him consonant with both Islamic law and natural justice (in

the original meaning of that term). If he thought it was, he would pass judgment accordingly; but, if not, he would send the case up to the Court of Appeal with his comments. Finally, if the appellate court considered the *fatwā* to be in accordance with Islamic law but contrary to natural justice, it would accept it if it was in favour of the accused but recommend pardon, or mitigation of sentence, if it was against him. At a slightly later date moreover, the ingenious expedient was adopted of asking the Muslim Law Officer, in cases in which the Islamic law seemed contrary to British concepts of justice, to give his *fatwā*, not on the facts as they were, but on certain specified assumptions.[28]

It was only under Warren Hastings that the new civil jurisdiction came to be exercised under Regulation II of 1772, Article 27, which expressly provided that Hindus and Muslims were to be governed by their own laws in "suits regarding inheritance marriage and caste and other religious usages and institutions.' No specific directions were given regarding the law applicable to them in other matters; so in 1781 Sir Elijah Impey declared that where no other law was expressly applicable, the courts should act according to justice, equity and good conscience. But Professor Duncan Derrett, in a most erudite article on this subject, has shown that this was by no means the earliest use of this phrase in India. When the East India Company first acquired the Island of Bombay, for example, the Civil Law which had prevailed under the Portuguese was maintained for the first seven years of the Company's sway; partly as a matter of convenience, and partly because it was considered by many to be the best and most suitable source of natural equity, eminently appropriate for application to Christians and non-Christians alike.[29] And "the second path which let in justice, equity and good conscience," Derrett insists, "was the demands of the East India Company itself for a system of law which could be applied conveniently to the foreigners who traded along the coast" and "a system of mercantile law which would satisfy the requirements of trade and avoid the notorious inadequacies of the

common law and the frustrating limitations of the English Admiralty Court." As a consequence the judges appointed by the Company in 1669 were always to act according to good conscience and had to take an oath to behave themselves "duly and truly towards all according to justice and good conscience." Later, a mercantile and admiralty court set up in Bombay by Royal Charter in 1683 was to handle all matters "according to the rules of equity and good conscience, and according to the laws and customs of merchants"; and a Mayor's Court similarly set up in Madras in 1687 was to try cases "in a summary way according to equity and good conscience."[30]

It is clear, then, that the formula was by no means invented by Impey, or by the Mr. Ives to whom he acknowledged his indebtedness; but it certainly received a new emphasis, and a much wider application, when Warren Hastings included it, as section 60, in the new Regulations promulgated in 1781 for the exercise of civil jurisdiction everywhere outside the Presidency towns. And this provision was "copied from Regulation to Regulation, and from Regulation to Statute," in such a way that it is now firmly established as a residual source of law.[31] In early days, before the era of codification and widespread legislation, it must have played a vital role; but, while its scope has been progressively narrowed, it remains true that "gaps in the personal laws (especially Hindu and Islamic) and gaps left in the interstices between them, where a conflict of personal laws may occur — gaps, too, in the judge-made, uncodified, topics of private and public law — may still be filled by reference to this source.[32] But what does the phrase really mean, whence was it quarried, and what sort of law was it intended to admit?

On one theory the original *intention*, in so far as courts outside the Presidency towns were concerned, was to provide a formula which would allow the Company's officials, who were not professional lawyers, to decide cases in the way for which their rudimentary knowledge of the law, together with their innate sense of justice and propriety, best fitted them. On

another view, advocated by Sir Frederick Pollock, the *effect* of the formula, so soon as professional judges began to be appointed, was to open the door wide to English law, since the "natural 'justice for Englishmen' governing in India was to follow the rules they were best acquainted with. The only 'justice, equity and good conscience' English judges could and did administer, in default of any other rule, was so much of English law and usage as seemed reasonably applicable ... Thus the law of civil wrong (among other branches) was practically taken from the common law of England."[33] These two views are in no way contradictory, and I think they are both broadly true. But Sir George Rankin has insisted that the phrase justice, equity and good conscience was certainly not originally intended to prompt the importation of English law, for that law had no particular claim in the Company's courts, where the judges were free not only to apply Hindu and Islamic law but also, where this seemed right, to give other persons "the benefit of any laws ascertained to be their own."[34]

But what is the basic meaning of the term? About this Derrett argues, with a wealth of detail, that "It would be a mistake to suggest that the law of Rome supplied the concept. It is not found as a ready-made formula anywhere in Roman, or for that matter Romano-canonical, texts. It arose out of Romano-canonical learning common to the whole continent of Europe as it appeared to English minds of the sixteenth century."[35] Thus *iusticia*, he says, meant the rules of positive law, whether written or unwritten, as modified by reference to the circumstances of a particular case by *aequitas*, in the first meaning of that somewhat nebulous concept. *Aequitas* in its second sense served not only to modify but supplement *iusticia* in cases which were not covered by written law or "contemplated by custom in so many words"; and the term *conscientia* was called in aid not only for those circumstances in which a judge had of necessity to decide *ex aequo et bono* (as where *iusticia* was silent and *aequitas* in the second sense inapplicable) but also for that conscience of the

judge to which all litigants appeal.[36] Thus, in England, the common law judges administered *ius strictum*, whether in the form of customary or statute law, modified to meet the circumstances of each case by judicial equity; the equitable jurisdiction of the Chancellor filled the gaps by supplying *aequitas* in the second meaning of that term; and Courts of Conscience and Requests came into existence largely to deal with mercantile law *ex aequo et bono.*[37]

What law, then, did the judges in India actually administer under this formula? In early days, presumably, they usually applied the personal law of the parties — not only in those matters, such as family law, where this was required, but in cases involving contracts and the transfer of property. But, where this seemed inapplicable or unjust, they were free to have recourse to Roman law, English law, any continental laws of which they had knowledge, or natural law. Thus in the first decades of the nineteenth century, Derrett affirms, books on "civil law in its natural order", and writers such as Pufendorf, and Domat and Pothier in English translations, began to train as well as aid the amateur jurist who sat in the country courts. Even when the Privy Council became established as an effective court of appeal, their Lordships commonly professed to apply rules which were "naturally just, and more or less universal in civilized countries," and English law was followed only when it satisfied these requirements. But, as more and more of those who administered justice in India had received a prior training in English law, English rules came increasingly to be applied provided always that they were suited to the circumstances; although the Bengal Legislature affirmed, in Regulation VII of 1832, section 9, that by justice, equity and good conscience it should not be understood that English or any foreign law was to be introduced into India. Even so, by 1870 "the view had gained ground that in practice the phrase meant English law unless there were some element in the case which made the English rule inappropriate." From 1880 till the present day, however, the pendulum seems to

have swung back somewhat, and Derrett insists that the dictum in the Privy Council that equity and good conscience are "generally to be interpreted to mean English law if found applicable to Indian society" is an over-statement, and that "instances where the English law has been repudiated as not in accordance with the law usual in civilised countries, as unsuited to India, or to the case, and so not applied there, are not infrequent."[38]

Derrett adds that, although advocates have repeatedly attempted to argue that even a provision of the personal law, or indeed of some statute, should "not be applied in the circumstances because it would be contrary to equity and good conscience to do so," they have never succeeded. Except in regard to inhumanity or barbarity, the personal laws cannot, he insists, be impugned.[39] But here, in my view, he goes rather too far; for, while it is true that the personal law of the parties may not be explicitly impugned on such grounds, a considerable number of instances could be quoted in which the strict letter of Islamic law has been softened, ignored or evaded in the interests of what the judges feel that equity and enlightened views of justice require.

But the country in which the phrase justice, equity and good conscience has been applied more radically than anywhere else is the Sudan, which "finds itself today in the unique position where almost the entire body of its substantive civil law" is covered by this formula.[40] Thus section 9 of the Civil Justice Ordinance 1929 reads: "In cases not provided for by this or any other enactment for the time being in force, the Court shall act according to justice, equity and good conscience"; but this provision merely replaced an almost identical section in the Civil Justice Ordinance 1900. Only questions of "succession, inheritance, wills, legacies, gifts, marriage, divorce, family relations, or the constitution of wakfs" are excepted; so, since legislation in other aspects of civil law is still scanty, and was almost non-existent in 1900, "the justice, equity and good conscience provision has remained the most important single provision in the

Civil Law of the Sudan ... For in all matters falling within the *ambit* of the law of obligations, property, administrative law and many other areas of the law, the Sudan courts are governed by the justice, equity and good conscience provision and nothing else."[41]

The phrase was obviously taken over from India, but there seems little doubt that, in the Sudan at least, the three components do not carry different or independent meanings but are cumulative or repetitive, so the omission of any one of them "would not derogate from or affect the general meaning." Even in India judges often referred to "equity and good conscience", or "justice and common sense" or "rules of justice and equity"—and much the same applies to other countries where similar phrases have been used. Thus Dr. Zaki Mustafa quotes Snell's statement that "In its popular sense equity is practically equivalent to natural justice" and the Chancellor "exercised his powers on the grounds of conscience. This appears to have been an importation from the cannon law ... Conscience was in theory based on universal and natural justice rather than the private opinion or conscience of the Chancellor."[42] But he also quotes Ilbert's assertion that "The unregenerate English law, insular, technical, formless, tempered in its application to English circumstances, by the quibbles of judges and the obstinacy of juries, [is] capable of being an instrument of the most monstrous injustice, when administered in an atmosphere different from that in which it has grown up."[43] There can be no doubt, however, that after about 1880 resort to English law tended to become more and more common in the Sudan—partly, no doubt, because the phrase justice, equity and good conscience was so imprecise, and partly because very few of the judges were in a position to consult other systems of law. It was not without reason that Sir James Fitzjames Stephen once described the formula as "attractive words [which] mean little more than an imperfect understanding of imperfect collections of not very recent editions of English text books."[44]

But the position in the Sudan, immediately after the overthrow of the Khalifa, was primitive in the extreme. In Wingate's words: "of government there was none; and of indigenous personnel to form a government, or even to staff the lowest post in any administration, there was also none. Everything had been destroyed ... It was a *tabula rasa*, and all had to be created."[45] In such a situation an effective means of dispensing justice is essential; so Lord Cromer opted for "a light system of taxation, some very simple forms for the administration of civil and criminal justice, and the appointment of a few carefully selected officials with a somewhat wide discretionary power to deal with local detail."[46] Meanwhile, martial law was proclaimed in all the areas which were recovered from the Mahdists. In the sphere of criminal justice the void was very effectively filled by a Penal Code and a Code of Criminal Procedure, both of which represented simplified adaptations of the corresponding Indian Codes; but the problem posed by civil justice was much more difficult to resolve. One possibility was Islamic law, which had been applied in some measure under the Mahdiyya. Another was Egyptian law, though Lord Cromer was against this. Yet a third alternative was English law, or some adaptation of it. But to all of these there were powerful objections. So Cromer reported that:

> "It was not thought advisable to create a body of substantive civil law at a time when all that was known of the customs of the people was that they probably differed from those of any country whose legislation could have been taken as a precedent. Section 3 of the Civil Justice Ordinance provides for the recognition of customary law so far as applicable and not repugnant to good conscience, in matters of succession, etc.; and section 4 provides for the administration of justice, equity and good conscience, a phrase which has been stereotyped custom in large parts of the East, and filled up the interstices with the principles of English law."

But he added that in commercial matters in the Sudan the judges "have inclined to interpret it as implying the obligation to recognize the principles of Egyptian commercial law in cases in which the law of civilized countries is not in agreement."[47]

These two sections at first provided virtually the only basis for substantive civil law in the Sudan. This solution had undeniable merits, but corresponding disadvantages. The chief disadvantage was that no one could know, in advance, what the law would be: it was, very literally, locked in the bosom of the judges. Its merits, on the other hand, were that it avoided the creation of a corpus of law which might well have proved unsuited to the mass of the people; it enabled the courts to have recourse to Egyptian law for as long as seemed appropriate, and then to turn increasingly to English law; and it spared the new administration the embarrassment of "having to give a definite answer as to whether they were going to apply Islamic law or not" — for Muslims were scarcely likely to suggest that the formula justice, equity and good conscience would exclude their sacred law.[48] In addition, it made it possible for the courts to apply the essence of English law without some of its superfluous technicalities; and this was an obvious advantage, not only in view of the general lack of sophistication in Sudanese society, but also in terms of the problem inherent in applying an alien system of law based on judicial precedents in a country where libraries and law reports were at a premium.

In most of the other African countries in which some such formula had been used before 1900, *e.g.* Nigeria, the Gambia, Ghana and Sierra Leone, it was used either negatively, as a "repugnancy clause" to limit the application of customary law, or positively, but in a strictly limited sense, to provide a residual law to fill any lacunae. It was only in the Sudan, by contrast, that the formula received an even wider application that it had ever been accorded in India. As in India, however, there was an initial period of uncertainty as to how, precisely, the formula was to be interpreted in practice. At first, for example, it was

sometimes interpreted in terms of universally accepted principles of justice; but this, in practice, would have made enormous demands on the judges, to say nothing of legal libraries. Still more often, Egyptian law seemed to be the obvious choice. With the passage of the years, however, the tide began to flow, as in India, ever more strongly in the direction of English law and the citation of English precedents — although this tide has ebbed as well as flowed. Zaki Mustafa admits, for example, that "as a result of the indiscriminate application of English law by some of the judges under the justice, equity and good conscience provision, some rules which are not just or equitable have been received," and that, "had there been more adequate facilities and if some of the mistakes which were actually committed in the application of English law could have been avoided," the reception of that law might have led to better results. All the same, in 1971 he considered that the main argument against the continuation of the justice, equity and good conscience provision, as it now stands, "lies not in the fact that it had, in the past, facilitated the application of English law, but rather that in the future it may facilitate the application of a multiplicity of legal rules derived from a wide range of legal systems." This should not be dismissed as a purely hypothetical proposition, since there are practising lawyers in the Sudan today trained in as many as 11 different countries; and there is "absolutely nothing to prevent any of them from construing justice, equity and good conscience as meaning Soviet, French or Egyptian law."[49] Since he wrote his book, moreover, a determined attempt has in fact been made in the Sudan to switch over from English law to Egyptian law, for which three powerful arguments could be adduced: first, that it is obviously easier to adopt a codified law than one based primarily on judicial decisions; secondly, that the Egyptian codes are written in Arabic, which is the *lingua franca* of the greater part of the Sudan; and, thirdly, that any step in the direction of adopting a pan-Arab law has considerable sentimental appeal. It seems, however, that this attempt, after an initial

success, has now been defeated — for the present, at least.

Space forbids any detailed consideration of the way in which this formula has been introduced, and utilised in practice, in a number of other countries which were at one time under British rule. As Sir Kenneth Roberts-Wray puts it in his magisterial survey *Commonwealth and Colonial Law*[50], it has most frequently been "employed by law-givers in providing the Courts with two different criteria:

(1) the positive or residual: for arriving at decisions where the law is silent;
(2) the negative or repugnant: as a test for the rejection, as repugnant to what is humane and just, of a particular principle — usually of indigenous law."

In this second use, he adds, "the phrase normally begins with the word 'natural,' but the reason for the addition is obscure and the effect must be nil." But while I agree that, although the terms natural justice, equity and good conscience have often been considered in isolation, "no serious attempt appears ever to have been made to draw distinctions of substance between them," it seems to me that the use of the word natural in other expressions also in this context (such as natural justice and humanity or natural justice and morality, for instance) points decisively to the doctrine of natural law as their ultimate *fons et origo.*

Notes

1 *Law, Liberty and Morality* (O.U.P., 1963), p. 34.
2 *e.g.* in 1627, in *Darnel's Case* (3 St. Tr. 1).
3 *Cf.* pp. 6 *et seq.*
4 *English Law — The New Dimension.*
5 *Op. cit.* pp. 1-3.
6 Scarman, *op. cit.* p. 6.
7 *Loc. cit.* p. 15.
8 A.C. [1942] 206, at pp. 232 and 244. *Cf.* Denning, *op. cit.* p. 11; Scarman, *op. cit.* p. 15.

9 At p. 96.
10 *Op. cit.* pp. 97-100.
11 1952 (2) S.A. 428.
12 *Op. cit.* pp. 92 and 96.
13 On the contrary, Professor Hamson in his Hamlyn Lectures was firmly of the opinion that the *Conseil d'Etat* "has achieved a result ... which we have not attained, at the very least not so clearly or so manifestly as they have." (*Op. cit.* p. 5.)
14 *The Republic* III, xxii, p. 33 (Trans. C.W. Keynes).
15 *Summa theologica*, as quoted by d'Entrèves, *Natural Law*, pp. 39-43.
16 Romans 2:15.
17 *Social and Political Ideas of the Sixteenth and Seventeenth Centuries* (London, 1926, chapter by N. Sykes), p. 73.
18 *Natural Justice* (Sweet & Maxwell, London, 1959).
19 In *Voinet* v. *Barrett* (1885) 55 L.J.Q.V. 39, 41.
20 In *Moses* v. *Macferlan* (1760) 2 Burr. 1005.
21 *Op. cit.* p. 9.
22 (1470) Y.B. 8 Edw. IV, 21.
23 (1610) 8 Co. Rep.
24 (1614) Hob. 85, 87.
25 (1723) 8 Mod. Rep. 148; 2 Raym. 1334; Str. 557 and Fort. 202.
26 2 B. and C. 448, 469.
27 (1871) L.R. 6 C.P. 576, 582.
28 *Cf.* Norman Anderson, *Law Reform in the Muslim World* (Athlone Press, London, 1976), pp. 20 *et seq.*
29 *Cf.* "Justice, Equity and Good Conscience" by J. Duncan Derrett, in *Changing Law in Developing Countries* (ed. J.N.D. Anderson, Allen and Unwin, London, 1963), p. 129.
30 Derrett, *op. cit.* pp. 130 *et seq.*
31 Derrett, *op. cit.* p. 139.
32 Derrett, *op. cit.* pp. 140 *et seq.*
33 *The Law of Fraud in British India*, pp. 6 *et seq.*
34 *Background to Indian Law* (C.U.P, 1946), pp. 9 *et seq.*
35 Derrett, *op. cit.* p. 117.
36 Derrett, *op. cit.* pp. 117-126.
37 *Cf.* Derrett, *op. cit.* p. 127.
38 *Cf.* Derrett, *op. cit.* pp. 140-145.

39 *Op. cit.* pp. 146 *et seq.*
40 *Cf.* Zaki Mustafa, *The Common Law in the Sudan* (Oxford, Clarendon Press, 1971). p. 1.
41 *Op. cit.* pp. 1 *et seq.*
42 *Op. cit.* pp. 3 and 4 — quoting Snell's *Principles of Equity* (26th ed.), pp. 5 and 6.
43 *Op. cit.* pp. 10 and 11 — quoting from *Government of India,* p. 53.
44 Quoted by Zaki Mustafa, *op. cit.* p. 20.
45 *Cf.* F.R. Wingate, *Wingate of the Sudan*, p. 128.
46 Earl of Cromer's memorandum explaining the Condominium Agreement, 1898, (Public Records Office, F.O. 78/4957) — quoted by Zaki Mustafa, *op. cit.* p. 42.
47 Report of H.M.'s Agent and Consul General on Egypt and The Sudan, 1903, p. 88 (cited in Zaki Mustafa, *op. cit.* p. 54).
48 *Cf.* Zaki Mustafa, *op. cit.* pp. 56 *et seq.*
49 *Op. cit.* pp. 239 *et seq.*
50 (Stevens, London, 1966) pp. 575 *et seq.*

Lecture Two

HUMAN RIGHTS AND JUSTICE: DO WE NEED A BILL OF RIGHTS?

I remarked in my last lecture that it is not always realised that it was the doctrine of natural law which was the direct progenitor of the concept of human rights. For in the hands of Grotius (and, still more, those of the rationalists who succeeded him) the concept of natural law, as taught in Europe by the Schoolmen, underwent a further and radical change; back, in fact, to a view which had been adumbrated centuries before by the Sophists. Thus Grotius himself put forward, as a theoretical assumption, the thesis that the doctrine of a Law of Nature would still be viable and convincing even if there were no God, or if the affairs of men were no concern to him;and to many of his successors this was much more than a mere hypothesis. As a result the whole concept underwent a metamorphosis from an emphasis on natural law to an insistence on natural rights: from an appeal to a divine law which man, as a rational creature, could in part discern and apply to a proclamation of the inherent and sacred rights of man. It was thus that the Virginian Declaration of Rights, in 1776, asserted that "all men are by nature equally free and independent, and have certain inherent rights of which ... they cannot, by any compact, deprive or divest their posterity"; that the American Declaration of Independence, in the same year, affirmed that it was self-evident that "all men are created equal," and that they "are endowed by their Creator with certain inalienable rights," among which are "Life, Liberty and the pursuit of Happiness"; and that the French National Assembly, in 1789, "resolved to lay down, in a solemn Declaration, the natural, inalienable and sacred Rights of Man."

All these declarations represented attempts to formulate certain precepts of natural law, in its new guise of natural rights, in a way which asserted their eternal validity and their claim to

universal allegiance. But it was only when some of them were included in legal documents — implicitly, for example, in the American Constitution in 1787, and explicitly in the first 10 Amendments (which comprise the "Bill of Rights" of 1791) — that they partook of the nature of positive law which could be, and increasingly was, interpreted and applied by the courts.

