BOOK II

THE PURPOSE OF LAW

IV

NATURAL LAW

§27. Introduction

At first sight the problem of natural law may not seem very closely related to that of the purpose of law. But many theories of natural law attempt to define law in terms of purpose, and hence it is convenient to consider together many of the contributions of philosophy to these two problems.

§28. Greece

The story of natural law begins with the philosophers of ancient Greece and its true meaning is still a matter of controversy today. The most diverse elements are gathered under the same label—Greek philosophy and medieval rationalism, Roman law and Christian theology, actual custom and moral intuition.[1] There is much confusion and crudity of thought, but the theory is concerned with two problems which are as vital now as when they were first formulated—what is the permanent underlying basis of law? what is its relationship to justice? Moreover, even if we think that many of the theories illustrate only 'another chapter in the history of human error', natural law has exercised great influence on legal development and some appreciation of it is necessary for an understanding of legal philosophy. To take only one example, 'no other philosophy moulded and shaped American thinking and American institutions to such an extent as

[1] G. D. Gurvitch, *L'Expérience juridique* (1935), 103, suggests that there are six uses of the term: (*a*) as a moral justification of all law; (*b*) as the *a priori* element of law; (*c*) as an ideal by which existing positive law can be judged; (*d*) as referring to immutable and not variable rules; (*e*) as 'autonomous' law valid because it is based on an ideal; (*f*) *droit spontané* as opposed to law fixed in advance by the State. These divisions seem to overlap a great deal.

did the philosophy of natural law in the form given to it in the seventeenth and eighteenth centuries'.[1]

To trace the history of natural law in detail would require a general history of jurisprudence and of political philosophy. For our purposes it is enough to discuss the light which typical theories throw on the problems of jurisprudence. Dominating all the doctrines of natural law is the thought that law is an essential foundation for the life of man in society and that it is based on the needs of man as a reasonable being and not on the arbitrary whim of a ruler.[2] 'The chief value of the older books on natural law for us of the present day does not lie so much in the systems they expound, as in the kind of legal thinking they exemplify.'[3]

The Greeks traditionally regarded law as being closely related both to justice and ethics.[4] Yet in the face of the diversity of the actual systems of the world, wherein was a permanent element to be found? The imaginative notions of Plato are still freely drawn on by modern thinkers,[5] and his *Republic* is a constructive attempt to discover the basis of justice. In the end, however, he rather underplayed the necessity for law in the sense of a body of binding propositions—the execution of justice was to be given to philosopher-kings whose education and wisdom was such that there was no need to shackle them by a higher law. Aristotle formulated more carefully the theory of justice.[6] He regarded justice as meaning either what is lawful, or what is fair and equal. Justice he divided into distributive and remedial justice. The first deals with the distribution of honour and wealth among the citizens and works according to the ratio of merit of the particular society in question.[7] A democracy will take different views from an oligarchy. In remedial justice the law looks to the nature of the injury, and attempts to restore the equality that existed before the wrong. Just action is a mean between acting unjustly and being unjustly treated. This definition, however, applies only to the position of the citizen—not that of the judge, for in making a decision, he is not in danger of being unjustly treated.

[1] E. Bodenheimer, *Jurisprudence*, 164.
[2] G. Del Vecchio, *Justice, Droit, État*, 134–5.
[3] Lon. L. Fuller, *The Law in Quest of Itself*