Now the Founding Fathers of the American Constitution could no doubt claim that they had precedents in British constitutional law both for their doctrine of the separation of powers and even for their Bill of Rights. But Lord Radcliffe, in his Reith Memorial Lectures in 1951[1], showed that this is not altogether correct. It is true, he said, that in this country "the judges played an important part throughout the eighteenth century in upholding individual rights against encroachment by the executive. By the beginning of the century they had been placed in a position that made them free from interference by Crown or Parliament, and Parliament had not then begun the practice of passing statutes that give the executive a safe conduct through the ordinary law." The relations between Crown and Parliament, however, were more complex, and varied considerably from reign to reign. "But, whether right or wrong about England, the Americans accepted the theory of the separation of powers as an obvious truth. The idea of letting one branch accumulate in its hands all the important 'prerogatives of sovereignty' struck them as something that no sane statesman could possibly allow." For that, as *The Federalist* put it, would be to "entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived." And it is to this conviction, Lord Radcliffe emphasises, "that the American Constitution owes its most characteristic features."[2]

Many Americans, indeed, at that time believed that no constitution could be complete unless it contained a list of civil rights which it guaranteed; and they thought that the British Constitution was "founded upon the Bill of Rights which Parliament had presented to William and Mary after the Revolution and then

made into an Act of Parliament." Edmund Burke was currently "teaching everyone to regard the Revolutionary Settlement as the final and unalterable form of the British Constitution"; and Thomas Paine, who was even more widely read in America, "had not yet written his *Rights of Man* to show that in the American sense there was no British Constitution at all. For all the great instruments of our history, Magna Carta, the Petition of Right, the Bill of Rights, were essentially treaties between the monarch on the one hand and some other power, the feudal lords, or Parliament, on the other." Parliament had, it is true, "put into its Act containing the Bill of Rights provisions about juries and freedom of election and excessive bail, and restrictions on Royal prerogative. But what Parliament had put into one Act, it could alter or remove by another Act."[3] In America, by contrast, the Constitution can only be changed by a special procedure which is both difficult and laborious; so all Americans can rest assured that those individual rights included in their Bill of Rights and in subsequent Amendments to the Constitution stand above ordinary laws and cannot be abrogated or attenuated at the whim of a transient majority in a single elective chamber. As a result, "statutes that violate the limitations of the Constitution are not bad laws: they are not laws at all. They are not laws that still have to be obeyed, even if with protest or resentment: they are words that can be ignored with impunity. It is the medieval doctrine over again, a supreme law that overrules the law-making of men, but with the written words of the Constitution in place of the uncertain theories of Natural Law."[4]

Another basic difference between Britain and the United States is the position of the judiciary *vis-à-vis* the legislature. Most American judges are, in some sense, political appointees, whether by selection or election, in a way that is certainly not the case in Britain today. It is true that appointments of judges to the High Court or to Crown Courts are made by the Lord Chancellor, who combines a judicial with a party political role,

and that appointments to the Court of Appeal or to the House of Lords are made by the Prime Minister — which is, in principle, a system of somewhat dubious propriety which we carefully avoided reproducing in the constitutions originally devised for our former colonial territories when they attained independence. But such is the strength of public opinion, and particularly that of the legal profession, that it must be many years since a "political" appointment (other than that of the Lord Chancellor himself) was made to the bench in this country. Once appointed, moreover, British judges are completely independent of the executive, and can be dismissed for misconduct only by a three-quarters' vote of both Houses of Parliament. But it is in regard to enactments by the legislature that the position of the courts in Britain and America differs most widely. In this country the judges' competence in this respect is confined to interpretation, enforcement and, on occasion, adverse comment; and, while it is true that they have considerable latitude in how they interpret and apply an Act of Parliament (and will certainly tend to give it as restricted an interpretation as its wording will permit if it conflicts with any basic principles of the common law), Parliament can always correct this by amending the Act and making it more explicit. In the United States (and several other countries), on the other hand, the position is very different, and the courts can — and do — strike down any ordinary legislation which they consider *ultra vires* the Constitution. This may, of course, be a very difficult and controversial point which the courts will not lightly decide; but there can be no doubt that in the United States the last word lies with the Supreme Court — unless, of course, the state of public opinion on the matter concerned is such that the legislature is prepared to introduce a further Amendment to the Constitution.

Now there was a time, as we have seen, when English judges were prepared to assert that the common law — or, indeed, the law of nature — could override statute law. As Lord Justice Scarman (as he then was) stated in his Hamlyn Lectures,

Professor Lauterpacht, "in a most revealing chapter in his book on Human Rights," emphasised certain features in the development of English law "which nineteenth-century thinkers chose to disregard." In particular, he cited "the English constitutional practice of safeguarding the rights of the subject by statutory enactment" (as in Magna Carta, habeas corpus, the Bill of Rights and the Act of Settlement), and challenged the notion "that the very conception of inalienable and fundamental rights superior to the State was unknown to English legal and political tradition."[5] So Lord Scarman, while conceding that "we must recognise that English law does today accept as beyond challenge the legislative sovereignty of Parliament," insisted that "there is nothing in its tradition or heritage that makes such acceptance so basic that, if it be limited, the system would collapse. On the contrary, history and the American experience both suggest that adjustment can be made, if it be thought desirable." And in his opinion recent developments in regard to human rights have in fact made this desirable — "perhaps even inevitable, if the United Kingdom is fully to honour its international obligations, and if its law is to meet the demands of a rising public opinion." Two courses are, he suggested, possible: either for the law "to pursue its present inclination to ignore the Human Rights movement, making the assumption that the existing English law is a substantial compliance with our international obligations"; or "to give thought to a new constitutional settlement whereby it would be made very much more difficult to repeal certain statutes than others — that is to say, the acceptance of entrenched provisions as part of our statute law."[6]

For the fact is that, in recent years, the scope, range and importance of what may aptly be called the human rights movement has been enormously expanded. Instead of being limited to a few countries, most of them characterised by a federal form of government, in 1948 the General Assembly of the United Nations Organisation adopted the Universal Declaration of Human Rights "as a common standard of achievement for all

peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance ... " It is true, as Professor Alan Gledhill has pointed out, that the General Assembly "did not profess to define those Rights in terms appropriate to their application by courts. They were stated in general terms, without qualification, except that they might be restricted to protect the rights of others."[7] But Lord Scarman could justly claim that this Declaration "spells out in language all men can understand the human rights which are to be considered 'fundamental' "; and the intention was that legislation should be introduced, "both among Member States themselves and among the peoples of territories under their jurisdiction," which would make these rights legally enforceable — for Article 8 reads: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Almost at once, moreover, the Indian Constitution of 1949 included a list of Fundamental Rights in Part III and of Directive Principles in Part IV. The latter, like the provisions in the Universal Declaration of Human Rights, represent a number of objectives which the Indian Government is directed to keep in mind and strive to promote, but which in the meantime are not actionable *per se*; but the Fundamental Rights, by contrast, are explicitly stated to be justiciable by the courts, and have, in fact, been the subject of a vast amount of litigation. All the same, they have not, in many cases, been drafted "with the same precision as the greater part of the Constitution." And the reason for this, Gledhill affirms, is that "the Committee of the Constituent Assembly responsible for them had to work out a compromise between those who wished to include as many Rights as possible, and those who were anxious to restrict their

number." As a consequence, he tells us, we find "some statements intended to be construed literally"—like Article 18, for example, which forbids the grant of titles, and Article 24, which forbids the hazardous employment of children; others "to which, though stated in comprehensive and absolute terms, exceptions and qualifications must have been contemplated"—like Article 14, which demands equal protection of equal laws; and yet others "in which the enunciation of the Right is followed by a more or less precise enumeration of permissible exceptions"—like Article 19, which defines the "seven Freedoms": freedom of expression, assembly, association, movement, residence, and freedom to hold property and follow an avocation. And he adds that "while Rights of the first and third classes have suffered little in the Courts, the Rights of the second class have been somewhat deflated."[8] But it is vital to note that, in the Indian Constitution, the Fundamental Rights were not entrenched. They were actionable, but essentially vulnerable—as events proved.

The Indian Constitution of 1949 was followed, in 1950, by the European Convention for the Protection of Human Rights and Fundamental Freedoms. This not only included the greater part of the human rights declared by the United Nations to be fundamental, but created machinery for their enforcement in the form of both a Commission of Human Rights and a Court of Human Rights. And in the last three decades there has been a positive spate of constitutions, conventions, declarations and laws which include, or in some cases are solely concerned with, human rights: the Basic Law of the German Federal Republic 1949; the Constitutions of the U.S.S.R. 1936, of Nigeria 1963, of the United Arab Republic and Dahomey, both of 1964, and of various countries in South America and the West Indies, chiefly between 1961 and 1967; the Slavery Convention 1926, amended by Protocol in 1953; the Conventions on the Prevention and Punishment of the Crime of Genocide 1948, and on the Political Rights of Women 1953; the Equal Remuneration Convention

1958, the International Convention on the Elimination of All Forms of Racial Discrimination 1966[9], and the American Convention of Human Rights 1969; the Declaration of the Rights of the Child 1959, on the Granting of Independence to Colonial Countries and Peoples 1960, and on the Elimination of Discrimination against Women 1967; the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, both of 1966[10]; the Proclamation of Teheran 1968; etc. It is interesting to note, moreover, that the Fundamental Rights included in the Constitution of Nigeria were based[11] on the European Convention, and that they, in turn, formed the basis for the Declarations of Human Rights embodied in many later Commonwealth constitutions.

This deluge of documentation about human rights — which is, even so, far from exhaustive — clearly represents a major phenomenon in the contemporary scene, any detailed analysis or discussion of which is manifestly beyond the scope of this lecture. All the same, a number of questions spring immediately to mind and are of direct relevance to our subject. First, should not a clear-cut distinction be made between those rights which are already justiciable; those which, while not at present justiciable, are susceptible in principle to legal enforcement; and those which represent aspirations which are designed to set goals and establish principles rather than define provisions which could be incorporated in legislative enactments? Obvious examples of the first of these categories are the Fundamental Rights in the Indian Constitution (enforced, as they are, by an extended application of the common law writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (breaches of which may be referred first to the Commission of Human Rights and then, in suitable circumstances, to the Court of Human Rights). Numerous examples of the second category can be found in the Universal Declaration of Human Rights: among them Article 11, which

provides both that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence," and that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed ... "; Article 13, which states that "Everyone has the right to freedom of movement and residence within the borders of each State," and that "Everyone has the right to leave any country, including his own, and to return to his country"; Article 18, which insists that "Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance"; and Article 20, which provides that "Everyone has the right to freedom of peaceful assembly and association", and that "No one may be compelled to belong to an association." But the same Declaration also includes examples of the third category, such as Article 22, which states that "Everyone, as a member of society, has the right to social security and is entitled to realization, through national and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality"; Article 23, which affirms that "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment," that "Everyone, without discrimination, has the right to equal pay for equal work," and that "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection"; or Article 24, which provides that "Everyone has the right to rest and leisure, including

reasonable limitation of working hours and periodic holidays with pay."

The argument in favour of making a clear-cut distinction between these very disparate rights is undeniably a powerful one. To equate what are, in effect, demands for the promotion of social welfare and distributive justice with the traditionally recognised rights to freedom from arbitrary infringements of personal liberty, to equality before the law, and to freedom of religion, for example, may well be thought to reduce these latter widely established rights to the same level as the former far more nebulous social and economic aspirations. So it has been suggested that the term 'rights' should be used exclusively to describe those rights which are, or at least could be, formally recognised and enforceable by legal sanctions, so that "a right to equal pay would, for example, only exist when a legal requirement on employers to provide equal pay for equal work existed." But the contrary argument is that this distinction, while it makes for exactitude, does so at too great a price. For it is "characteristic of the political and philosophical tradition which has espoused the use of human rights language that it has grounded its appeal on the moral perception that a certain standard of conduct is owed to human beings by virtue of their humanity alone." This tradition, moreover, has had two distinct lines of development: the first from "a challenge to all authority rationally to justify any claim it made on the liberty of the individual person" — as exemplified, for example, in the writings of John Stuart Mill; and the second from a realisation "that material and spiritual poverty could stunt the growth of people as persons every whit as effectively as lack of political or legal rights, and that legal guarantees of the rights of the individual could be deployed by some groups in the community to resist the claims of other groups." As a result, the concept of human rights, like that of the Rule of Law, as we saw in my last lecture, has become increasingly identified with the eradication of whatever impedes men and women from living as free human beings — be it legal,

political, social or economic inequality or deprivation. There can be no doubt, moreover, that the inclusion of articles designed to this end in the Universal Declaration of Human Rights has "proved to be of inestimable value in shaping attitudes and actual behaviour. As innumerable human rights movements have discovered, the ability to point to an international statement to which one's own government has given its public support gives a degree of leverage to appeals for just treatment which could not be achieved by appeals founded on equity and justice alone."[12] Both arguments, it seems to me, have undeniable merits; and a reasonable compromise may, perhaps, be found in some such distinction as we have already noted in the Indian Constitution between those Fundamental Rights which are justiciable *per se* before the courts, on the one hand, and, on the other, those laudable objectives (which may well, in some cases, also be termed human rights in a rather different sense) classified as Directive Principles which, though not at present legally actionable, the State is committed to promote.

There is, moreover, a further important difference between the contemporary movement for human rights and the earlier tradition of the "natural and inalienable rights of man." The earlier tradition was primarily concerned with the claims of individual citizens *vis-à-vis* the tyranny of an absolute monarch or the exploitation of a feudal baron, whereas our contemporary conviction about the interdependence of social and individual well-being prevents us from giving the individual such an absolute priority. It is precisely at this point that the concept of justice becomes so complex and vital. As John Rawls puts it: "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[13] But how is justice, in this sense, to be defined? Is it in Utilitarian terms of the greatest good of the greatest number — a principle which

might well open the door to the exploitation of the individual in the interests of the community? No, Rawls insists, since

> "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analagously, an injustice is tolerable only when it is necessary to prevent an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising."[14]

Rawls himself does not actually define justice as 'fairness', since he does not regard the two terms as synonymous; rather, he conceives of justice as those principles which rational beings would rationally adopt as fair if they had to decide what is fair in general without knowledge of their own particular position in society — or behind "the veil of ignorance."[15] Thus he distinguishes "a proper balance between competing claims" from "a set of related principles for identifying the relevant considerations which determine this balance."[16] Starting from the theory of the Social Contract, which is, he emphasises, a purely hypothetical concept, he maintains that rational persons might be expected to agree to two principles to regulate their common life: the first would require "equality in the assignment of basic rights and duties," and the second would recognise that "social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society." These principles, he insists, "rule out

justifying institutions on the ground that the hardships of some are offset by a greater good in the aggregate ... But there is no injustice in the greater benefits earned by a few provided that the situation of persons not so fortunate is thereby improved."[17]

Now there are clearly a number of ways in which this whole subject of human rights may be approached. First, there is the obvious fact that, in any community or society, the right of each individual to pursue his own interests must be restricted to the extent necessary to ensure that this does not improperly prejudice the rights and interests of others. At the very least, in Bernard Levin's aphorism, "Your fist's freedom ends where my nose begins." But it is a characteristic phenomenon of contemporary society to find two mutually contradictory tendencies simultaneously in operation: on the one side the demands of the so-called permissive society, and on the other the ever-increasing encroachment of statutory regulations and restrictions in the interests of social and economic justice (to say nothing of bureaucratic centralisation). The demands of the more extreme exponents of the permissive society have been defined by Dr. John Robinson as "freedom from interference or control, doing your own thing, love, laxity, licence, promiscuity — and, in terms of verbs, swinging, sliding, eroding, condoning"; or, in Mrs. Campbell's vivid phrase, "People may do what they like as long as they don't do it in the streets and frighten the horses" — a principle which, in our highly mechanized age, would permit a virtually unfettered exercise of individual liberty such as no community can ever have tolerated! Yet alongside this highly libertarian attitude of our contemporary society — or certain elements in it — towards some aspects of life, there is the opposite tendency to restrict the liberty of the individual more and more in the interests, whether real or mistaken, of the community as a whole. Examples of this, some of which I shall discuss in subsequent lectures, may be found in demands for the suppression of all independent education and private medicine; in legislation designed to prevent discrimination in housing,

mortgages, education or employment on grounds of race or sex; and in the necessity to get permits for any number of different things in the interests of town and country planning, conservation or the environment. So where, precisely, is the line to be drawn between these two competing tendencies — or, in simpler and more general terms, between the liberty of the individual and the interests of other individuals or of society as a whole? Clearly, the criterion must be sought in some reasonable balance or equilibrium between the two. But this is virtually a synonym for justice — or, to be more precise, the concept of justice as fairness to which reference has already been made. And here some of Rawls' reasoning may help to clarify the issue.

Rawls, as we have seen, takes as his theoretical starting point a hypothetical Social Contract in which rational persons enter into a compact, as it were, on the basis of enlightened self-interest, but with a "veil of ignorance" which prevents them from knowing in advance what position in society each of them will in fact occupy. As a consequence, they may all be expected to take an impartial view of what is fair and advantageous to the nation or community as a whole. And it is from this premise that he concludes — by a process of reasoning which lies outside the scope of this lecture — that rational persons might be expected to agree on two principles of justice, in a distinct order of priority, to which a passing reference has already been made: the first is that each person should "have an equal right to the most extensive basic liberty compatible with a similar liberty for others," and the second that social and economic inequalities should not be allowed to go beyond what can "reasonably be expected to be to everyone's advantage" or what is "attached to positions and offices open to all."[18] This classification makes a clear-cut distinction between "those aspects of the social system that define and secure the equal liberties of citizenship" (freedom of speech and assembly, liberty of conscience and religion, freedom of thought, etc.) which may be regarded as the basic rights that a just society should ensure for all, on the one

hand, and "the distribution of income and wealth" (and, indeed, questions of remuneration, leisure, and much else), on the other. The difference between them lies in the fact that "a departure from the institutions of equal liberty required by the first principle cannot be justified, or compensated for, by greater social and economic advantages," for the "distribution of wealth and income, and the hierarchies of authority," whatever they may be, "must be consistent with both the liberties of equal citizenship and equality of opportunity."[19]

The similarity between this classification and the distinction made in the Indian Constitution between Fundamental Rights and Directive Principles will, I think, be immediately apparent. This distinction does not consist only in the fact, previously noted, that the Fundamental Rights specified in the Constitution are already actionable before the courts, while the Directive Principles are merely objectives which the Government of India is pledged to attempt to attain. The distinction is, in a real sense, more basic than that, and consists in a recognition that the Fundamental Rights have a prior status and a higher authority. So it seems to me that the same sort of distinction can be made in regard to all the heterogeneous "human rights" which have been claimed, declared or covenanted in the vast documentation on this subject to which reference has already been made. It is not only that some of them are already justiciable (although this is, of course, highly relevant), for some of those which are not yet legally enforceable should certainly be made so—or made so effectively, rather than merely on paper. Nor is the term "inalienable," as applied to some rights rather than others, wholly appropriate in this context (although it certainly carries the implication that the rights so described stand on a different footing from others, and should in all ordinary circumstances be regarded as inviolable; and this does, in my view, represent a valid distinction between such basic principles as that of equality before the law, on the one hand, and those principles relating to distributive shares in material goods, on the other). The crucial

point in the present context, as I see it, is that it is only human rights of this prior category which should be guaranteed in any Bill of Rights or other constitutional enactment that accords them an entrenched position which makes them immune from the changes and chances of ordinary, day to day legislation — dependent as this may be on a slender and fortuitous majority in a legislative chamber which may not be really representative, may be swayed by some transient emotion, and may even be oblivious of the implications of the enactment it is passing.

A further question, of course, is whether the cause of human rights is really better served by a list of positive rights expressed in very general terms than by a much more down to earth treatment of concrete, and even *ad hoc*, situations by means of appropriate remedies. There can be little doubt that it is the latter method which is characteristic of the common law, just as the former is of civil law systems. Even in documents such as Magna Carta the principles of constitutional government and the liberties of British subjects were put in the comparatively negative form of "limitations on the exercise of authority" rather than the positive form of "concessions to free human action." Thus Roscoe Pound emphasises that the Charter

> "put them as legal propositions, so that they could and did come to be a part of the ordinary law of the land invoked like any other legal precepts in the ordinary course of orderly litigation. Moreover, it did not put them abstractly. In characteristic English fashion it put them concretely in the form of a body of specific provisions for present ills, not a body of general declarations in universal terms... When recent historians, affecting to overthrow the lawyer's conception, tell us that its framers meant no more than to remedy this or that exact grievance of a time and place and class by a particular legal provision framed to the exigencies of that particular grievance, they tell us no more than that the method of the Great Charter is the method of English

> law in all ages. The frame of mind in which it was drawn was nothing less than the frame of mind of the common-law lawyer; the frame of mind that looks at things in the concrete, the frame of mind that prefers to go forward cautiously, on the basis of experience, from this case to the next case as justice in each case seems to require."[20]

This is very true; but I find it much more questionable when he interjects: "Herein, perhaps, is the secret of its enduring vitality," and then observes: "Like the Constitution of the United States it is a great legal document. Like the Constitution it lent itself to development by lawyers' technique. It did not foreclose legal development by universal abstract clauses. It did not seek to anticipate and provide for everything in time to come."[21] I agree, of course, about its enduring vitality, and the fact that, like the Constitution of the United States, it was a great legal document. But there are manifest differences between the two documents, as Roscoe Pound himself admits elsewhere when he describes the Constitution as "a happy balance between the specific and the general, between the redress of specific grievances and guarantee of specific rights after the manner of Magna Carta and the general declaration of fundamental liberties after the manner of the eighteenth-century publicists." Precisely; and I should have thought that it is arguable that, in the Constitution, the second of these two elements predominates. Both documents, moreover, were susceptible to development by lawyers; but there can be no doubt whatever that the Supreme Court has developed the American Constitution and its various Amendments in a way, and to a degree, very different from anything that the legal profession has achieved, or has ever attempted, on this side of the Atlantic. The suggestion that "universal abstract clauses" serve to "foreclose legal development" is, moreover, positively ludicrous in the light of a series of comparatively recent judgments handed down by the Supreme Court.

It is also true, as Professor Neville Brown has recently emphasised[22], that in English law "freedoms are *residual*—an Englishman can do anything *except* what the law forbids"; and he cites as an illustration freedom of expression or speech, which "is limited only by laws of libel and sedition, breach of the peace, contempt of court, the law relating to official secrets, and so on" —a subject to which I shall revert in a later lecture. In England, again, "the traditional emphasis has been on having a *remedy* available for every encroachment on our freedoms"[23]; and he quotes Dicey's famous remark that "Our Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberties."[24] But it is obvious, from the whole tenor of his remarks, that Neville Brown would agree that here Dicey seriously overstated what is certainly a very important point. Manifestly, it is of little use to have declarations of rights or liberties enshrined in a constitution if there is no effective remedy by which they can be enforced. This is amply illustrated in the U.S.S.R., for example; although even there the relevant articles in the Constitution do, at least, give the heroes of dissent (for such they certainly are) a basis for their protests. But to go to the opposite extreme and suggest that, where remedies such as habeas corpus exist, there is no need for any constitutional declaration of rights, would be a very different thing.

In the past these specific remedies may, indeed, have given the individual citizen reasonably adequate protection against oppression by the executive; but they have given him no protection whatever, in recent years, against an oppressive or ill-considered Act of Parliament. Nor do they give wholly adequate protection today against wrongful, or clearly mistaken, encroachments on individual liberties by official action or by the exercise of some administrative discretion — for we live in an era in which legislation is so profuse that much of it is inadequately examined, provides for a plethora of subsidiary regulations, and

often gives very wide discretionary powers to local authorities or to the Minister concerned. To the abuses to which people are thus exposed the need for an Ombudsman gives convincing testimony. A Bill of Rights, moreover, would not only help to enlighten and reinforce public opinion, but might also provide a much needed degree of protection, both to individuals and the public, against an oppressive use of the vast power now wielded by elements in our society with which Parliament seems singularly unable to cope: the trade unions, on the one hand, and multi-national companies on the other. Thus Neville Brown quotes Thomas Jefferson's statement, some two centuries ago, that "A Bill of Rights is what the people are entitled to against every Government on earth, and what no just Government should refuse, or rest on inference," and pertinently remarks:

> "Up to now, we in England have been content to rest our basic liberties 'on inference.' Today, in these dangerous times, we need to proclaim aloud those rights and liberties and a Bill of Rights enforceable in the English Courts (rather than at the European Human Rights Court in Strasbourg or, as may now happen, at the Common Market Court in Luxembourg) would be a progressive and natural evolution in English constitutional law — and the European Convention is ready at hand as the model to adopt and adapt."[25]

What, then, of the contention of the Law Society's law reform committee that the European Convention on Human Rights is entirely unsuitable for incorporation into British law? Here, as I see it, there are at least two distinct issues. It may, of course, be conceded that simply to make the convention part of national law would pre-empt the outcome of a very necessary debate about whether we do not need some much more radical constitutional change — such, for example, as a written constitution which would alter the basic relationship between Parliament, the executive and the judiciary. But when the Committee goes on to

state that "We now find ourselves debating a proposal to enact into domestic law a series of directly enforceable human rights formulated in the vaguest and most general terms, and subject to almost equally vague qualifications," and that "Such a proposal is so totally at variance with traditional methods of law-making in this country that it seems to us to make no sense except as part of a complete overhaul of our fundamental constitutional arrangements," then a few observations may be in order.

First, this country is already in the position of being a signatory to this Convention — and, indeed, of having been arraigned before the European Court of Human Rights for its failure to comply with its requirements. Secondly, there is no fundamental reason why the Convention should be incorporated *in toto* into our law, if it is possible to define these rights, together with their qualifications, in less vague and general terms — although it would seem to me very questionable whether it would not be a work of supererogation, and cause of confusion, to attempt to draft an alternative Bill of Rights. Thirdly, it is no good imagining that the form of English law, and in particular the style of statutory draftsmanship and methods of statutory interpretation customary in this country, will remain wholly unaffected by our entry into the European Community. On the contrary, we shall have to become progressively more accustomed to statutes drafted in more general terms and to according the courts a much wider scope for judicial interpretation. Fourthly, it is manifestly true that any entrenched Bill of Rights would mean a very important change in, although scarcely a "complete overhaul of," our constitutional arrangements; for there are in fact a number of different ways in which some measure of entrenchment might be achieved. But I find myself in complete agreement with Lord Scarman that there is an urgent need for certain fundamental human rights to be put beyond the danger of arbitrary infringement by a minority government which may claim a highly questionable mandate from the electorate — or, in reality, from its election manifesto — either to intrude into the

private lives of its citizens in a way that is wholly unacceptable to the population as a whole, or to fail to observe its international obligations to safeguard the interests of individuals or minority communities, even in the sphere of private law.

The argument is always raised, of course, that it is impossible, under the constitutional law of this country, for any Parliament to bind its successors. But it is absurd to suggest that this means that our constitutional law can *never* be effectively changed — for it has, in fact, already been changed by our adherence to the Treaty of Rome, to say nothing of the progressive eclipse of the authority of the Second Chamber. It would, in any case, be perfectly possible for Parliament to enact a Bill of Rights with an explicit provision that the courts should accord it priority over any subsequent legislation unless the latter included a specific declaration that it was expressly intended to overrule or amend the Bill of Rights, whether in whole or in part. A recent example of this method of procedure is provided by the Canadian Bill of Rights 1960. Headed "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms," the Pre-amble reads:

> "*The Parliament of Canada,* affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;
> *Affirming* also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;
> *And being* desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

> *Therefore* Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows ... "

Then follows the Bill of Rights itself. Part I, section 1 lists a number of human rights and fundamental freedoms which "have existed and shall continue to exist" in Canada "without discrimination by reason of race, national origin, colour, religion or sex"; and section 2 explicitly provides that:

> "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights,* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared. ... "

Clearly, this device, if adopted in this country, would not fetter or diminish the legal sovereignty of Parliament in any way whatever, but it would expose the Government of the day to censure and criticism if it took such action in any wanton or irresponsible way.

Again, the suggestion has been made that Parliament might adopt a Standing Order providing that a Bill of Rights could be amended only "by some parliamentary majority greater than a simple one, or by some other special procedure," while still remaining free to suspend or repeal that Standing Order at any time if it so wished. The attitude of the courts to any legislation which might in fact be promulgated by Parliament without regard for such a Standing Order would, of course, ultimately depend on that of the Law Lords. Yet again, a reformed and more effective Second Chamber would provide a considerable safeguard against too easy a repeal of a Bill of Rights, once promulgated. But now that the somewhat questionable recourse to referenda has been introduced in this country, it would,

perhaps, be better to go the whole way and for Parliament to submit to the public, and then enact, a basic change in our constitution whereby a Bill of Rights was entrenched in such a way that the courts would be both empowered and required to strike down any legislation that conflicted with its provisions *unless* this had been promulgated in some special way, by a prescribed majority, or on the basis of a further referendum.

One further point must, I think, be made. However well Parliament, its legal draftsmen and the courts were to do their work, there can be no doubt that the whole subject of human rights will always bristle with difficulties and problems. This is why Mr. Tom Sargant, the admirable Secretary of Justice (the British section of the International Commission of Jurists) has stated that he is driven

> "to the conclusion that, however efficient the safeguards may be, the only real guarantee of human rights lies in the hearts and minds of those who are called upon to wield power at various levels and in various departments of life. In other words, human rights are a religious problem as well as a constitutional problem. We have to learn how to exercise power over each other and to be willing to submit not only to external disciplines but to standards and codes of behaviour which are as compelling as the external disciplines. This is what I mean by saying that the problem of human rights is basically a religious problem. For the right exercise of power involves some kind of training — the constant instilling of ethical concepts — and the recognition that any power that we are privileged to wield over our fellows does not come to us as of right — to do with it as we think fit — but as a sacred trusteeship for which we have to answer to a power higher than ourselves."[26]

In this context it is interesting to observe that, in the New Testament, the emphasis in matters of personal and social ethics is always put on duties rather than rights: the duties of wives to

their husbands and husbands to their wives; of children to their parents and parents to their children; of servants (or employees) to their masters and masters to their servants; and of citizens to the State and the State to its citizens. Similarly, the pattern found in the Old Testament is that of specific commands about the way in which the Israelites must, and must not, treat "the sojourner, the fatherless and the widow" rather than abstract declarations concerning the rights to which deprived persons are entitled. This is not, of course, to deny the concept of human rights, which necessarily represents the obverse side of the coin; for the basic Judaeo-Christian doctrine of man made in the image of God implies that others have a duty to treat him in the way which best befits his status. Yet the primary emphasis is always functional — on duties that must be performed rather than rights that are inherent.

But while we can scarcely think of natural rights without a natural law which prescribes them, or of human rights without at least a moral duty to treat men and women accordingly, what we are concerned with here is positive law, or the law which the courts must enforce. This is why we need a Bill of Rights (on which the courts can always fall back and to which they can give practical effect and appropriate substance), together with detailed legislation on some of the more complex questions involved. Both, I submit, are required. Nor should the distinction between them be confined to the difference between general principles and detailed provisions. The basic distinction, as I see it, should be between legislation which must inevitably be somewhat tentative, and which can (and should) be amended as circumstances demand, and those basic principles of personal and social justice which are of unchanging validity and should be accorded a much less vulnerable status. The principle that race and sex discrimination is wrong, for example, is of little practical effect until it has been spelt out in the form of detailed legislation, while the fundamental rights of freedom of speech, assembly and the Press stand in need of certain qualifications

and exceptions — and I shall attempt to illustrate both these points in the course of my next two lectures. Social and economic justice can never, in this very imperfect world, be achieved without the intervention of the executive, the legislature and the law in the form of detailed legislation; but to secure a measure of economic justice at the expense of our basic liberties is to pay much too high a price. That is why we need not only detailed legislation but also an entrenched Bill of Rights.

Notes

1 Published by Collins, London, in 1952 as *The Problem of Power.*
2 *Op. cit.* (Comet Books edition of 1958), pp. 65 *et seq.*
3 *Op. cit.* pp. 71 *et seq.*
4 *Op. cit.* p. 73.
5 *International Law and Human Rights* (London, 1950), Chap. 8 — as quoted and propounded by Scarman, *op. cit.* p. 16.
6 Scarman, *op. cit.* pp. 17 *et. seq.*
7 A. Gledhill, *Fundamental Rights in India* (Stevens, London, 1955), p. 35.
8 *Op. cit.* p. 36.
9 Preceded, in 1963, by the Declaration on the same subject.
10 Both of which came into force only in March 1976, through the deposit of the 35th instrument of ratification.
11 At the suggestion of the Minorities Commission.
12 *Cf. Human Rights: Our Understanding and Our Responsibilities* (Church Information Office, London, 1977), pp. 7 *et seq.*
13 *A Theory of Justice* (Oxford, Clarendon Press, 1971), p. 3.
14 *Op. cit.* pp. 3 *et seq.*
15 *Op. cit.* pp. 12 *et seq.*
16 *Op. cit.* p. 10.
17 *Op. cit.* p. 14.
18 *Cf. op. cit.* p. 60.
19 *Op. cit.* p. 61.
20 *The Development of Constitutional Guarantees of Liberty* (Yale University Press, 1957), pp. 18 *et seq.*
21 *Loc. cit.*

22 In a lecture on "Legal Education and Public Law in Guyana," published by the Commonwealth Foundation in 1976 as Occasional Paper No. XXXVI.
23 *Op. cit.* p. 15.
24 *Op. cit.* p. 14 — quoting Dicey's *Introduction to the Study of the Law of the Constitution* (1st ed., 1885, 10th ed., at p. 198).
25 *Op. cit.* p. 21.
26 Speech in Bangalore in 1968.

Lecture Three

HUMAN RIGHTS AND LEGISLATION: RACE AND SEX DISCRIMINATION

IN the first two lectures in this series I discussed the subject of liberty, law and justice largely in terms of jurisprudence, legal philosophy and constitutional law. We noted man's perennial longing for liberty: for freedom to live his own life, make his own choices, "do his own thing" and even fight his own battles, unshackled by tyrannical governments, obtrusive bureaucracies or pettifogging rules and regulations. Today, moreover, this instinctive reaction against any form of regimentation—always, it seems, characteristic of a considerable proportion of the human race—bursts out at times with a violence which threatens a return to the anarchy of the jungle and betrays a positive obsession to destroy an "unjust" political, social and economic system, root and branch. Yet, at the same time, we live in an era marked by a widespread attempt to put the whole world to rights, and to remedy every kind of evil, by means of an unprecedented spate of International Declarations, Conventions and Covenants and a vast proliferation of domestic legislation.

To most of us, however, the problem is not so much the comparatively simple alternative of extirpation or emendation, revolution or reform, but the much more complex decision about where to draw the line between the rival claims of liberty and law. And this, in its turn, involves a double question: where do the ideal of justice and the pragmatism of sound judgment together point the way? What is fair in principle, and feasible in practice? Down to earth justice (to quote Mr. Tom Sargant once more) "is not an ideal or principle to be pursued on its own," but rather "something that has to be pursued and administered with an informed conscience, a lively imagination and an inbuilt set of scales with which to weigh relative values and priorities." For "according to Christian tradition and belief," he asserts,

"there are three divine attributes — justice, love and truth ... And the task and function of the human conscience is to try to achieve a balance between the demands of these three principles. This is the only way in which true justice can be achieved." [1]

But this faces us, once again, with the age-old problem of the inter-relation of morality and law. Most moral philosophers would agree that man *ought* to love his neighbour as himself; but it is obvious that this ethical obligation cannot be formulated as a legal imperative or enforced by legal sanctions. All the law can do is to attempt to prevent him from injuring his neighbour in a number of specified ways. Even this, moreover, raises the problem — to which passing reference has already been made — of how tightly or precisely legislation should be drawn, and how much can safely (and wisely) be left to the discretion of the courts. Broadly speaking, it is much more important that legislation should be detailed and precise in the sphere of criminal than civil law — just as proof of guilt in a criminal prosecution should be beyond reasonable doubt, while the decision between two contending parties in civil litigation must often rest on a balance of probabilities. Yet even in the sphere of criminal law it is virtually impossible to define with any exactitude the point at which driving becomes dangerous or reckless, or a publication becomes indecent or obscene; and in civil law there is the continual problem of the degree to which fundamental freedoms, such as that of speech, expression or association, should be restricted in the interests of other people, or the community as a whole.

In most cases, it seems to me, the thesis expounded by Rawls in *A Theory of Justice*, which I summarised briefly in my last lecture, will suffice to provide a pointer to the solution of the basic problem of what is just and equitable. But it is often still more difficult, I think, to decide how to give this solution the force of law, and what sort of legislation is needed. So I propose, at this point, to turn from the abstract and general to the concrete and particular, and to concentrate on two or three

matters in which tension, and even conflict, between liberty and law is apt to be most acute. In my next lecture I shall deal with the perennial problem of the restrictions which either "must" or "can justly" be imposed on the fundamental freedoms of speech, assembly and the Press. But the subject that I intend to discuss in this present lecture is the exceedingly complex and topical problem of discrimination on grounds of race or sex, together with a passing reference to the rights of parents in regard to the education of their children.

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 confines itself, in this context, to the comprehensive provision, in Article 14, that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status," and, in Article 13, that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ... " But Protocol No. 1 of 1952, Article 2 adds the additional provision that "No person shall be denied the right to education," and that "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." Protocol No. 4 of 1963[2], moreover, provides that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his own residence" and "shall be free to leave any country, including his own"; that "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of a State of which he is a national" or "deprived of the right to enter the territory of the State of which he is a national"; and that "Collective expulsion of aliens is prohibited."

But the United Nations Declaration on the Elimination of All Forms of Racial Discrimination 1963, and the International Convention on the same subject in 1966, go into much more detail. Thus Article 1 in the Declaration states categorically that "Discrimination between human beings on the grounds of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights"; and in Article 1 of the Convention the term "racial discrimination" is comprehensively defined as "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." But the same Article expressly states that "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure ... equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups." Again, Article 2 of the Convention not only provides, *inter alia*, that all states "shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization," but also enacts that they "shall, when circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and individual freedoms" — with the same proviso

as in Article 1. Where, moreover, Article 3 of the Declaration urges that "particular efforts shall be made" to prevent such discrimination, "especially in the fields of civil rights, access to citizenship, education, religion, employment, occupation and housing," and that everyone, without distinction, "shall have equal access to any place or facility intended for use by the general public," Article 5 of the Convention spells out that the civil rights which must be guaranteed to all without discrimination include "the right to freedom of movement and residence"; "to leave any country, including one's own, and to return to one's country"; "the right to nationality"; "the right to work", "to free choice of employment", "to protection against unemployment" and "to equal pay for equal work"; "the right to housing"; and "the right to equal participation in cultural activities." Again, Article 4 of the Convention provides that States Parties "Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination," etc., and "Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law." And Article 6 of the Convention insists that "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

Four years after the Declaration, and one year after the International Convention, on the elimination of racial discrimination, the Declaration on the Elimination of Discrimination against Women was adopted by the United Nations General Assembly in November 1967. This provides, in Articles 1-4, that

"Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust, and constitutes an offence against human dignity"; and that "All appropriate measures shall be taken to abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate equal legal protection for equal rights of men and women," "to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of the inferiority of women," and "to ensure to women on equal terms with men, without any discrimination ... the right to hold public office and to exercise all public functions." These rights were to be "guaranteed by legislation." Article 6 explicitly declares that "Women shall have equal rights with men during marriage and at its dissolution" and also "in matters relating to their children" — with the proviso, in all cases, that "the interests of the children shall be paramount." Article 8 provides that "All appropriate measures, including legislation, shall be taken to combat all forms of traffic in women and exploitation of prostitution of women." Article 9 is concerned with education, and insists that "All appropriate measures shall be taken to ensure to girls and women, married or unmarried, equal rights with men in education at all levels" and, in particular, "equal conditions of access to, and study in, educational institutions of all types," the same "choice of curricula, the same examinations, teaching staff with qualifications of the same standard, and school premises and equipment of the same quality, whether the institutions are co-educational or not," and "equal opportunities to benefit from scholarships and other study grants." Article 10 turns to economic matters, and seeks to "ensure to women, married or unmarried, equal rights with men in the field of economic and social life," and in particular "to free choice of profession and employment, and to professional and vocational advancement"; to "equal remuneration with men and to equality of treatment

in respect of work of equal value"; and to "receive family allowances on equal terms with men" (together with measures to prevent their dismissal in the event of marriage or maternity); with the explicit provision, in terms of what is sometimes called positive discrimination, that measures "to protect women in certain types of work, for reasons inherent in their physical nature, shall not be regarded as discriminatory."

Finally, it should be noted that Resolution (68) 30, adopted by the Council of Europe on October 31, 1968, provides for measures to be taken against "incitement to racial, national and religious hatred"; and that in the Proclamation of Teheran, adopted by the International Conference on Human Rights in the same year, Article 1 provides that all the prescribed rights should be "without distinctions of any kind such as race, colour, sex, language, religion, political or other opinions," Article 5 that "the laws of every country should grant each individual, irrespective of race, language, religion or political belief, freedom of expression, of information, of conscience and of religion"; and Article 15 that "The discrimination of which women are still victims in various regions of the world must be eliminated."

But subscription to the Universal Declaration of Human Rights, or any other International Declaration, Convention or Covenant, is regarded in this country as giving rise to a moral, rather than strictly legal, obligation to put its provisions into effect. It is now clear that even the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, together with its Protocols, cannot be regarded as part and parcel of English law, however much we may be called to account in Strasbourg for any failure to observe its provisions. To the question "What is the position of the Convention in English law?," Lord Denning M.R., in *R.* v. *Secretary of State for Home Affairs, ex p. Bhajan Singh*[3], replied:

"I would not depart in the least from what I said in the

> recent case of *Birdi* v. *Secretary of State for Home Affairs.* The court can and should take the convention into account. They should take it into account whenever interpreting a statute which affects the rights and liberties of the individual. It is to be assumed that the Crown, in taking its part in legislation, would do nothing which was in conflict with treaties. So the court should now construe the Immigration Act 1971 so as to be in conformity with a convention, and not against it ... I would, however, like to correct one sentence in my judgment in *Birdi's* case. I said: 'If [an Act of Parliament] did not conform [to the convention] I might be inclined to hold it invalid.' That was a very tentative statement, but it went too far. There are many cases in which it has been said, as plainly as can be, that a treaty does not become part of our English law except and insofar as it is made so by Parliament. If an Act of Parliament contained any provisions contrary to the convention, the Act of Parliament must prevail. But I hope that no Act ever will be contrary to the convention."

In the past, moreover, the record of the legislature, the executive and even the judiciary in the United Kingdom — and, in particular, in British overseas dependencies — in questions of racial discrimination has been far from impressive.[4] It was not until 1966 that the Court of Appeal, in *Nagle* v. *Feilden*[5] (a case of discrimination on grounds of sex rather than race) provided what Anthony Lester and Geoffrey Bindman term "a rare example of the creative development of the Common Law by the courts in response to changing social values." In this case members of the Court were, it is true, "assisted by the existence of a statute[6] from which to infer public policy, but their decision went well beyond anything required by Parliament" — or, indeed, existing case law, for Lord Justice Salmon (as he then was) expressed astonishment that the House of Lords had decided, in a previous case[7], that the Stock Exchange

Committee had not acted capriciously in refusing to re-elect Hugo Weinberger because of his German origin. So it might perhaps be inferred that "if someone were in future to be denied employment in his trade or profession, solely because of his race or colour, by a licensing body, or a professional association, or a trade union controlling a closed shop, the courts would probably have granted him a remedy, even if Parliament had not intervened."[8]

But in this field Parliament has in fact intervened. It has promulgated no less than four Acts, in the last few years, in an attempt to eliminate discrimination on grounds of both race and sex. The first was the Race Relations Act 1965, which was largely restricted to racial discrimination in places of public resort — such as hotels, restaurants, cafés or public houses; theatres, cinemas, dance halls, sports grounds, swimming pools or other places of entertainment or recreation; premises, vehicles, vessels or aircraft used for purposes of public transport; or places of public resort maintained by a local authority, etc. It also set up a Race Relations Board and conciliation committees; sought to prevent the enforcement or imposition on racial grounds of restrictions on the transfer of tenancies; and made it an offence to publish or distribute written matter which is "threatening, abusive or insulting" — or to use words which are threatening, abusive or insulting in any public place or at any public meeting — "with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race or ethnic or national origins." But the Act omitted any reference to the two main areas in which discrimination against the coloured minority was most serious: housing and employment.[9] The 1968 Act went considerably further, and made discrimination on grounds of colour, race, ethnic or national origin unlawful in the provision to the public, or to a section of the public, of goods, services and facilities, including education, employment and property transactions — but subject to a considerable number of exceptions. The enforcement of this legislation was, moreover, entrusted

exclusively to the Race Relations Board rather than those individuals who claimed to have been injured, for it was only the Board which could take legal action and then only after the case had been "sifted through an elaborate network of conciliation machinery."[10]

In their admirable monograph on this subject, Anthony Lester and Geoffrey Bindman called attention to some of the unnecessary exceptions included in the Acts of 1965 and 1968, and stated that "at the time of writing (October 1971) there is no indication that the Government is considering any measures to remove the worst defects from the Race Relations Acts, or indeed to enforce the present statutes more vigorously." Yet they were firmly of the opinion that further action was needed "if the legislation is to be saved from falling into disrepute with those whom it was designed to benefit," for it "would be tragic if Britain's new ethnic minorities were to lose confidence in the willingness of the community to ensure that there are effective legal remedies against racial discrimination in employment, housing and elsewhere."[11] But an attempt has now been made, in the Race Relations Act 1976, both to amend and to extend the previous legislation. This Act was closely modelled on the Sex Discrimination Act 1975, which had itself been drafted in the light of experience gained from both the strengths and the weaknesses of the 1968 Race Relations Act; for it was the avowed policy of the Government "to harmonize the powers and procedures for dealing with sex and race discrimination so as to secure genuine equality of opportunity in both fields."[12] It is to this new legislation that we must soon turn; but it may be useful, first, to make a few comments on some of Lester and Bindman's more general observations.

They are clearly right, for example, when they state that "however much the legal system may treat individuals and institutions as equals, it cannot by itself alter the profound inequalities within their actual relationships; law is at best a limited instrument with which to seek greater social justice."[13]

Similarly, they rightly emphasise that "not even the best-drafted statute will work in an unfavourable economic and social environment. Equality of opportunity will remain a pious declaration of hope so long as there is high unemployment, wide-spread scarcity in the housing market, gross deprivation in primary and secondary education, and inadequate social welfare benefits."[14] But this, as they would themselves wholeheartedly agree, does not mean that legislation can do *nothing* in such a situation; for laws that provide for "positive discrimination" (that is, for special facilities for those whose circumstances would otherwise make the concept of equality of opportunity a hollow and even cynical cliché), and that penalise adverse discrimination, can at least do something to prevent racial minorities from always finding themselves at the very bottom of the social and economic pyramid, and from feeling that there is no possibility of ever extricating themselves from this position.

Again, while they deliberately eschew any attempt to relate race relations to the law of nationality and immigration (since this would "require another volume of at least equivalent length"), they do make a few pertinent remarks about this exceedingly difficult subject. It was as a result of an "ugly racist campaign," they state, that legislation was passed in 1962 with the aim of limiting further coloured immigration, and

> "It is now conventional wisdom that Britain is too small and overcrowded to absorb fresh newcomers — unless they are white. At the same time, it is also widely accepted that racial discrimination is economically wasteful, socially divisive, harmful to international relations or morally wrong (according to one's particular standpoint). The approach of successive governments has therefore been that Commonwealth citizens who are already here should be treated equally, regardless of their colour ... The law therefore has two faces. One face confronts the stranger at the gate; the other is turned towards the stranger within. They

> express the ambivalence of public policies. The hostile expression of our immigration law casts doubt upon the friendly expression of our race relations law. However much our legislators might wish it were otherwise, the hostility is taken more seriously than the friendliness — on both sides of the colour line ... If our immigration laws are racially discriminatory in their aims and effect, it becomes difficult to persuade employers, workers, property developers and house-owners to treat people on their merits, regardless of race. If our nationality laws create a pseudo-citizenship, imposing the obligations of allegiance and loyalty to the British Crown upon a group of citizens, while denying to them, as 'non-patrials' or 'non-belongers', the same rights as their fellow citizens, even the wisest and most vigorous policies for racial equality are likely to lack credibility both with majority and minority."[15]

It is undeniable that there is much truth in these words. The ambivalence of the law as it now stands is obvious. To those denied the right of United Kingdom citizenship and free entry to this country, and to their relatives, this is a matter of major concern and grave resentment; and there can be no doubt that this ambivalence has a baneful influence on the attitude of the indigenous community. It is arguable, however, that in this passage the case has been put in a somewhat one-sided way.[16] Britain is undeniably small and over-crowded, and the present level of unemployment, shortage of housing, and need for cuts in public expenditure, make it impossible to open the door to large-scale immigration. It is clear, moreover, that it is from the developing countries that the great majority of those who would avail themselves of an open-door immigration policy would be likely to come — driven, by poverty and malnutrition, to clutch at the opportunities they believe to be available in a Welfare State incomparably richer than their country of origin. For this very reason it seems sub-Christian to slam the door in their faces; yet

here, as in most moral problems, the argument of the lesser of two evils cannot be ignored. On the one hand it is idle to imagine that a law which discriminates against the admission of further coloured immigrants will not blunt the effect of legislation designed to lessen the prejudices which undoubtedly exist against those who are already here; on the other it is futile to suppose that a massive and precipitate increase in their numbers would not exacerbate tensions that are already sufficiently acute.[17]

In point of fact it is widely accepted, both in this country and in the Commonwealth as a whole, that the unrestricted admission either of aliens or of citizens from other Commonwealth countries is no longer practicable. It is any emphasis on race or colour as the decisive criterion which is both offensive and harmful. So it seems to me that our goal should be a policy of both justice and compassion: justice in considering every applicant strictly on his merits and giving full recognition to the claims of those who have opted for United Kingdom citizenship to the exclusion of any other; and compassion in opening the door freely to the *bona fide* marriage partners and dependents of those who are already here and to other cases of exceptional hardship.

To those who believe that the fight against discrimination could, and should, have been fought by means other than legislative enactments, Lester and Bindman give a most convincing answer. First, they argue that "the Common Law acquired much of its present shape during the heyday of *laissez-faire*, when the protection of property and contract rights were the dominant concern of the courts." And although the judges "have indeed adapted much of the Common Law of negligence, contract, the family and public administration to the facts and demands of modern industrial life," judicial reforms "have not been based upon a coherent, egalitarian philosophy," and "the effect of their ethical aimlessness" has been especially striking in the "marked insensitivity" of the English Bench to manifestations of racial discrimination.[18] It is true that the courts have

shown a distinct reluctance to uphold racial restrictions on the transfer of property, particularly by will; but such restrictions have usually been held void for uncertainty or lack of precision rather than on the broad grounds of being contrary to public policy.[19] Even so enlightened a judge as Lord Radcliffe, who argued in *The Law and its Compass* that

> "The civilization of which English law is one form of expression has been built, with labor and sacrifice beyond record, upon the structure of certain beliefs as to the nature of man and his purpose in society ... We must see ourselves, therefore, as committed for good to the principles that the purpose of society and all its institutions is to nourish and enrich the growth of each individual human spirit ... There are liberties which the law has a title to assert wherever its hand can rest: not just the liberty of contract, with which English law has been so much concerned, but the complex of liberties which are needed to preserve the freedom of the human spirit. We all feel that there are relationships arising out of human institutions which deserve special protection ... "[20]

was not prepared to include the freedom of Britain's coloured communities from gross discrimination among the liberties and relationships which, he said, should be protected, as a matter of public policy, from "the bullying of property rights or the aggression of contractual claims or, most menacing of all today, the usurping power of associations." But surely these communities are made up of human beings made "in the image and likeness of God," the growth of whose spirits should be "the purpose of society and all its institutions" in exactly the same way as is applicable to other citizens?

Instead, in a lecture in 1969 on "Immigration and settlement: some general considerations"[21], Lord Radcliffe maintained that the law should intervene only in "situations in which the moral issue is generally regarded as beyond debate," whereas

prejudice and discrimination, in his view, "do not carry any association of moral ill-doing." So he himself felt free to describe our coloured communities as a "large alien wedge" which carries "a flag of strangeness and all that strangeness implies —" on the ground, as he put it, that they were immigrant workers, rather than immigrant settlers in the full sense. But this analysis, as Lester and Bindman pertinently remark, ignores the fact that discrimination, strangely enough, seems "likely to become more widespread against the children of Commonwealth immigrants, who are not a 'large alien wedge,' but born and educated in this country; and what is conspicuously absent is the simple but vital statement that they are entitled to equal rights on their merits, regardless of colour, origins or descent."[22] There is a world of difference between Lord Radcliffe's attitude and that of Roy Jenkins, who in 1967 observed that racial integration need not mean "the loss by immigrants of their own national characteristics and culture. I do not think that we need in this country a 'melting-pot,' which will turn everybody out in a common mould, as one of a series of carbon copies of someone's misplaced vision of the stereotyped Englishman."[23] Some immigrants will, of course, become assimilated in course of time to the culture of the land of their adoption; but this must be by their own choice, not by external pressure. Roy Jenkins is surely right in defining integration "not as a flattening process of assimilation but as equal opportunity accompanied by cultural diversity, in an atmosphere of mutual tolerance." It is this equality of opportunity that the Race Relations Acts were designed to promote; but it is of the utmost importance that cultural diversity should not develop into any form of apartheid —and, to that end, that the positive discrimination which will certainly be needed for a time should not be allowed to give rise to any lasting distinction between different sections of the population. In the words of the International Convention on the Elimination of All Forms of Racial Discrimination, such measures must not "lead to the maintenance of separate rights

for different racial groups."

But it is time to turn our attention specifically to the Race Relations Act 1976 (which was brought into operation, with very minor exceptions, only on June 13, 1977), and to the Sex Discrimination Act 1975, on which it was largely modelled. It is tempting, indeed, to comment on these Acts *seriatim*, as cogent examples of the way in which the generalities of the European Convention and its Protocols, and the more explicit precepts and provisions of the United Nations Declaration and the International Convention quoted above, need to be spelt out in detail, in so complex a subject as discrimination, by domestic legislation. But any such treatment would be too time-consuming and tedious for an occasion like this, so I must content myself with discussing, with suitable illustrations, some of the more important or interesting principles involved.

There can be no doubt whatever that both these Acts have profited greatly from criticisms[24], and practical experience, of the defects and weaknesses of the Race Relations Acts of 1965 and 1968, on which the Act of 1976 represents a significant advance. But the way had also been prepared by a series of studies of the facts and extent of racial disadvantage in employment and housing published by Political and Economic Planning (the first in 1967, and others between 1974 and 1976); a White Paper on Racial Discrimination in 1975[25]; and a widespread anxiety about the gravity of the situation and the need to avoid the kind of civil disorders seen in the United States. It is significant, moreover, that the White Paper stated unequivocally that

> "The Government's proposals are based on a clear recognition of the proposition that the overwhelming majority of the coloured population is here to stay, that a substantial and increasing proportion of that population belongs to this country, and that the time has come for a determined effort by Government, by industry and unions, and by ordinary men and women, to ensure fair play and equal

> treatment for all our people, regardless of their race, colour or national origins. Racial discrimination, and the remediable disadvantages experienced by sections of the community because of their colour or ethnic origins, are not only morally unacceptable, not only individual injustices for which there must be remedies, but also a form of economic and social waste which we as a society cannot afford."

As with all legislation about human rights, however, the Government was faced with three major problems. First, there was the basic problem of how far the law could, or should, encroach on the liberty of the individual citizen—in this case in regard to his freedom to choose with whom he wishes to associate and do business. Secondly, there was the perennial problem, to which reference has already been made, of how to draft the necessary legislation in terms that were at once adequately general and sufficiently precise. Thirdly, there was the additional problem—common to much legislation, but particularly acute in such a delicate subject as race or sex discrimination—of how the law could be made effective in practice. In the event, the Act of 1976 includes a number of innovations designed to extend the reach and sharpen the teeth of the preceding legislation, although there are still some grounds to fear that it could become, in the terms of a recent article in *The Times,* "another expensive blueprint for failure."[26]

In 1965 the original intention had been to make racial discrimination a criminal offence. But it would seldom be possible to prove such discrimination "beyond any reasonable doubt," and the punishment of the offender would do little to compensate the victim; so the Government was persuaded to change its mind about this, in the light of American experience. Instead of prescribing criminal sanctions, therefore, the Act of 1965 set up a Race Relations Board which was charged with the duty of investigating all complaints with the help of local conciliation committees. Unlike the Commissions which operated in the

United States (which could, where necessary, convene a public hearing and even order compensation or some other remedy, subject only to the right of the respondent to challenge this in the courts), the British Board had very limited powers. Under the 1965 Act, indeed, its local committees could intervene only on the basis of some specific complaint; and, if conciliation failed, the Board could do no more than report the matter to the Attorney-General or the Lord Advocate, as the case might be, and then only if the conduct complained of seemed likely to continue. Under the Act of 1968, however, the Board was given authority to begin investigations on its own initiative if it suspected that anyone was being discriminated against unlawfully, and to initiate civil proceedings, where conciliation had failed, for damages for the victim, for a declaration that the defendant had acted unlawfully, and for an injunction where a threat of repetition of the act could be shown to exist. But the Board had no power to compel the production of documents or information; the procedure it followed involved considerable delays; and there were other weaknesses. It was for the Board alone to take action, moreover, and the complainant himself could do nothing whatever except make his complaint.

It was precisely at these points that the White Paper *Racial Discrimination* proposed major reforms. The Race Relations Board and the Community Relations Commission established under the previous legislation were both to be replaced by a new body called the Race Relations Commission[27] — on the model of the Equal Opportunities Commission set up under the Sex Discrimination Act 1975 — which was to assume a much more strategic role and concern itself primarily with systems and practices which involve discrimination rather than the investigation of every specific complaint, whatever its nature, which they happened to receive. Instead, the right to take action in such cases, whether by way of complaint to an Industrial Tribunal or by civil proceedings in a county court or a sheriff court, was given for the first time to individual complainants; and the

Commission was required to give them advice and other assistance, at their discretion, only where "the case raises a question of principle"; where "it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved, or to any other matter to expect the applicant to deal with the matter unaided"; or "by reason of any other special consideration." In addition, special forms were made available, both from the two Commissions and from the Department of Employment and its local offices, by means of which an aggrieved party might put questions to the person he or she considered responsible, and on which the respondent might reply.[28]

The process of development in the Race Relations Acts of 1965, 1968 and 1976 (together with the Sex Discrimination Act of 1975, which had profited so greatly from the lessons learnt from the first two of these, and had itself paved the way for the third) throws considerable light on how the law can most effectively tackle the problem of attempting to eliminate, or at least to discourage and lessen, race and sex discrimination. It was natural, I think, that the initial impulse was to turn to the criminal law; but this idea, as we have seen, was soon discarded — except in regard to cases of incitement to racial hatred, with which I shall deal in my final lecture on "Human Rights and their Limitation: Freedom of Speech, Assembly and the Press." For the rest, persuasion, conciliation and the enlightenment of public opinion were, in 1968, thought likely to be far more effective; but this could not be left to the victims of discrimination themselves, and must, instead, be attempted by persons of standing and expertise. Even so, persuasion and conciliation are bound, at times, to come up against obduracy and entrenched self-interest, so sanctions of some kind must necessarily be available. Except for incitement to racial hatred, however, the civil remedies of damages and injunctions — together with declarations of unlawful conduct, and all the attendant publicity — were seen to be more appropriate than criminal prosecution.

The logic behind the more recent changes is equally illuminating. To quote Geoffrey Bindman:

> "The 1968 Act made conciliation the central theme, assuming racial discrimination to manifest itself mainly as an act committed deliberately by one individual against another which could best be remedied by persuading the discriminator to make good the wrong done to his victim ... But experience has shown that the analysis of the problem, and consequently the machinery to tackle it, is inadequate. The development of our understanding of the pathology of racial discrimination is well expressed as follows: 'In 1964 employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organisation ... Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of systems and effects rather than simply intentional wrongs ...'"[29]

As a result, the new Commission has been given the right to "undertake or assist (financially or otherwise)" such research or educational activities as appear necessary[30]; to issue codes of practice containing guidance about the elimination of discrimination in the field of employment and the promotion of equality of opportunity in that field between persons of different racial groups[31]; to conduct formal investigations[32], require the production of documentary information and *sub poena* witnesses[33]; to issue "non-discrimination" notices requiring persons to desist from specified conduct and to inform the Commission that they have done so[34], and to make investigations as to whether such notices have in fact been complied with[35]; and has been required to make annual reports.[36] It may also apply to a county court for an injunction, or to a sheriff court for an order, to restrain anyone, in suitable circumstances, from "persistent discrimination"[37]; it, alone, has the

right to institute proceedings in regard to discriminatory practices, discriminatory advertisements, or instructions or pressure to discriminate[38]; and it may assist an individual claimant where this seems necessary.[40] For the rest, the local conciliation committees have been abolished, since individual complainants are now expected, under both the Race Relations and the Sex Discrimination Acts, to make their complaints direct to an industrial tribunal in regard to questions of employment, and individual claimants to present their claims to a county court in England, or a sheriff court in Scotland, in regard to any other questions of allegedly unlawful discrimination.[41]

The major gain in these new arrangements is the much more wide-ranging and effective investigations into those practices and patterns of social and economic life that involve discrimination which, it is hoped, the Commission for Racial Equality and the Equal Opportunities Commission will now be able to make. Such investigations could well reveal areas of discrimination which would have remained wholly unmasked by enquiries based only on specific complaints, for much discrimination may in fact be practised of which the victims themselves are totally unaware. Another major advance is the concept of indirect discrimination (to which we must soon turn); for the Commissions are not limited to the investigation of situations where there is some particular reason to suspect unfair discrimination, but have every right to ask for full information about any companies, industries or other forms of employment in which it would appear, for example, that the number of persons from minority groups employed is out of proportion to their strength in the local population as a whole. A further obvious gain is that the individual complainant or claimant, as we have seen, has for the first time been given the right to take action on his own initiative, rather than being exclusively dependent on the good offices of the former Race Relations Board; for it "may well be time," as Geoffrey Bindman puts it, "to end the 'paternalism' which denies the victim of discrimination the right to take his own case

to court."[42] But it must be recognised that there are corresponding dangers, both from the point of view of the individual victim of discrimination and of the Commission itself. The victim, for his part, may well find that his adult status in this matter has been bought at too high a price; for whereas, in the past, all he had to do was to make his complaint to the Race Relations Board, which then assumed full responsibility (without cost to him, or even the need for any further action), under the new Act he will not normally have the benefit of the skill and experience of the Board's conciliation officers, and he will find that legal aid is not available for a complaint to an industrial tribunal, and may not always be easy to obtain even in regard to civil litigation. So it is greatly to be hoped that the Commission will be as generous as possible in giving assistance to all those cases in which the Act makes this allowable. Happily, a letter published in *The Times* on August 20, 1977, from the Chairman of the Commission shows that he is well aware that "there is a risk that, with the changed procedures under the Race Relations Act 1976, ordinary individuals may find themselves less well placed to get their grievances redressed," and adds: "but the new Commission has very wide discretion to help" and "its Complaints Committee will make maximum use of this discretion. Among the first series of applications considered, we have agreed to provide full legal representation in no less than half the cases." But this, in its turn, serves to emphasise what is, beyond question, the major danger in regard to the work of the Commission: that it may not have the money, the personnel, or even the sustained determination to tackle an acute (and very complex) social problem on the scale, and with the vigour, that the situation demands. The 1976 Act has, indeed, provided the basic "legal armoury"; what now remains is for the Commission to deploy this with both courage and discretion, and for the Government and the public to combat the many-sided causes and effects of disadvantage by action that lies beyond the sphere of legislation and litigation (although the provisions in regard to

what is called "positive discrimination" — to which we must soon revert — serve, in part, to point the way).

The scope of the enquiries and investigations open to the Commission for Racial Equality and the Equal Opportunities Commission is, however, much greater than those within the competence of the old Race Relations Board, by reason of the fact that the definition of discrimination is far wider than it was under the previous legislation. What may be termed *direct* discrimination is still, of course, basically the same: that is, for one person to treat another, on racial (or sexual) grounds, "less favourably than he treats or would treat other persons."[43] But the Sex Discrimination Act and the new Race Relations Act have gone much further than this and include provisions which prohibit what may be called *indirect* discrimination: that is, to apply to another person a requirement or condition such that the proportion of persons of that other's race or sex who can comply with it is "considerably smaller than the proportion of persons not of that racial group" or sex "who can comply with it," and which cannot be shown "to be justifiable irrespective of the colour, race, nationality or ethnic or national origins," or sex, of that other person.[44] It is noteworthy, too, that under the Race Relations Act 1976 any argument about treatment which is "separate but equal" is explicitly precluded by the provision that "for the purposes of this Act, segregating a person from other persons on racial grounds is treating him less favourably than they are treated."[45] It should also be observed that under the Sex Discrimination Act (most of which is drafted in terms of discrimination against women) it is expressly provided that the relevant provisions "shall be treated as applying equally to men, and for that purpose shall have effect with such modifications as are requisite."[46] Both Acts, moreover, prohibit discrimination by way of victimisation, which consists in treating anyone adversely because he or she has previously brought proceedings, given evidence or information, or "otherwise done anything under or by reference to" this legislation.[47]

Comments on these provisions must be kept to a minimum. Under direct discrimination, for example, it is not necessary to prove that the discriminator openly expressed any intention to discriminate on racial grounds, since it would often be possible to infer a discriminatory intent from all the circumstances of the case. It is irrelevant, moreover, whether the discriminator is able to show that he himself has no feelings in this matter. Discrimination is a breach of the law whatever its reason: personal prejudice, apprehension of the reactions of customers or shareholders, the placation of other employees, or anything else. Under the provision regarding indirect discrimination, on the other hand, the presence of an intention to discriminate is indeed relevant, but only in regard to compensation or damages. Questions will also inevitably arise, of course, in regard to the meaning of a "considerably smaller" proportion of persons[48], and those circumstances in which employment may "justifiably" be restricted to those of a particular size[49], appearance[50], national origin[51], or competence in some language[52], despite any indirect racial repercussions, because this is in some genuine sense inherent in the nature of the job, association or activity concerned. It was in this context, indeed, that a clash occurred between the Lords and the Commons with regard to the question of where the burden of proof should lie. For indirect discrimination to be established, it was stated, five primary issues of fact had to be proved: whether a condition or requirement had been applied to the complainant, whether the complainant had failed to comply with it, whether this failure had operated to the complainant's detriment, whether the condition was such that the proportion of those of his racial group who could comply was considerably smaller than that of those not in his racial group, and whether the condition or requirement was justifiable irrespective of any such consideration. A Lords' amendment had insisted that the onus of proof should be placed on the complainant in regard to all five issues of fact, whereas the Bill as it had left the Commons had laid the

onus of proof on the complainant in regard to the first four issues, but provided that it should pass to the respondent in regard to the fifth, since this concerned facts or matters at issue which were peculiarly within his knowledge. Rightly, in my opinion, the view of the Commons prevailed.

It is also noteworthy that, in the Committee Stage of the 1968 Race Relations Bill, Mr. Quintin Hogg (as he then was) tabled an amendment which would have extended the class of persons protected against discrimination still further, by adopting the definition contained in the Universal Declaration of Human Rights: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; and a still more relevant option for this country, for the reasons I gave in my last lecture, would have been the almost identical definition in the European Convention for the Protection of Human Rights. In the context of a Bill of Rights such a suggestion would, indeed, have been wholly appropriate; but the legislation under discussion was the Race Relations Act of 1968 (although it might almost equally well have been the Act of 1976, except for the fact that discrimination on sex grounds had been explicitly dealt with in the previous year). It has often been remarked, of course, that the omission of the words language and religion, in particular, may limit the scope of this Act; but it seems probable that the provisions regarding indirect discrimination on racial grounds will largely cover any discrimination on the basis of either language or religion[53] which cannot claim some reasonable justification. To refuse employment to Sikhs because they refuse, on religious grounds, to be clean-shaven would, for example, seem totally unjustifiable; but a much more plausible argument could, in principle, be made out for insisting that they must not ride motor-cycles without crash helmets — on the grounds that this may have serious repercussions for the other party to an accident (and, indeed, for the community as a whole in regard to the cost of medical treatment, in both money and resources, under the National Health Service).

Similarly, a ruling in *Ahmad* v. *Inner London Education Authority*[54] that a Muslim teacher might not demand time off duty to attend Friday prayers at a mosque, unless he was willing to take on some other duty on behalf of those who would have to "stand in" for him, would not have seemed to me unreasonable.[55] But while those who drafted the 1976 Act saw no need to add religion or language to the list of grounds summed up in the term "racial grounds", they did find it necessary to add nationality to the phrase ethnic or national origin (which they retained from the previous legislation) because the House of Lords had decided, in *London Borough of Ealing* v. *Race Relations Board*[56] that nationality in the sense of citizenship was not synonymous with national origin — so it is now clear that discrimination against someone who has retained his alien citizenship does fall within the scope of the new Act (quite apart from any discrimination against EEC nationals which is forbidden under the law of the European Community).

There are still some exceptions which are allowed under the Race Relations Act 1976, but these are fewer than under the previous legislation — and some of these exceptions are common to the Sex Discrimination Act, too. Thus neither race nor sex discrimination by an employer (other than by way of victimisation) is unlawful in relation to a job where being of a particular racial group, or being male or female, is a "genuine occupational qualification"[57]; and the same principle applies, under the Sex Discrimination Act, where the job needs to be held by a man (or woman) "to preserve decency or privacy," the details of which (in terms of physical contact, state of undress, sanitary facilities and living accommodation, etc.) are specifically enumerated.[58] Some of the examples of "genuine occupational qualification" listed in the Race Relations Act are "where the job involves participation in a dramatic performance or other entertainment in a capacity for which a person of that racial group is required for reasons of authenticity"; where it involves acting as an artist's or photographic model under

similar conditions; and where "the holder of the job provides persons of that racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group."[59] Where, moreover, "some only of the duties of the job" require this special qualification the exception will still apply unless, at the time when the vacancy is filled, "the employer already has employees of the racial group in question who are capable of carrying out the relevant duties," whom it would be reasonable to employ on those duties, and "whose numbers are sufficient to meet the employer's likely requirements in respect of those duties without undue inconvenience."[60] Similar provisions about employees whose duties, or part of whose duties, require that they should be either male or female are also included, almost verbatim, in the Sex Discrimination Act.[61]

All this makes perfectly good sense when considered in the abstract. But it requires little imagination to picture how difficult it would be for an industrial tribunal to decide whether an employer, accused of unlawful discrimination in such circumstances, could in fact, "without undue inconvenience," have got some other employee to perform those duties requiring some "genuine occupational qualification" on account of which he recruited, transferred or promoted some particular individual. No wonder, then, that I.A. Macdonald writes:

> "One major worry remains: the effectiveness of the individual remedy ... Experience of the Race Relations Board under the 1968 Act suggests that only the most careful and painstaking investigation is able to obtain the necessary evidence, except in those relatively few cases where the discrimination is open and blatant. Few individual complainants are likely to have the time, resources or experience to carry out such enquiries. The questionnaire procedure, while helpful, is clearly not the answer. And it is not at all clear whether the Commission for Racial

> Equality ... will have the resources or inclination to do the job for them.''[62]

Further exceptions which call for little comment, under the Race Relations Act, are those which concern employment intended to provide training in skills to be exercised outside Great Britain[63], and seamen recruited abroad[64] — and, under the Sex Discrimination Act, in regard to jobs that must be done by a man because the laws in this country regulating the employment of women, or the laws or customs of other countries where the work has to be done[65], preclude any alternative. But it is noteworthy in passing that the Sex Discrimination Act does not apply to service in the armed forces, in any of the women's services administered by the Defence Council, or in regard to employment in which the employee may be required to serve in support of the armed services[66]; that its prohibitions do apply to service with the police, except in so far as any regulations about height or uniform are concerned (and that the same exception in regard to height is also applicable to prison officers)[67]; that it does not apply to ''employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers'' [68]; that the effect of section 20 is that the legal bar to men becoming midwives is now removed, but that discrimination in the selection, promotion, transfer or training of persons as midwives is not, for that reason, unlawful; and that the effect of section 21 is that it is no longer illegal for a woman to be employed underground in a disused mine, or in a job which involves only occasional duties underground even in an active mine. Exceptions are also made, *inter alia*, for charitable instruments which contain provisions for the conferment of benefits on members of one sex only[69], for competitive sport[70], and for insurance policies based on actuarial data.[71]

The chief significance of many of these provisions, in so far as

these lectures are concerned, is the complexity of the details into which the draftsmen have felt compelled to go. Instead of leaving it to the courts to give appropriate effect, in a wide variety of circumstances, to the broad principles of a Bill of Rights, for example, they have done their best, in typical British fashion, to prescribe in advance, as precisely as possible, what is or is not lawful. But it is of even greater interest, for our purposes, to note the points in which a difficult and controversial line has had to be drawn between the general policy applicable to questions of employment, education, housing or other facilities in terms of the community at large, on the one hand, and the preservation of individual liberty of choice, in more personal and domestic spheres of life and action, on the other. Thus the rules against race or sex discrimination (other than by way of victimisation) in regard to employment are not applicable to employment in a private household — and under the Sex Discrimination Act this exception is extended to cover businesses in which the number of persons employed do not exceed five[72] — although it is noteworthy that the exceptions in regard to private houses do not apply to contract workers (such as employees of some agency sent to work in the house[73]) nor do they cover the sort of dismissal classified as unfair under the Trade Union and Labour Relations Act 1974. Where a partnership in a company is concerned, moreover, the prohibition of discrimination does not apply where the number of partners is less than six.[74]

Both Acts, again, make it "unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services," whether on grounds of race or sex, and whether the discrimination is direct, indirect or by way of victimisation. Examples of such facilities and services include access to any place which members of the public or a section of the public are permitted to enter; facilities by way of banking,

insurance, grants, loans, credit or finance; facilities for education, entertainment, recreation, refreshment, transport or travel; and the services of any profession or trade, etc.[75] Private clubs represent a particularly interesting problem in this context. If they have a constitution under which membership is based on personal selection they fall outside the provisions applicable to those who provide facilities or services "to the public or any section of the public," since the House of Lords decided, in *Charter* v. *Race Relations Board*[76], that the members of such a club do not constitute a section of the public under the terms of the 1968 Act. So the 1976 Act includes a special section relevant to such clubs[77] which makes racial discrimination in the election of members, or their subsequent treatment, unlawful if the club concerned has 25 or more members — but with a specific exception in favour of clubs or associations whose main object is to enable the "benefits of membership" to be enjoyed by persons of a particular racial or ethnic group, provided always that this is "defined otherwise than by colour."[78] This means that clubs such as the Caledonian Club, the London Scottish Rugby Football Club, or a club for West Indians, for example, may continue to confine their membership to those who pass the relevant racial or ethnic test, but that this would not apply to any club which made the criterion that of colour. In other words, the Act is so worded as to allow private clubs to continue to elect their members on the basis of their personal acceptability, but with two exceptions (both of which are clearly on grounds of public policy): first, that in any ordinary social club this should not be based only on racial discrimination; and secondly that, in a club whose primary purpose is to bring together the members of some particular race, the criterion of acceptability must not be defined by reference to colour. But it would obviously be exceedingly difficult to prove that an individual applicant for membership had been turned down specifically because of the racial or ethnic group to which he belonged, rather than because of his personality, behaviour or

some other criterion — to which his racial or ethnic origin might, of course, have contributed. It would normally be only on the basis of a *pattern* of conduct in regard to applications for membership, or some explicit statement about an individual applicant, that unlawful discrimination could be proved. Provisions against discrimination in regard to the disposal or occupation of premises do not apply, moreover, to the disposal of premises by an owner-occupier provided he does not resort either to an agent or to advertisement[79] — and there is a further exemption from the application of these provisions in favour of those who provide accommodation in "small premises" in which the landlord or some near relative of his intends to continue to reside and the accommodation is partially shared.[80]

The law in regard to facilities for education can be summed up in the statement that under the Sex Discrimination Act they must be "equal" but (in contrast to the Race Relations Act) may be "separate." Thus discrimination in admissions, the acceptance or refusal of applicants, and the treatment of those who have been admitted, is forbidden; but a school or college may cater for one sex only — whether throughout, or in so far as its boarding facilities, etc., are concerned. It is permissible, moreover, for such a school to admit a few members of the other sex in exceptional circumstances or for particular courses. If, however, a previously one-sex college at a University decides to admit undergraduate students of the other sex, then it is unlawful to operate a quota-system[81] (*e.g.* the admission of women to fill 25 per cent. of the places in a previously men's college, as was proposed in Oxford — by agreement with, and largely in the interests of, the women's colleges). But such is the difficulty of proving on what precise grounds one candidate for admission is accepted and another rejected, that it may, of course, still be possible to maintain something resembling a quota-system in practice; but any statement to that effect, or any regular pattern in the numbers of respective admissions, would clearly constitute

an infringement of the provisions of the Act — except under the terms of a "transitional exemption."[82] It is, however, allowable for a single-sex college to admit only postgraduate students of the other sex; and further education courses in physical training, or for teachers of physical training, are also treated as an exception. But any explicit principle (such as is certainly not unknown) that a college should discriminate, even marginally, in favour of women in the admission of would-be scientists, for example (on the grounds that girls' schools have in the past been apt to neglect this subject somewhat, and women scientists are in distinctly short supply), would not seem to fall within the terms of the provision providing for "discriminatory training" by certain bodies in section 47 of the Act.

The Race Relations Act 1976 appears — rightly, in my view — to make much more provision for "positive discrimination" or "discrimination in reverse," for Section 35 states unequivocally that "Nothing in Parts II-IV shall render unlawful any act done in affording persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare or any ancillary benefit." The intention behind the whole concept of positive discrimination is not, of course, to put disadvantaged persons in posts for which they are not adequately qualified — although there is, at times, an understandable tendency to do this (and I have even heard that in some American universities a candidate for a place or post who is both black and a woman has an enormous pull over any competitors!).[83] But this, if it really became a matter of policy, would be wrong in principle and self-defeating in practice, for it would make an underprivileged class into a privileged class. The true rationale of positive discrimination is to provide such help, extra tuition or other facilities as will enable those who have been denied a fair start in life to compete with others on as equal terms as possible. I well remember how my son, when President of the Cambridge Union, chose for his Presidential Debate the motion that

"Equality of opportunity is not enough." Nor is it. Only a starry-eyed visionary, of course, can think in terms of complete egalitarianism — for, quite apart from any question of what money can buy, it is impossible to equate a home where education is valued, industry encouraged and ideals fostered with one in which material gain is the sole criterion and an obsession with television makes study almost impossible. But every feasible effort should be made to give a new start and new hope to those who might otherwise resign themselves to the inevitability of remaining at the very bottom of the social and economic ladder.

It is vital, of course, that any provision for positive discrimination should be kept under constant review and not allowed to erect new barriers. That is why the International Convention on the Elimination of All Forms of Racial Discrimination insists that such measures must not "lead to the maintenance of separate rights for different racial groups."[84] But certain racial groups have suffered from so much adverse discrimination in the past that something *must* be done, on a temporary basis, to redress the balance. As Bishop David Sheppard puts it:

> "People, including Church members, sometimes grumble to me about situations in which they feel that discrimination is made in favour of black people. If it is sometimes the case, we should not apologise for it, but explain why it is necessary. Underlying this is a debate about justice. We talk a great deal about justice without making plain what we mean by the word. I want to argue that there is a distinctively Biblical view of righteousness, justice ... It is not epitomised by the blind-eyed Goddess of justice. She properly stands over the Law Courts. She does not look to see if you or I have greater needs; she is blind. She dispenses even-handed justice. But, in the Bible, the righteousness of God is not blind: the living God has His eyes wide open: He is active on behalf of those in special need ... If we are to

> reflect the character of the living, eyes-wide-open God, we should argue unashamedly for policies which will spend much more money, give much more resources, to those inner-city areas where black people largely live."[85]

Beyond question, somewhat the same argument could have been used, not very long ago, about women, who have had a very raw deal in most countries at some times and in some countries at all times.[86] But today these remarks apply particularly to racial minorities.

Reference to one other point must be kept to a minimum, although it opens up yet another sphere in which social policy, as expressed in the law of the land, may clash with what many regard as basic human rights. At the beginning of this lecture I referred to Protocol No. 1 of 1952 to the European Convention of Human Rights, which declares that: "In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." But it seems somewhat doubtful, to say the least, how far this can be reconciled with a monolithic system of state-controlled education such as is often called for in this country. That the public schools, for example, have proved socially divisive is, I think, unquestionable; but few would deny that this divisiveness is much less obvious or significant today than it was in the past, or that it could not be still further diminished. It is axiomatic that our aim should be to provide the best possible system of education for everyone — as also, for that matter, the best possible system of legal aid for all those who need it. But does that mean that *any* choice of either teachers or lawyers must, or should, be completely precluded? It seems to me that to make an inevitably unsuccessful[87] attempt to enforce complete educational egalitarianism, by the imposition of what would be a total State monopoly, would open the door to an ideological, or even political, dictatorship which is

potentially far more dangerous.

Finally, it is important to remember that the chief purpose of legislation about race and sex discrimination is not to bring offenders to court but to provide a legal framework which will facilitate and encourage a fundamental change of attitude and practice. The Race Relations Act and the Sex Discrimination Act both constitute, primarily, unequivocal declarations of public policy. As such, they serve to give support to those who do not wish to discriminate, but who might otherwise feel compelled, by social pressure, to do so. Where discrimination in fact exists, the principal method of redress will, no doubt, continue to be through the intervention of the Commission for Racial Equality or the Equal Opportunities Commission by way of enquiry, exhortation and instructions. The fact that the former is no longer under a duty to investigate *all* complaints should make it possible for it to do a much better job in regard to those of strategic significance, although the demise of the local conciliation committees may well prove a considerable loss. But it is also essential that the law should have teeth; so the two Commissions must be both able and willing to take legal action where this is necessary, and the individual who feels himself to be the victim of discrimination must have a personal remedy. As the former Race Relations Board wrote in its first annual report, "A law thus provides for the peaceful and orderly adjustment of grievances and the release of tensions" and also, in course of time, tends to reduce prejudice "by discouraging the behaviour in which prejudice finds expression."

If this is to take place, it is clearly essential that racial and ethnic minorities should not abuse the hospitality of the land of their adoption. But the demand for full equality of treatment and opportunity, as we have seen, does not necessarily mean that they must lose their distinctive identity, any more than the corresponding demand by women for equality of treatment and opportunity need, or should, involve any suppression of their distinctive qualities. To reject any policy of apartheid in race

relations is not to deny the fact, or demand the elimination, of cultural diversity, any more than to repudiate male dominance and privilege is to ignore the essential complementarity, rather than identity, of the sexes. It would be a dull world — and, as I see it, totally contrary to the Creator's plan and purpose — if an attempt were made to reduce every individual to a unisex stereotype of undifferentiated humanity. In regard both to race and sex the problem is how to achieve the right balance: a state of society in which every individual person can develop his or her distinctive qualities, talents and potentialities to the greatest possible degree.

Notes

1 Speech in Bangalore in 1968.
2 This Protocol has not yet been ratified by the U.K.
3 [1976] Q.B. 198.
4 *Cf. Race and Law*, by Anthony Lester and Geoffrey Bindman (Penguin Books, 1972).
5 [1966] 2 Q.B. 633 (C.A.).
6 The Race Relations Act 1965.
7 *Weinberger* v. *Inglis* [1919] A.C. 606.
8 Lester and Bindman, *op. cit.* p. 52.
9 *Cf.* I.A. Macdonald, *Race Relations — the new Law*, (Butterworths, London, 1977), p. 2.
10 I.A. Macdonald, *op. cit.* p. 3.
11 *Race and Law*, p. 375.
12 White Paper, *Equality for Women,* Cmnd. 5724 (1975).
13 *Op. cit.* p. 24.
14 *Op. cit.* p. 375.
15 *Op. cit.* pp. 13 *et seq.*
16 Although there is certainly evidence in the Immigration Acts of 1962 and 1971, and in official policy in regard to work permits, to support the charge of discrimination.
17 A point which Lester and Bindman in no way denied.
18 *Op. cit.* pp. 69 *et seq.*
19 *Cf. op. cit.* pp. 65 *et seq.*

20 *Cf.* pp. 65 *et seq.* — as quoted, in part, by Lester and Bindman, *op. cit.* pp. 69 *et seq.*
21 Published in *Race* (Vol. 11, no. 1), pp. 35-51.
22 *Op. cit.* p. 90.
23 Quoted by Lester and Bindman, *op. cit.* p. 77.
24 Notably in the Street Report on Anti-Discrimination Legislation, 1967 (which was prepared, of course, only on the basis of the 1965 Act).
25 Cmnd. 6234 (1975).
26 August 17, 1977.
27 A name subsequently changed to the Commission for Racial Equality.
28 SS. 65 and 66 of the Race Relations Act, and SS. 74 and 75 of the Sex Discrimination Act.
29 "The Changes in the Law," in *Racial Discrimination: A guide to the Government's White Paper* (The Runnymede Trust, 1975), p. 8 — with a quotation from a report by the United States Senate Committee on Labour and Public Welfare. But *cf.* also in this context Geoffrey Bindman's two articles "The Law and Racial Discrimination: Third Thoughts," in *British Journal of Law and Society* (Summer 1976, pp. 110 *et seq.*) and "Law and Racial Discrimination: the New Procedures," in *New Community* (Autumn 1975, pp. 284 *et seq.*). I am much indebted to him for the insights in all these articles and also for personal advice.
30 S. 45 (*cf.* S. 54 of the Sex Discrimination Act).
31 S. 47.
32 S. 48 (*cf.* S. 57 of the Sex Discrimination Act).
33 S. 50 (*cf.* S. 59 of the Sex Discrimination Act).
34 S. 58.
35 S. 60
36 SS. 46 and 51 (*cf.* SS. 58 and 60 of the Sex Discrimination Act).
37 S. 62.
38 S. 63.
40 S. 66.
41 *Cf.* SS. 53-57 and 62-66, respectively.
42 "The Changes in the Law," *op. cit.* p. 13.
43 S. 1(1)(*a*) of both Acts.
44 S. 1(1)(*b*) of both Acts.
45 *Cf.* S. 1(2).
46 *Cf.* S. 3 and S. 1(2).

47 S. 2 of both Acts.
48 *Cf.* the cases of *L.B. Steel* and *B.M. Price* before the Employment Appeal Tribunal under the Sex Discrimination Act. The point of primary interest in the latter case is whether a condition with which a "considerably smaller proportion" of women can comply should be construed in terms of theoretical or practical possibility. The former case turned, in part, on whether a particular condition is necessary or merely convenient, and whether the continuing effects of past (and at that time lawful) discrimination could be remedied by some different requirement. (I.R.L.R., 1977, p. 288 and pp. 291 *et seq.*, respectively).
49 *e.g.* in recruitment for the police.
50 *e.g.* in regard to waiters in a Chinese restaurant.
51 *e.g.* in regard to eligibility for the London Scottish Rugby Football Club.
52 *e.g.* in regard to proof reading, teaching, etc.
53 Although it is noteworthy that in Northern Ireland, to which this Act does not apply, the Fair Employment (Northern Ireland) Act 1976 makes explicit provisions regarding persons of different religious beliefs, and that protection from discrimination on the grounds of religious belief or practice is provided elsewhere in the U.K. by the Education Act 1944 (S. 30).
54 Court of Appeal, March 22. 1977 (unreported).
55 But to hold that he must take a reduced salary seems to me a very different matter.
56 [1972] A.C. 342.
57 S. 5(1) and (2) and S. 7(1) and 2(*d*) and (*e*), respectively.
58 S. 7(2)(*a*), (*b*) and (*c*).
59 S. 5(2).
60 S. 5(3) and (4).
61 S. 7(3) and (4).
62 *Op. cit.* p. 24.
63 S. 6.
64 S. 9.
65 S. 7(2)(*f*) and (*g*).
66 S. 85(4) and (6).
67 SS. 17 and 18.
68 S. 19(1).
69 S. 43.
70 S. 44.

71 S. 45.
72 *Cf.* SS. 4(3) and 6(3), respectively.
73 SS. 7 and 9, respectively.
74 SS. 10 and 11, respectively.
75 SS. 20 and 29, respectively.
76 [1973] A.C. 868.
77 S. 25.
78 S. 26.
79 SS. 21 and 30, respectively.
80 SS. 22 and 31, respectively.
81 But presumably this would not apply if it was part of certain College Charters, since S. 51 of the Sex Discrimination Act excepts from its scope any acts done in order to comply with statutory authority. *Cf.* S. 41 of the Race Relations Act 1976, and the question of fees payable by foreign students.
82 *Cf.* SS. 25, 26 and 27.
83 *Cf.* the case of Allan Bakke, a white student who claims that the fact that his admission to the medical school of the University of California at Davis was twice rejected, although black applicants with lower marks were admitted, was contrary to the equal rights provision in the Fourteenth Amendment. His claim was upheld by the California courts, but an appeal by the University to the Supreme Court of the U.S.A. is still pending.
84 S. 1(4). See p. 63, above.
85 *The New Black Presence in Britain: A Christian Scrutiny.* (A Statement by the British Council of Churches' Working Party on Britain as a Multi-Racial Society), pp. 5 *et seq.*
86 My treatment of sex discrimination has been severely restricted by the scope of this lecture. Thus I have made no reference to the Equal Pay Act 1970, or to the obvious fact that there can be no real equality of the sexes in this country until our law of matrimonial property has been radically reformed and the problem of remunerating women kept from outside employment by the care of children, etc., has been solved.
87 Because so much is involved: backward children, nervous children, exceptionally gifted children, and children who need to be sent to a boarding school — besides children whose parents desire some special religious, ideological or educational emphasis.

Lecture Four

HUMAN RIGHTS AND THEIR LIMITATION: FREEDOM OF SPEECH, ASSEMBLY AND THE PRESS

IN my last lecture I tried to illustrate some of the tensions between liberty and law which arise, in any human society, not so much from the need to restrain man's proclivity to physical violence, as from his innate tendency to indulge in various forms of discrimination. When expressed in terms of human rights, the tension here is between the right to freedom of association, in the widest connotation of that term (that is, the right to choose with whom one will work, be educated or do business) and the right to equality of treatment and opportunity (not only before the law, but in access to public facilities and services, to education and employment); or, in more general and abstract terms, the tension between personal freedom and social and economic justice. We saw, moreover, that in such a complex question as that of race or sex discrimination the generalities of a Bill of Rights, however necessary such a Bill may be, need to be spelt out in detailed legislation such as our Race Relations and Sex Discrimination Acts. But there is one aspect of the recent legislation in regard to race relations which I deliberately omitted from my last lecture: namely, the offence of "incitement to racial hatred" created by the Race Relations Act of 1965 and somewhat extended by that of 1976. The chief reason for this omission was not the fact that under the Act of 1976 (unlike that of 1965) this offence was wholly incorporated into the Public Order Act 1936, and thus excluded from the scope of the legislation specifically devoted to race relations, but because any discussion of this offence falls more naturally, as I see it, under a general consideration of the right to freedom of speech, assembly and the Press than under that of freedom from discrimination as such.

Even under the Act of 1965 there was in principle a clear

distinction between its anti-discrimination provisions and this new offence of publishing or distributing written matter, or using words in any public place or meeting, which are "threatening, abusive or insulting" and likely to stir up racial hatred — with the intent that this should happen. This provision is much more closely related to section 5 of the Theatres Act 1968[1], which makes it an offence for anyone to present or direct a public performance of a play which involves the use of threatening, abusive or insulting words, with the deliberate intention of stirring up racial hatred, if that performance, taken as a whole, is likely to have such an effect. In the Race Relations Act 1965, moreover, section 6, which created this offence, was immediately followed by a section which amended section 5 of the Public Order Act 1936, by substituting for it the words:

> "Any person who in any public place or at any public meeting —
>
> (a) uses threatening, abusive or insulting words or behaviour, or
>
> (b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting,
>
> with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence."

When, moreover, the Race Relations Act 1976 completely repealed that of 1965, this had no effect on section 5 of the Public Order Act 1936, which still (under the Interpretation Act 1889) stands in its amended form. But the distinction between the sections in the Act of 1976 designed to prevent racial discrimination and the provision regarding incitement to racial hatred (in all those cases where this is not "with intent to provoke a breach of the peace" or in circumstances likely to cause such a breach) has been made even more obvious, as we have seen, by the total incorporation of this provision in

the Public Order Act 1936, as a new section 5A. There is, moreover, a major change in the wording of this new section when compared with the otherwise very similar provision in the Race Relations Act of 1965; for now the publication or distribution of written matter, or the use of words in any public place or meeting, which are "threatening, abusive or insulting, in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question," constitutes a criminal offence regardless or not of whether the accused had the *intention* that this should be the result.[2]

The reason for this omission of any reference to intent in the new law can almost certainly be found in the remark of Lord Justice Scarman (as he then was), in his report on the recent disorders in Red Lion Square, that section 6 of the 1965 Act was "merely an embarrassment to the police. Hedged about with restrictions (proof of intent, requirement of the Attorney-General's consent) it is useless to a policeman on the street." To make it an effective sanction it needed "radical amendment," particularly in relation to its "formulation of the intent to be proved before an offence can be established."[3] It was, however, clearly necessary to provide that the new section should not apply to the publication or distribution of "a fair and accurate report of proceedings publicly heard before any court or tribunal exercising judicial authority" which is published contemporaneously with those proceedings or as soon after them as is reasonably practicable, or of any proceedings in Parliament[4]; and also that in any alleged offence under this section "it shall be a defence for the accused to prove that he was not aware of the content of the written matter in question and neither suspected nor had reason to suspect it of being threatening, abusive or insulting."[5] A further subsection, moreover, states that the words publish and distribute in this section "mean publish or distribute to the public at large or to any section of the public not consisting exclusively of members of an association of which the

person publishing or distributing is a member," and that written matter includes "any writing, sign or visible representation[6]" —such as a placard, for instance. But it is important to note that this section is double-edged, for it can be used both in regard to an Englishman who makes a threatening, abusive or insulting speech (calling, for example, for the repatriation of black immigrants in Britain) that gives rise, or is likely to give rise, to hatred against them, and also in regard to a threatening, abusive or insulting speech by a West Indian that accuses white people of racial oppression in a way which causes, or is likely to cause, hatred against them by immigrant communities.

It is also noteworthy that a deliberate intention to stir up racial hatred is still an essential element in an offence under section 5 of the Theatres Act 1968, and that the consent of the Attorney-General is still necessary before legal proceedings are brought either under that Act or under section 5A of the Public Order Act. In principle, Lord Scarman's remarks about the need to prove that the use of threatening, abusive or insulting words which are likely to cause racial hatred were uttered with that deliberate intention would seem to be equally relevant to the Theatres Act—except, of course, for his reference to "the policeman on the street"; and the requirement that a prosecution must not be brought under either Act without the Attorney-General's consent may not only prove an embarrassment to the police, but may even, in some circumstances, make the law a dead letter. It is always dangerous to make the enforcement of the law completely dependent on the fiat of the executive; but in the context of the Public Order Act this requirement may at least be seen as testifying to the importance of preserving the basic right to freedom of speech and assembly from any unnecessary limitation. All the same, some have questioned how effective the new section is likely to prove in practice. The stated aim of the provision about incitement to racial hatred is to reduce racial tension, but all it is likely to do, in I.A. Macdonald's opinion, "is to change the style of racialist propaganda, make it less

blatantly bigoted, and therefore more respectable. Since the underlying assumptions of most racialists are firmly enshrined in the Immigration Act, 1971, all kinds of racist propaganda can be dressed up as proposals for the amendment of that Act or for further restrictions to be made under it. Until that legislation is totally repealed, and the assumptions on which it is based are relegated to the scrap-heap of history, racial tension will continue to thrive and no amount of tinkering around with this or that incitement provision will make any impact at all."[7]

I think this is an over-statement, although I agree that the terms of the Immigration Act 1971 stand in urgent need of amendment.[8] It is vital, as I see it, that as clear a distinction as possible should always be made between a serious and responsible discussion of any question, whatever it may be, and a cheap, vulgar and provocative exploitation of the subject concerned. This distinction is by no means limited to the sphere of race relations, for it underlies not only much of the ground covered by the Public Order Act, but also by the common law offence of criminal libel (defamatory, seditious, blasphemous or obscene), and even, to some extent, the law regarding civil defamation. But before we discuss any of these — or, indeed, other restrictions on freedom of speech and the Press such as contempt of court, the Official Secrets Acts, or the Obscene Publications Act — we must pause to emphasise the vital importance of the "fundamental human right" on which such heterogeneous limitations have been put.

It may at first sight seem surprising that in the American Bill of Rights of 1791 the very first Amendment to the Constitution declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." In the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, on the other hand, the right to "freedom of

thought, conscience and religion," to "freedom of expression," and to "freedom of peaceful assembly" come comparatively late in the list of fundamental freedoms[9] — as is also true of the Universal Declaration of Human Rights 1948, and the United Nations Covenant on Civil and Political Rights 1966.[10] It is, of course, natural enough that the European Convention, for example, should accord priority of mention to the right to life and to freedom from torture and slavery, to liberty and security of the person, to justice before the courts, and to respect for private and family life[11]; and the order in which the Amendments are placed in the American Bill of Rights may be largely fortuitous and may, in any case, be said to presuppose the provision in the American Constitution that among the inalienable rights with which "all men ... are endowed by their Creator" are "Life, Liberty and the pursuit of Happiness." Yet all down the centuries men have been prepared to give their lives, and put their liberty in jeopardy, for freedom of religion, speech and assembly; and there is much truth in the assertion that all our other liberties depend, to a considerable extent, on the freedom of the Press. Nor is the reason for this far to seek: for the preservation of our liberties, the scrutiny of our laws and the maintenance of justice all demand constant vigilance, and the public cannot exercise that very necessary function unless they are kept informed by a vigilant, courageous and independent Press.

It is largely thanks to the First Amendment that the media in the United States enjoy a freedom which is almost certainly not accorded them anywhere else and is the envy of reporters and journalists in every other country. But this freedom also provides a striking illustration of the way in which a short and very general clause in a Bill of Rights can be extended and applied by the judiciary — as a recent article in *The Economist* has vividly portrayed.[12] The American Press can "comment uninhibitedly, even mistakenly, on public persons; it can publish what the government wishes to keep secret; it can investigate suspected

wrongdoing regardless of court proceedings. It can do all those things under the constitution; but all the constitution has to say on the subject is that one grand, Delphic statement in the first amendment. It is the judges of the United States, and especially of the supreme court, who have defined the freedoms of the press. By way of interpreting the first amendment, they have created a complex structure of law to which they are still adding." For while "the guarantee of the first amendment, for free speech and press, used to be a freedom to express unorthodox *ideas*," the main battleground today "has become, instead, the right to obtain and publish the *facts* of public life." A pertinent example of this can be found in the legal wrangle about the so-called Pentagon papers, in which the trial judge observed: "It is not merely the opinion of the editorial writer or of the columnist which is protected by the first amendment. It is the free flow of information so that the public will be informed about the government and its actions."[13]

Now no doubt *The Economist* is right when it suggests that the word press in the eighteenth century presumably referred primarily to printing presses (or to written matter in general) rather than to newspapers as such; and there will be many who feel that the American Press has often gone beyond the bounds of what is fair to individuals, or in the best interests of the community as a whole, in its disclosures, suggestions and comments. But it certainly has some notable achievements to its credit; and it is tolerably certain that President Nixon would have remained in power were it not for some "investigative reporting" by Mr. Bob Woodward and Mr. Carl Bernstein which would not have been possible in this country, where the law regarding contempt of court[14], the Official Secrets Acts and the probable issue of an injunction would almost certainly have intervened. And it is with the law of England that we are primarily concerned.

Let us begin with the offence of contempt of court. In so far as freedom of speech or of the Press is concerned, this primarily

consists either in prejudicing the prospect of a fair trial by any action which may, or is intended to, have that effect (whether in civil litigation or a criminal prosecution which is pending or imminent), or in "scandalising" the court by scurrilous abuse of a judge.[15] Examples of conduct likely to prejudice a fair trial range from threatening, intimidating or trying to bribe the parties to a case, their witnesses or the jury—or attempting improperly to influence the judge—to the publication of any statement that an accused person[16] is guilty of, or has confessed to, the alleged crime or has been guilty of other offences in the past, of an account of any independent investigation of the alleged offence (particularly, of course, if this includes evidence, or alleged evidence, which would not have been admissible against him at his trial), or of an attack on the character or behaviour of a party or witness in civil litigation.

It is so vitally important that every reasonable precaution should be taken to ensure the fundamental right of litigants and accused persons to a fair trial that at this point any genuinely necessary restriction on the right to freedom of speech must, I think, be accepted. But in so far as the Press is concerned, these precautions are almost exclusively designed to protect potential (or actual) jurymen or witnesses; for I would agree with the American view that a judge should be able to dispense with any such protection. This would mean that precautions of this kind are seldom, if ever, needed in appellate courts (except in cases in which a re-trial by the court of first instance might conceivably be ordered); and the trend of recent cases points decisively in this direction.[17] But in the United States, as we have seen, there is virtually no *sub judice* rule; and the attempts which have been made to gag the Press by issuing cautionary orders to the local media to say nothing about an accused person's alleged confession, or some other compromising fact or allegation, from the time of his arrest until a jury has been chosen[18], have recently been frowned upon by the Supreme Court in *Near* v. *Minnesota,* on the typically American principle that "Prior restraints on

speech and publication are the most serious and least tolerable infringement on first amendment rights."[19] As a result, the American Press "is free to assist in detecting crime, to interview witnesses and suspects and report their observations, to comment on trials as they proceed, and to give opinions on the guilt of suspects" in a way which prompts Professor Street to comment: "Englishmen should be proud of the fact that none of these things can happen in England: the law of contempt stands in the way."[20] And in civil proceedings, where no defendant's life or liberty is in jeopardy, the process of "trial by the Press" would, of course, be still more uninhibited in America; which would, at least, have the happy result that anything comparable to our recent thalidomide controversy would be inconceivable.

Even in this country, of course, the court must be satisfied not only that a writ has been issued, but that this has been done with a genuine intention actively to pursue proceedings rather than merely to stifle criticism, before an injunction will be granted. But in cases like the thalidomide tragedy the public interest should, surely, always prevail. It should be noted, moreover, that the European Commission of Human Rights decided[21], by eight votes to five, that the intervention of the Attorney-General which prevented *The Sunday Times* from publishing an article on this subject was in breach of the provisions of Article 10 of the European Convention. This Article declares that the right to freedom of expression "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority"; and the Commission held that interference in this instance was not justified by the need for "maintaining the authority and impartiality of the judiciary" or by any of the other reasons listed in Article 10 as justifying restraints on freedom of expression. So the case is now to be referred to the European Court of Human Rights for judgment.

In general, contempt of court is a crime of "strict liability" in which no *mens rea* need be proved. But two exceptions to this

were introduced by the Administration of Justice Act 1960, which provides that it is a defence to a charge of *publishing* matter which would otherwise constitute a contempt if the publisher can show that, after taking all reasonable care, "he did not know and had no reason to suspect that the proceedings were pending, or that such proceedings were imminent"; and, to a charge of *distribution*, if the accused can prove that, after taking all reasonable care, he did not know that what he distributed contained any matter calculated to interfere with the course of justice in connection with such proceedings.[22] It is a mistake, however, to assume that, since the Act, "publishers will not be guilty of contempt so long as they do not know the true facts," for liability still arises regardless of the publisher's state of mind except in regard to whether proceedings are pending.[23] But Street has observed that the whole problem of parliamentary procedure in relation to the *sub judice* rule needs re-examination, since there "is often a conflict between the desire not to prejudice a trial and the need for prompt parliamentary discussion of matters of public interest." It would certainly "be deplorable if a man could avoid discussion of any matter in Parliament by the simple expedient of issuing a writ." But in 1976 the Speaker stated that, in view of a Resolution of the House of Commons in 1972, "he would exercise his discretion in favour of freer debate whenever proper."[24]

The law of contempt is equally controversial in regard to "scandalising the court." We are not concerned in this context with contempt in the face of the court, in regard to which the major problem is the principle that no man should be judge in his own cause, but with criticism of a judge outside the court. If a judge's character is maligned he can, of course, sue for defamation in the same way as anybody else; and Lord Atkin aptly remarked that:

> "whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong

> is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice, or attempting to impair the administration of justice, they are immune."[25]

This seems straightforward enough; but in a previous case the magazine *Truth* was fined for remarking that Lord Justice Slesser, when trying a case arising out of an Act of Parliament which he had himself steered through the House of Commons as Attorney-General, "can scarcely be altogether unbiased about legislation of this type." Here the Court acted on the principle that the judge's impartiality had been called in question; but the accused contended that he was "merely pointing out what is generally recognized: the dangers of *unconscious* bias in specific situations"; and Street is surely right when he remarks that it does not make sense that "fair criticism of judicial competence should be allowed," but "a reasoned and reasonable speculation about a judge's unconscious bias" should be a crime. He adds that it is unlikely that the judges would follow this line today, and that "honest criticism of judicial performance may be made with impunity provided it does not amount to scurrilous abuse"; and he quotes dicta which state that "no criticism of a judgment, however vigorous, can amount to contempt providing it keeps within the limits of reasonable courtesy and good faith," and that the freedom to comment responsibly on verdicts and sentences is a valuable safeguard which "should not be curtailed."[26] Fortunately, the Administration of Justice Act 1960 remedied the fact that English law was previously "the only legal system in Western Europe which ever denied a civilian sent to prison a right of appeal"—for such was

the case in regard to criminal contempt. Until recently, however, there was one respect in which the Press in this country might, on occasion, seriously prejudice a fair trial: namely, by reporting in full the preliminary investigation by magistrates which, in England, precedes the committal for trial of anyone charged with an indictable offence and is usually conducted in public; for during this investigation evidence may well be given which would be inadmissible at his trial. But suggestions made in 1958 by a Departmental Committee on Proceedings before Examining Magistrates designed to remedy this defect were in fact substantially embodied in the Criminal Justice Act 1967.[27]

A far more arbitrary restriction on freedom of speech, expression and the Press is provided by the Official Secrets Acts. It is, of course, inevitable that the State should do all it can to protect itself against espionage and other security hazards, and no one can deny the reality of such dangers today. So it is only to be expected that it is precisely at this point that the sharpest conflict occurs between the liberty of the individual and the law which the Government regards as necessary to preserve public security. The trouble is that this is such a delicate area that it is exceedingly difficult to ensure that justice holds the balance as it should—not only under a dictatorship, but even under our cherished democratic ideals. There can certainly be no question that in matters of security an exceedingly wide discretion has been left in the hands of the executive, and there is lamentably little protection for the individual against insinuations and attacks which may be almost wholly without foundation and yet may threaten his whole career. But we must confine our attention almost exclusively to the Official Secrets Acts.

The first of these, that of 1889, was far from effective, so a very different piece of legislation was rushed through Parliament in 1911 as a response to some dramatic and highly-publicised German espionage activities.[28] Section 1 was clearly directed against spying, as both the marginal note "Penalties for spying" and the Parliamentary debates on the subject clearly indicate;

but the wording (which made it a criminal offence if "any person, for any purpose prejudicial to the safety or interests of the State, approaches ... any prohibited place," or obtains or communicates to any other person "information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy") is obviously susceptible to a wider interpretation. So, under the very restrictive rules of statutory interpretation habitually adopted in this country, the Act was held to cover the activities of members of an organisation supporting nuclear disarmament who approached an airfield with the intention of immobilising it for warlike purposes. More serious, under this Act "the onus was no longer on the prosecution to prove that the accused had a purpose prejudicial to the State"; and, if he denied this, then "the prosecution was free to lead evidence of his bad character, including previous convictions."[29] Section 2 of the Act, which was designed to prevent leakages of official information, is enormously wide in its scope, for it makes it an offence for anyone who has, *inter alia*, any "sketch, plan, model, article, note, document or information ... obtained in contravention of this Act" to communicate it to any unauthorised person, to use it in any way prejudicial to the safety or interests of the State, to retain it when he has no right to do so, or to fail to take reasonable care of it. The section also covers any information which has been entrusted in confidence to him by an officer of the Crown or which he obtained as a servant of the Crown or while employed in connection with contracts with the Crown. Anyone who receives such information "knowing or having reasonable cause to believe that it is given in contravention of the Act" is also guilty of a criminal offence. Under this section, moreover, "no *mens rea* beyond an intention to cause the *actus reus* is required," and it is no defence that the accused did not intend to do anything to prejudice the safety or interests of the State. In 1920, moreover, another Official Secrets Act was promulgated, which *inter alia* made it a crime to do any act whatever preparatory to the commission of

an offence under the Official Secrets Act of 1911 — a provision that is much wider than the normal definition of an attempted crime, which must involve taking some step towards the commission of that offence which is immediately connected with it.[30]

Now it is perfectly proper that when the safety of the State is threatened the law should be more than usually stringent. But it is clear that our Official Secrets Acts are "deliberately framed in terms so wide as to go far beyond the protection of national safety and to cover all kinds of official information unrelated to security—" so much so that, in the words of Sir Lionel Heald Q.C., section 2 "makes it a crime, without any possibility of defence, to report the number of cups of tea consumed each week in a government department."[31] And in that extended area, as Street rightly observes, "such extraordinary rules have no place." The Acts have in fact been used to threaten people with prosecution for actions which have no connection whatever with espionage. A debate in Parliament on this subject did, indeed, prompt a fourth Official Secrets Act in 1939, but this amended the former Acts only by requiring the police to obtain the Home Secretary's permission before exercising their powers under the Act.[32] In 1965 the Committee of "Justice," in its report *The Law and the Press*, recommended that it should be a valid defence under the Acts for the accused to show that the national interest, or legitimate private interests confided to the State, were not likely to be harmed by what he had done, and that the information concerned was passed and received in good faith — for in point of fact Ministers, civil servants and the Press commit offences under section 2 of the Act of 1911 continually. But the Government still refuses to let the courts decide what is in the public interest in such matters and insists that this is exclusively within the competence of the Executive. This is most unfair to the Press, and in 1962 even the Radcliffe Committee on Security Procedures in the Public Service found that "the Official Secrets Acts are not an effective instrument for

controlling Press publication of that kind of 'military' information of some though perhaps of no great individual importance which it is nevertheless most desirable to keep from hostile intelligence," and that it must often be impossible at the critical moment of publication for the editor himself to say whether he is within or without the provisions of the Acts. Even so, the Committee seems to have misunderstood the fact that the Act is far more extensive in its scope than their report would indicate. Almost as soon as the 1911 Act had been passed, the Government "had to seek ways and means of clarifying and alleviating the position of the Press" (as Street pertinently remarks) by setting up a Committee empowered to issue D notices, the purpose of which was to request a ban on the publication of certain information and also, in effect, to "let the Press know unofficially when they could commit an offence [under the Act] without risk of prosecution."[33] Section 2 of the Act has, indeed, recently been described as "a blot on the statute book which needs to be removed," for "it is time that Parliament recognised that one of the fundamentals of democracy is at stake." If it is to be replaced at all, then criminal offences should be much more narrowly defined.[34]

In addition, each Service Ministry has a recognised procedure by means of which books which describe or discuss service matters can be cleared for publication. This seems wholly acceptable; as is also the fact that reasons are given when clearance is refused. What is unsatisfactory is that "the author is given no opportunity to argue his case before those who decide," and does not even know who they are.[35] Another, and more controversial, question which has received considerable publicity of late is the publication of "Cabinet secrets." These are, of course, covered by the Official Secrets Acts and also by the oath to "keep the Queen's counsel secret" which all Privy Councillors have to swear. Quite apart from any security risk, moreover, it would gravely inhibit frank and forthright discussion of political issues by Cabinet colleagues if they were

conscious that everything they said might be published. Yet it is clearly difficult to deny a Minister the right to explain, with suitable reticence, why he resigned or acted in the way he did. As for the scrutiny of Government documents by scholars or authors, this is normally covered by the Public Records Acts of 1958 and 1967, under which most (but not all) such papers are transferred to the Public Records Office, and made available for consultation, after a period of 30 years. This seems an unnecessarily long time.

This whole subject is one in which it is exceedingly difficult to maintain a just equilibrium between competing interests. On the one side it may be said that politics are bedevilled, and diplomacy frustrated, if every assessment of possibilities, tentative reaction or initiative is broadcast to the world, and the principle of confidentiality is thrown to the winds. On the other hand, as Street insists: "The Government and the senior members of the Opposition are agreed on one thing: that the less the public knows about the process of decision-making the better. Whether this is an understandable confusion of what is politically and administratively convenient with what is in the public interest may well be asked."[36] A good case can, I think, be made out for the view of a Conference of Privy Councillors that "It is right to continue the practice of tilting the balance in favour of offering greater protection to the security of the State rather than in the direction of safeguarding the rights of the individual"; but the danger of the system, in Lord Devlin's words, "is that it installs as the judges of what ought to be revealed men whose interest it is to conceal." Up till now, however, the Government has not yet given its views on the cautious, and "not altogether convincing" reforms proposed by the Franks Committee.[37]

A further restriction on freedom of speech, expression and the Press is provided by the law of libel: defamatory, seditious, blasphemous and obscene. All four types had their beginnings in the Star Chamber, which in the sixteenth and seventeenth centuries "regarded with the deepest suspicion the printed word in general,

and anything which looked like criticism of the established institutions of Church or State in particular" — as Mr. J.C. Spencer insists in a most interesting article entitled "Criminal Libel — A Skeleton in the Cupboard."[38] Such publications "would be punished as either a *blasphemous* or else as a *seditious* libel." At the same time, however, the Star Chamber was anxious to suppress duelling; so "it would punish *defamatory* libels on private citizens who had suffered insult thereby, in the hope that this remedy would be more attractive to the person insulted than the issue of a challenge to fight." Then, when the Star Chamber was abolished in 1641, the Court of King's Bench inherited its criminal jurisdiction, criminal libel included. Indeed, it "even improved upon it, inventing *obscene* libel by analogy with the other three types in *Curl's* case[39] in 1727." But it was not until the nineteenth century that the distinction betweeen defamatory, seditious and blasphemous libel became "as clear-cut as it is today. Before then, a published attack on a high state official, for example, might be prosecuted as either a seditious or a defamatory libel, and an attack on the Church or its doctrine might be prosecuted as either a blasphemous or a seditious libel. What the attack in question was called seems to have depended largely on the taste in vituperative epithet of the man who drafted the indictment or information. However, there was always the clearest of distinctions between government prosecutions of dangerous critics of the established order on the one hand, and prosecutions by or on behalf of private persons who had been defamed on the other".[40] Prosecutions for the criminal libel of private persons were comparatively common before the Second World War, but in recent years have been almost completely displaced by civil actions for damages. In this very summary treatment of limitations on freedom of speech and the Press it will, however, be sufficient to treat civil litigation and criminal prosecutions for defamatory libel together. In both cases it is primarily, although by no means exclusively, the media which are concerned; and here, again, the problem is how

to balance the right of private citizens that their good name should not be impugned against the right of the Press to publish what editors believe or allege that the public, on its part, has the right to know.

In general terms, a statement may be said to be defamatory if it would tend to damage the reputation of the plaintiff in the opinion of right thinking members of the public: that is, if it constitutes an attack on his character or reputation, whether by direct statement or by innuendo. It must be published to some third party, and it must concern the plaintiff personally. This distinguishes the law of defamation from the provisions in the Race Relations Act which we have already discussed, on the one hand, and from any criticism of a manufacturer's products (as, for example, in the magazine *Which?*), on the other.[41] When an alleged defamatory libel comes to trial, it is for the judge first to rule whether the statement complained of is capable of being defamatory, and then for the jury to decide whether, in all the circumstances, it should in fact be so regarded — together with the damages which the defendant must pay. In most cases, moreover, there is no liability whatever if the statement is substantially true, for under the Defamation Act 1952 "a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges." This means that a newspaper may, with impunity, ruin a man's reputation and career by giving publicity to some moral lapse of the distant past, for the defence of substantial truth will avail even if the publication was inspired by malice or not believed by the editor himself at the time when he published it. Admittedly the newspaper may be made to pay heavy damages if the statement cannot be proved to be substantially true; but it can take out an insurance policy against such a possibility, and since 1965 the Court of Appeal will intervene to set aside an award which it regards as penal. A plaintiff of modest means, on the other hand, may find the

prospective costs of litigation prohibitive.

Statements by a Member of Parliament in the House, or by judge, lawyer, litigant or witness in the courts, are said to be absolutely privileged, even if the member, litigant or witness sets out deliberately, from spite or greed, to defame an enemy or business competitor in a statement he knows to be false. So, too, is a fair, accurate and contemporaneous report of such a proceeding published in the Press. When, moreover, a statement is in the public interest, or in the interest of the person who makes it and the one to whom it is made, it enjoys what is termed qualified privilege: that is, it can be published with impunity, even if untrue, provided that the person who makes it himself believes it to be true and is not actuated by malice. A fair and accurate report in the media of the proceedings of local authorities or other public bodies is covered by this qualified privilege, as is also fair comment on any matter of public interest. In the absence of any statutory law of privacy, therefore—or any more precise protection against the intrusions of "snoopers" or of the media on a person's private life (such as is provided, in the case of certain minor criminal offences, by the Rehabilitation of Offenders Act 1974[42])—it seems to me that the Press has little ground for complaint about the law of defamation. On the contrary, whereas the media certainly stand in need of protection against the ubiquitous restrictions of the Official Secrets Acts, in the sphere of defamation it is the distributor[43] and the private citizen (or even, to a somewhat lesser degree, those who venture into public life) who should be given further legal safeguards—as would, I think, be agreed by most people under the criteria for justice suggested by Rawls and discussed in my second lecture.

It may be remarked in passing that the difference between libel and slander in this context is of no great significance. The basic distinction is between what is permanent and visible and what is temporary and audible; but a further distinction is that, in slander, the plaintiff must in some cases prove that he has

suffered some material loss by reason of the slanderous statement. But even this difference is not applicable, as Street puts it, "where the slander imputes a crime; where it imputes that a person has venereal or some other contagious disease; where the words are calculated to disparage the plaintiff in any office, profession, trade or business; and where the words impute unchastity or adultery to any woman or girl."[44]

We must turn briefly to the crime of *blasphemous* libel, recently brought into renewed controversy, after more than 50 years, by the prosecution of *Gay News* and its editor. Prior to the seventeenth century, accusations of blasphemy were, of course, within the exclusive jurisdiction of the ecclesiastical courts. It was because such matters might threaten a disturbance of the King's peace that the secular courts first began to take cognisance of them, while later it came to be stated that "to dispute the truth of Christianity would be an offence, because 'Christianity is part of the law of the land.' "[45] But over the last three centuries the Church of England has progressively abdicated the dominant position it once held; and in 1883 Lord Coleridge L.C.J. stated unequivocally that "if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy," and he quoted from a number of previous judgments to illustrate the difference between "a grave argument against the truth of the Christian religion" and "strong and coarse expressions," "indecent attacks," or "expressions of contempt and hatred," etc.[46] Much more recently, Lord Sumner reiterated that

> "Our Courts of law, in the exercise of their own jurisdiction, do not, and never did, that I can find, punish irreligious words as offences against God ... They dealt with such words for their manner, their violence, or ribaldry, or, more fully stated, for their tendency to endanger the peace then and there, to deprave public morality generally, to shake the fabric of society, and to be a cause

> of civil strife. The words, as well as the acts, which tend to endanger society differ from time to time ... In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods *not scandalous*."[47]

But until the *Gay News* case, the last prosecution for blasphemy was in 1921, and many people no doubt thought that the law regarding blasphemous libels was obsolete. It is not altogether rare, however, for some statute or principle of the common law which has lain dormant for years to be re-animated in circumstances which seem to demand its invocation. So two questions arise in this context: should the law of this country take any cognisance at all of blasphemous libels; and, if so, should the existing law on this subject be reformulated — whether by statutory enactment or by a further process of judicial interpretation?

It can, of course, cogently be argued that God does not stand in need of protection by the law of the State; that the early Christians got on very well without any such law; and that it is a mistake to give the impression that matters of religion have to be bolstered up by the Establishment. But although even the most scurrilous attacks on God or Christ may be unlikely, today, to cause a violent breach of the peace or the manifest "dissolution" of society, it may still be said that an assault on the deeply held convictions and instinctive loyalties of large numbers of people — by obscenity, ribald abuse or vulgar allusions rather than reasoned arguments — may amount to an attack on the fundamental decencies and mutual respect on which our society is founded, may give grave offence to many, and may in that sense be held to undermine the stability of the community. An illustration of popular reaction in such circumstances was provided by the recent outcry about the proposed shooting in this country of a pornographic film on the alleged (but wholly unsubstantiated) sex life of Christ. Nor are such feelings of

religious outrage by any means confined to Christians, as the pressure of public opinion which caused a change to be made in the title of a contemporary film on the life of Muhammad vividly demonstrated. It is true that in 1838 it was judicially stated that "a person may, without being liable to prosecution for it, attack Judaism, Mahomedanism[*sic*], or even any sect of the Christian religion (save the established religion of the country)."[48] But times have changed, and so has the judicial interpretation of the law. The Church of England is still "by law established"; but in this context, at least, it claims no privileged position. In a much more fundamental sense, the religion of these islands is still the Christian faith; but other religions are professed today by considerable numbers of our fellow citizens. So in an era when a new attempt is being made to strike a just balance between freedom of speech and regard for the rights of others (especially racial and ethnic minorities)—or, in more general terms, between liberty and law—it would not seem unreasonable for the law to restrain scurrilous or offensive comments or attacks on the religious beliefs of any section of the community. What is clear, I think, is that the law today, whatever its source, should not try to withdraw any such subject from serious discussion or responsible criticism, but should concentrate solely on the manner, the terms and the spirit in which the discussion is pursued.

The offence of publishing an *obscene* libel—originally, like blasphemy, within the exclusive competence of the ecclesiastical courts, but treated as a common law misdemeanour at least since *Curl's* case[49]—has now been superseded by the terms of the Obscene Publications Acts of 1959 and 1964; for the 1959 Act expressly provides that: "A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene."[50] But the judgments in the Court of Criminal Appeal and the House of Lords in 1961 and 1962 in *Shaw* v.

Director of Public Prosecutions[51] made it clear that this did not mean that no offence whatever could in future be committed at common law in regard to the publication of an obscene article; for Shaw was convicted, *inter alia*, of a common law conspiracy to corrupt public morals by publishing his *Ladies' Directory*, although its publication *per se* was no longer punishable under common law, but only under the Act. These judgments have been widely criticised, largely because they make the judges *custodes morum* even in matters in regard to which Parliament has seen fit to legislate; but in this lecture I must confine myself to the broad questions of how far, and in what way, liberty of speech, expression and the Press may legitimately be restricted in order to restrain the publication, distribution and display of obscene, pornographic or indecent material.

Now there are few subjects which generate so much heat rather than light as does the very mention of the word censorship. Not long ago, an author told me that he had read the substance of one chapter in a proposed book at a meeting of some University society; and, at the end, a young don had exploded: "This is dreadful. What you are suggesting in your book would amount to censorship. It should not be allowed to be published!" This incident not only shows how inconsistent many of us are in our attitude to the whole subject of freedom of speech and publication, but also that the word censorship has a variety of different shades of meaning. It is used, for example, of the criticism, discouragement or suppression, whether official or unofficial, of any kind of publication. But even in regard to official censorship, there is a profound difference between a law which forbids the publication of anything which has not first been passed by a censor and a law which operates only *after* publication and exposes those who have abused their fundamental freedom of expression, by publishing matter to which exception may reasonably be taken, to such sanctions as may have been prescribed by Law. It is only of the former that the term censorship, in a technical sense,

should in my view properly be used; and the compulsory censorship, in that sense, of *ideas* (which would clearly open the door to political or ideological dictatorship) should be resisted in every possible way. But this does not mean that films should never be censored in advance, or that indecent displays and obscene publications should not be subject to suitable legal sanctions *ex post facto*.

An apt illustration of this principle may be found in relation to the First Amendment in the American Bill of Rights, which precludes Congress from making any law which abridges the freedom of speech and the Press. About this Alexander M. Bickell has written:

> "Nothing is more characteristic of the law of the First Amendment — not the rhetoric, but the actual law of it — than the Supreme Court's resourceful efforts to cushion rather than resolve clashes between the First Amendment and interests conflicting with it ... Freedom of speech, with us, is a compromise, an accommodation. There is nothing else it could be."[52]

Thus in *Roth* v. *United States* and *Alberta* v. *California* (two appeals heard together by the Supreme Court and decided on June 24, 1957), Justice Brennan, speaking for the majority of the Court, said:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a constitutional problem. These include the lewd and obscene ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[53]

The Court then proceeded to formulate the test for obscenity as "Whether to the average person, applying contemporary

community standards, the dominant theme of the material taken as a whole appeals to the prurient interest," and added: "All *ideas* having the slightest social importance ... have the full protection of the guarantees ... But, implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

Now it is true that in a subsequent case[54], in which there was no majority opinion, Justice Brennan (speaking for himself and two other justices) stated that in the test of obscenity

> "Three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters and (c) the material is utterly without redeeming social value ..."

But this last condition, as Justices Clark and White remarked, rejected one of the basic propositions of the *Roth* case (that is, that such material is not protected because it is inherently and utterly without social value) and would give "the smut artist free rein to carry on his dirty business." This was fully recognised by the Supreme Court on June 21, 1973, in *Miller* v. *California* (and related cases), in which Chief Justice Burger, speaking for a majority of the court, referred to both *Roth* v. *United States* and *Memoirs* v. *Massachusetts* and said:

> "While *Roth* presumed 'obscenity' to be 'utterly without redeeming social value,' *Memoirs* required that to prove obscenity it must be affirmatively established that the material is 'utterly without redeeming social value.' Thus even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative ... a burden virtually impossible to discharge under our criminal standards of

> proof ... But now the Memoirs test has been abandoned as unworkable by its author and no member of the court today supports the *Memoirs* formulation."

So the Court concluded that the basic guidelines must be:

> "(a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest, ...
> (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

And it gave as examples of the sort of thing that a State statute could properly specify

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals. Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places ... "

It is noteworthy that in this case the Court substantially reiterated the *Roth* test except that it dropped the phrase about "the dominant theme." It insisted, moreover, that the protection given to speech and press by the First Amendment "was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people. But the public portrayal of hard-core sexual conduct for its own sake and for the ensuing commercial gain is a different matter."

Another decision of the Supreme Court[55], also in June 1973, established four other points of great importance. These are summarised by Paul J. McGeady in "Obscenity Law and the Supreme Court"[56] as

> "1. '*Expert*' testimony is not necessary in obscenity prosecutions.
> 2. There is no immunity from stated obscenity laws because obscene films are patronized only by '*consenting adults*'.
> 3. The State has an interest in the enforcement of obscenity laws even for 'consenting adults'. This includes the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers and possibly, the public safety itself ... The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene materials and crime.
> 4. States have the right to prohibit obscenity for adults ... because ... such material has a tendency to injure the community, to endanger public safety or jeopardise the State's "right" to maintain a decent society."

An important footnote at this point states that:

> "In *Miller* and related cases, the U.S. Supreme Court cites the Pornography Commission's Hill-Link Report on four occasions. The legal and philosophical premises of the Hill-Link Report have been adopted, and the Pornography Commission's Majority Report, which urged legalization of obscenity for adults had been rejected. This means that the "majority report" has been rejected by the U.S. Senate 60-5, by the President of the United States, and now by the Supreme Court."

Much of this, in my opinion, is very much better than the present

law regarding obscenity in this country — and that in spite of the paramount importance which Americans attach to freedom of speech and the Press. It seems, however, that the *enforcement* of the law on this subject is almost equally ineffective on both sides of the Atlantic. Of this a few random examples must suffice. First, I quote from an article by Mary Kenny published in the *Spectator* on February 12, 1977:

> "Last week the *Daily Mail* brought us interesting news from the world of advertising and commercial promotion; the latest rage in the selling of clothes, the marketing of records and of glossy magazines is the rage for sado-masochism. The fashion is now for displaying human beings (mostly women) in various stages of bondage, violation and humiliation. One of the most successful photographers on American *Vogue* likes to photograph women wincing in pain ... a man's fist ramming into a woman's breast. French *Vogue* likes to show women being violated in the bath. A British jeans manufacturer has distributed 3,000 posters of a naked young woman being dragged through the streets on her hands and knees. Record companies find it profitable to have pictures on the sleeves of discs which suggest (or even depict) gang rape ... It has become almost impossible to visit the cinema without emerging feeling offended and brutalised."

Turning to the current debate about rape, she continues:

> "The one patently obvious question about rape has, however, remained conspicuously unasked: why is it on the increase? Why are more and more men charged with violating women? It would be unthinkable, wouldn't it, for anyone to claim that the increase in rape might just have a connection with the pornography that glamourises it? You'd be laughed out of court if you did make any such claim. Why, it's been proved, time and time again ... that pornography is *therapeutic.*"

Again, I am informed by a personal friend that gangs of youths dressed up like those in *The Clockwork Orange* have assaulted drink-sodden alcoholics in East London in direct imitation of the film, and that the short-term effect of *A Bigger Splash* (recently showing in London) is quite undeniable: male nudity and homosexual indecency are displayed, and at a recent performance males in the audience were seen to be soliciting each other in the cinema itself. I should have thought that some of these examples would have come four-square within the definition of obscenity in the Obscene Publications Acts (described by Lord Widgery as unsatisfactory, by Lord Denning as having misfired, and by Lord Wilberforce as illogical and unscientific), and that it would be difficult, even for some of the expert witnesses who so often give evidence for the defence in such cases, to testify that they were in any way "for the public good."

It is noteworthy, moreover, particularly in the context of the declarations, conventions and covenants about human rights to which a number of references have been made in these lectures, that an International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications (dating originally from the era of the League of Nations, but slightly amended by a Protocol signed at Lake Success, New York, in 1947), came into force on February 2, 1950. More than 50 nations are signatories; the only repudiation has been that of Denmark in 1967; and reference was made to it by the Supreme Court of the United States, in the *Roth* case, as reflecting "the universal judgment that obscenity should be restrained." Article 1 of this Convention provides that:

> "The High Contracting Parties agree to take all measures to discover prosecute and punish any person engaged in committing any of the following offences, and accordingly agree that it shall be a punishable offence:
> 1. For purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession

> obscene writings, drawings, prints, paintings, cinematography, films or any other obscene objects;
> 2. For the purposes above mentioned, to import, convey or export or cause to be imported, conveyed or exported any of the said obscene matters or things, or in any manner whatsoever to put them into circulation. ... "

But in this, as in regard to so many other international obligations, the law in this country seems to be falling palpably short. I must, however, content myself with a few final observations on this subject.

First, it has been aptly remarked that there are three possible approaches to a legal test or definition of what is obscene. It can be approached from the angle of the *intention* of those who produce or pass on the article or utterance under consideration. This is an excellent test in so far as moral responsibility is concerned, but is exceedingly difficult to prove — and we have already seen how (and why), in the Race Relations Act 1976, the necessity to prove an intent to stir up racial hatred has been dropped. Again, the approach may be from the point of view of the *effect* the material has on those exposed to it: disgust, outrage, psychological trauma, moral corruption, anti-social behaviour, etc. This test, too, is very useful so far as it goes; but it is relevant to observe that while a jury would in most cases find it comparatively easy to decide whether something is "disgusting" or "outrageous," it is extraordinarily difficult for them to say how far it is likely to "deprave or corrupt." Yet again, the approach may be from the angle of the very *nature and content* of the material concerned — as, indeed, in the examples given by the American Supreme Court of the sort of regulations that a State statute might include.[57] Nor are these approaches by any means mutually exclusive.

Secondly, the Obscene Publications Acts of 1959 and 1964 have been shown in practice to be singularly ineffective. The criterion of whether the material concerned is "such as to tend to

deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it" is virtually incapable of proof; the testimony of the procession of expert witnesses commonly paraded by the defence, in a way apparently regarded as unnecessary by the American Supreme Court, has made the task of the jury almost impossibly difficult; and the way in which expert (and dedicated) counsel have been able to exploit the Acts' weaknesses has resulted, in case after case, in the refusal of the Director of Public Prosecutions to institute proceedings. There can, indeed, be no doubt that the common law offences of indecent public exhibition, a conspiracy to outrage public decency, etc., are much more readily susceptible of proof than an offence under the Obscene Publications Acts or the Theatres Act; yet it is precisely these common law offences that the Law Commission suggests should be abolished (or at least excluded in such cases) — as has already been enacted, in relation to cinematograph exhibitions, in the Criminal Law Act 1977.[58]

Thirdly, the growing habit of providing that prosecutions may be brought only by, or with the consent of, the Attorney-General or the Director of Public Prosecutions seems to me a very dubious expedient. This is obviously a useful safeguard against frivolous or vexatious proceedings which waste the time of the courts; but it puts the private citizen more and more at the mercy of the executive. A law which can be invoked only with official permission is of little use to the public at large.

Fourthly, I am not entirely happy about the phrase "taken as a whole." No one would deny that the primary criterion should be the total impact of the book or article concerned, rather than some isolated phrase, single sentence or incidental passage. But I cannot see why a writer of undoubted literary merit, for example, should be allowed, under this formula, to insert — for whatever motive — incidents, descriptions or material, in themselves clearly obscene, which are superfluous and essentially irrelevant to his theme.

Fifthly, it seems to me that two distinct tests or standards are needed. In the case of material flaunted in the face of all and sundry a stricter standard of decency should be required than in regard to a book to which adults only may have access; for why should children — or, indeed, anyone who objects to such material — be denied the basic right not to have it thrust upon them? A strong case can also be made for applying some such standard to those television programmes which many people find acutely embarrassing, or cinemas to which people often go in a party with little or no knowledge of what they are likely to see — particularly in regard to trailers of films to be shown in the future. Obviously enough, anyone who finds broadcasts or films offensive can always switch off the television or leave the cinema, although it is not at all easy to do this when in company. Even in regard to indecent exposure in a park or street, those who are upset by it can always turn resolutely away; but why should they be put in this position at all? In the case of books or films which are not on public display, on the other hand, a more lax or liberal standard will clearly be appropriate, although it is impossible in practice to prevent such material from falling into the hands of those for whom it was not intended, or even from being deliberately shown to them. Private immorality between consenting adults is not subject to criminal sanctions, so it would be absurd for the law to try to prevent obscene photographs being taken in such circumstances, or subsequently shown to friends. But as soon as a commercial motive is introduced a different situation arises, particularly where the shooting of a film involves the exploitation of children or of any actors who are particularly vulnerable. It has aptly been remarked that "our libertarians would blanch from the cruelty of a Roman gladiatorial show," and if anyone tried to stage it, even with consenting adults, almost everyone would agree that the law should intervene. Nor do we allow racial or ethnic minorities to be humiliated or insulted on the stage, or in other ways. So why should we allow people, in D.H. Lawrence's words, "to do dirt

on sex" or to make a public display of sadism?

Sixthly, there is, I think, a valid distinction between what may be bought and what may be sold; what may be read and what may be published. Regulations about the nature and quality of what is offered for sale are commonly accepted in our society, for the vendor is primarily motivated by financial gain. Similarly, journalists and broadcasters are accustomed to operate within prescribed rules as to what they may, and may not, report in divorce cases or in regard to proceedings against young people; and there is a degree of privacy to which, I believe, all are entitled.

Lastly, the assertion that pornography does nobody any harm is patently ridiculous — unless, of course, we solemnly assert that we never learn anything, good or bad, from what other people teach, write or do, and that advertisements are wholly ineffective. In point of fact evidence for the short-term effects of pornography has been produced again and again; and it only stands to reason that a continuing diet of that sort over a period of years is liable to influence action in a way which is still more serious, even if the causal connection is more difficult to prove. It may be true that pornography *sometimes* has a therapeutic value for people suffering from certain "hang-ups." So has poison for the physical health of individual patients, when it is responsibly prescribed; but it should none the less be labelled "poison," and should not be on sale in a supermarket. Incidentally, the House of Lords held unanimously, in *Director of Public Prosecutions* v. *Jordan*[59], that expert evidence that the publication of pornographic material was for the public good because it might have a beneficial psychological effect was *not* admissible under the Act; but this does not appear to have prevented some counsel for the defence from still raising this argument.

Freedom of assembly, again, is closely connected with freedom of speech. The two freedoms are coupled together, for example, in the First Amendment, where the words "and to

petition the Government for a redress of grievances" are appended to "the right of the people peacefully to assemble." This desire to induce the Government to redress grievances is, of course, still one of the reasons why people assemble for speeches, processions or demonstrations, although today these usually take the form of protests and demands rather than petitions. But another reason is for political or ideological propaganda: to bring their views to the attention of the public. So two questions inevitably arise: first, does the phrase peaceful assembly mean only that those who assemble must not commit a breach of the peace, or can it be extended to mean that they must not obstruct the flow of traffic by a procession, or attempt to prevent access to a building by a sit-in or a picket line; and, secondly, is the adjective peaceful confined to what they themselves do, or does it include the violent reactions which their assembly may provoke in others?

The first of these questions involves striking that balance between liberty and law which we have been concerned with throughout these lectures. As the recent Scarman Report on the disturbances in Red Lion Square[60] puts it:

> "Amongst our fundamental rights there are, without doubt, the rights of peaceful assembly and public protest and the right to public order and tranquillity. Civilised living collapses ... if public protest becomes violent protest or public order degenerates into the quietism imposed by successful oppression. But the problem is more complex than a choice between the two extremes — one, a right to protest whenever and wherever you will and the other, a right to continuous calm upon our streets unruffled by the noise and obstructive pressure of protesting processions. A balance has to be struck ... that will accommodate the exercise of the right to protest within a framework of public order which enables ordinary citizens, who are not protesting, to go about their business and pleasure without obstruction or inconvenience."

But where is that balance which accords with our concept of justice to be struck in such a context? In regard to picketing, the House of Lords held, in *Broome* v. *Director of Public Prosecutions*[61], that the "peaceful picketing permitted under the Industrial Relations Act, 1971, does not confer the right to stop and detain a vehicle on the highway for the purpose of peaceful persuasion." In the case of demonstrations on the streets, the Scarman Report stated that "English law recognises as paramount a right of passage: a demonstration which obstructs passage along the highway is unlawful. The paramount right of passage is, however, subject to the reasonable use of the highway by others."[62] On this basis a procession which allows room for others to go on their way was declared to be lawful—even if, presumably, it impedes, but does not wholly obstruct, the flow of traffic. But the Report questioned "whether a public meeting on a highway can ever be lawful, for it is not in any way incidental to the exercise of a right of passage—although Mr. David Williams regards it as distinctly doubtful whether this distinction between processions and stationary meetings can really be sustained.[63]

The second question—that is, the reactions of others which an assembly which is peaceful in itself may provoke—largely turns on section 5 of the Public Order Act 1936, which subjects to legal sanctions "conduct conducive to breaches of the peace" which involves "threatening, abusive or insulting" words or behaviour. But Williams[64] emphasises that the definition of the offence requires proof of both elements: the intent to provoke a breach of the peace or conduct which is calculated to do this, on the one hand, and words or behaviour which are not only "vigorous," "distasteful," "unmannerly" or such as to "cause resentment or protest" (to quote Lord Reid and Lord Morris in *Brutus* v. *Cozens*[65]), but actually "threatening," "abusive" or "insulting." This decision clearly accords with that reached in 1882, in a much earlier state of the law, in *Beatty* v. *Gillbanks*[66], where it was held that the Salvation Army

could not be penalised because their marching through the streets behind a band provoked the so-called Skeleton Army to violence, for it may be taken for granted that the Salvationists were not threatening, abusive or insulting; but it may, perhaps, be regarded as contrary to *O'Kelly* v. *Harvey*[67], a case decided in Ireland in the following year. It is, however, important to note that the Scarman Report stated unequivocally that

> "The police are not concerned with the politics of a demonstration: if they were, we would be a police state. Their duty is to maintain public order and to act, if need be, to prevent or suppress a breach of the peace. Offensive to many as were the slogans and chants of the National Front, their march was orderly and appears to have been treated by the public with indifference; some may have felt contempt, but, with the exception of some of the counter-demonstrators, nobody was provoked into any breach of the peace. And the 'provocation' to the counter-demonstrators was not anything that they saw the National Front do, but the mere idea that they were marching at all."[68]

The police have the exceedingly difficult task of deciding at what point the expression or manifestation of political, ideological or religious opinions is likely to provoke a breach of the peace or to stir up racial hatred, and also, in itself, becomes threatening, abusive or insulting. There can be little doubt that many of the "tribal marches" so much beloved in Ulster — or, indeed, demonstrations by the National Front or Socialist Workers Party — qualify under the first criterion. It is the second which is likely to be far more difficult to prove, although I should have thought that a typical march by the National Front through a predominantly coloured area might perhaps, in itself, be regarded as threatening.

1 Or even, to give an extreme example, to the Genocide Act 1969, which makes it an offence to commit any act which falls within the definition of Genocide under Art. II of the Genocide Convention.
2 *Cf.* Anthony Lester and Geoffrey Bindman, *Race and Law,* p. 343.
3 Cmnd. 5919 (1975), para 125.
4 subs. 5A (2).
5 subs. 5A (3).
6 subs. 5A (6).
7 *Op. cit.* p. 139.
8 *Cf.* pp. 70 *et seq.*, above.
9 Arts. 9, 10 and 11.
10 Arts. 18, 19 and 20, in both cases.
11 *Cf.* Arts. 2-8.
12 "The American Press and the Law," April 2, 1977.
13 *Loc. cit.*
14 Because both a civil suit for damages and a criminal prosecution against the Watergate burglars were at that time *sub judice.*
15 *Cf.* for example, Smith and Hogan, *Criminal Law* (3rd ed., Butterworths, London, 1973), pp. 601-608; and Harry Street, *Freedom, the Individual and the Law* (4th ed., Penguin Books 1977), pp. 166-194.
16 Or a person against whom the one who publishes it knows, or has good reason to believe, that criminal proceedings are imminent.
17 *Cf.* Street, *op. cit.* pp. 175 *et seq.*
18 After which, the argument runs, its members can be suitably warned, or even sequestered.
19 *Cf. The Economist, loc. cit.* p. 45.
20 *Op. cit.* p. 155.
21 On July 29, 1977 — as reported in *The Times* on July 30.
22 SS. 10 and 11, respectively.
23 *Cf.* Street, *op. cit.* p. 177.
24 *Op. cit.* p. 171.
25 *Ambard v. Attorney-General for Trinidad and Tobago* [1936] A.C. 322, at p. 335. Quoted in Street, *op. cit.* p. 181.
26 *Op. cit.* pp. 185 *et seq.*
27 Street, *op. cit.* pp. 175 *et seq.*
28 See generally, David Williams, *Not in the Public Interest* (Hutchinson, 1965).

29 *Cf.* Street, *op. cit.* p. 222.
30 *Cf.* Smith and Hogan, *op. cit.* pp. 651-654; Street, *op. cit.* pp. 222 *et seq.*
31 Letter in *The Times*, March 20, 1970.
32 *Cf.* Street, *op. cit.* pp. 227 *et seq.*
33 *Op. cit.* p. 218. (*Cf.* also Cmnd. 3309 (1967), para. 6).
34 *Cf.* written evidence to the Franks Committee by Professor H.W.R. Wade.
35 *Cf.* Street, *op. cit.* p. 232.
36 *Cf.* Street, *op. cit.* p. 238.
37 Cmnd. 5104 (September 1972).
38 *The Criminal Law Review*, July 1977, pp. 383-394.
39 19 St. Tr. 154.
40 Spencer, *loc. cit.* pp. 383 *et seq.*
41 The latter might, conceivably, be actionable as injurious falsehood, but only if malice could be proved. (*Cf.* Street, *op. cit.* p. 158).
42 Together with S.I.1975 No. 1023.
43 *Cf.* an article entitled "Censorship by Libel Law" by Michael Rubinstein, in *The Law Society's Gazette,* May 25, 1977.
44 *Op. cit.* p. 159.
45 Quoted by Lord Coleridge C.J. in *Reg.* v. *Ramsey and Foote* (1883) 15 Cox C.C. 231 at 237.
46 *Loc. cit.* pp. 237 and 239.
47 *Bowman* v. *Secular Society Ltd.* [1917] A.C. 406 at 466 *et seq.* My italics.
48 *In re Gathercole* (1838), 2 Lew. 237 — as quoted by Street, *op. cit.* pp. 199 *et seq.*
49 (1727) 2 Str. 788 (*cf.* p. 115, above).
50 S. 2(4).
51 [1962] A.C. 220; [1961] 1 A11 E.R. 330.
52 *Where Do You Draw the Line?* Victor B. Cline (ed.), (Brigham Young University Press, Utah, 1974), p. 65.
53 354 U.S. 476 (1957).
54 *A Book Named 'Memoirs of a Woman of Pleasure'* v. *Attorney-General of Massachusetts* 383 U.S. 413 (1916).
55 *Paris Adult Theater I* v. *Slaton* 413 U.S. 49, 414 U.S. 881. (U.S. Sup. Ct. 1973).
56 In *Where Do You Draw the Line?*, p. 104. I am indebted to this exceedingly valuable article for much of my information about

Supreme Court decisions.
57 *Cf.* p. 124, above.
58 Although this section of the Act does have the distinct merit of bringing both distributors and film clubs under the law.
59 *Cf. The Times*, November 17, 1976.
60 Cmnd. 5919 (1975), para. 5.
61 [1974] 1 A11 E.R. 314.
62 Cmnd. 5919 (1975), para. 122.
63 *Keeping the Peace* (London, 1967), p. 216.
64 In an article entitled "Freedom of Assembly and Free Speech: Changes and Reforms in England" to which I am much indebted. (1975) 1 Univ of N.S.W. Law Journal 97-120.
65 [1973] A.C. 854.
66 (1883) 15 Cox C.C. 138.
67 (1883) 15 Cox C.C. 435 (Ct. of Appeal in Ireland).
68 Cmnd. 5919 (1975), para. 69.

EPILOGUE

IN retrospect, it is clear that the dominant theme in these lectures on "Liberty, Law and Justice" has been the contemporary emphasis on human rights. We have seen how man's perennial longing for freedom, manifesting itself in some quarters today in a revolt against all authority (and an almost total rejection of an "unjust" political, social and economic system) which can only be said to border on anarchy, co-exists uneasily with a parallel tendency to resort to an unprecedented spate of legislation as the golden road to reform. Yet, for all their mutual antipathy and contradictions, those who opt for revolt and those who settle for reform are basically united in their instinctive quest for a state of society in which human rights are recognised and respected; for it is to those rights that the revolutionary appeals, and those self-same rights that the reformer labours to ensure. Only so, moreover, can the inherent tension between liberty and law be resolved; for human rights can be largely expressed in terms of human freedoms, yet those very freedoms need to be defined, guaranteed and delimited by law.

The emphasis on human rights was bequeathed to our contemporary liberal democracy, as we saw, by the American and French Revolutions, whose leaders insisted on the natural and inalienable rights of man. But the concept of natural rights can be traced, through the philosophers of the seventeenth century, to Thomas Aquinas and others in whose thinking they were subsidiary to, and dependent on, Natural Law — as, indeed, they had been virtually from antiquity. It was the Creator of nature and its laws who had made man in his own image, and who had imprinted on his heart, and made accessible to his mind, certain basic "Maker's Directions" as to how he could live an authentic human life. But agnostics who questioned the existence of any

eternal law still appealed, somewhat inconsistently, to fundamental and inalienable rights; and it was only natural that humanists should put a paramount emphasis on those rights which they claimed to be inherently human.

Even so, these human rights had to be defined, guaranteed and delimited, as I have put it, by positive law. They have been defined negatively, in terms of freedom from violence, oppression and all that dehumanizes man, and positively, in terms of freedom to live a truly human life. They have been guaranteed, in part, both by those general declarations and assertions which are commonly included in a Bill of Rights (and the more such a Bill is entrenched against impetuous, ill-considered or irresponsible violations the firmer such a guarantee becomes) and also by a series of *ad hoc* legislative enactments which seek to spell them out in greater detail. But a Bill of Rights or an International Convention may be so general that it is exceedingly difficult for the courts to give it substance—unless, of course, they are prepared and permitted to legislate as openly as the Supreme Court of the United States. Conversely, a legislative enactment may go into so much detail, and put such rigid restrictions on the freedom of individual choice (as some people allege to be the case with our Sex Discrimination and Race Relations Acts), that it becomes counter-productive. As for delimitation, everyone will agree that some limits must be put even on such basic rights as freedom of speech, assembly and the Press; but it seems clear that the shackles imposed by our Official Secrets Acts are much too comprehensive and restrictive, while the restraints postulated in the Obscene Publications Acts, for example, are so elastic and even illusory as to be almost totally ineffective.

The emphasis on human rights, then, opens up the possibility of resolving the age-old tension between liberty and law, but does not of itself provide that resolution. For individual rights or freedoms can be pressed so far that they impinge on those of others, and law can be so narrow and rigid as to restrict individual liberty to an unacceptable degree. So what criterion is

available as to where the line should be drawn, and the balance struck? It is at this point, I think, that we turn instinctively once more to justice — for we lapse, almost unconsciously, into speaking of what is just or unjust. As we saw in the first lecture in this series, even if the concept of Natural Law is regarded by most lawyers today as of academic, rather than practical, importance, the principles of Natural Justice — and even those of justice, equity and good conscience — are still very much alive. But how is justice itself to be defined, either in law or social science? Perfect justice, no doubt, is an attribute of God alone; but in this imperfect world the nearest we can get, perhaps, is Rawls' suggestion of what rational people would regard as fair if they had to decide that question with no knowledge whatever of what their own position would be. And he believes that they could be expected to agree on two basic principles: first (in both order and importance) that every individual should "have an equal right to the most extensive basic liberty which is compatible with a similar liberty for others"; and, secondly, that those social and economic inequalities that are in practice inevitable should be limited, so far as is possible, to what can reasonably be expected to work out for the public good or is "attached to positions and offices which are open to all." And to this I would myself add one further principle: that the goal of "equality of opportunity" loses much of its cogency unless all that is feasible is done to put those who are disadvantaged by heredity or circumstances in a position to compete with others on as equal terms as can realistically be attained.

THE EUROPEAN COMMUNITIES AND THE RULE OF LAW

by

LORD MACKENZIE STUART

Judge of the Court of Justice of the European Communities

In 1962 in their judgment on the historic case of *Van Gend en Loos* the Court of Justice of the European Communities declared that: "The Community constitues a new legal order . . . for the benefit of which the [Member] States have limited their Sovereign rights."

In the 1977 Hamlyn Lectures, Lord Mackenzie Stuart, a Judge of the Court of Justice of the European Communities, examines this concept and seeks to trace its origin and to analyse its nature and its novelty. In particular he discusses the part played by the European Court in sustaining that " legal order " and the extent to which characteristics of the judicial function common to the six original Member States have determined the approach of the Court.

At this time, when the United Kingdom is still adjusting to the implications of joining the European Communities, and United Kingdom law is being increasingly influenced by the jurisprudence of the other Member countries, this series of lectures is particularly significant and important. Students of law, politics and government, as well as lawyers, businessmen, and all those interested in the effect of EEC law, will welcome this authoritative work.

1977

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STEVENS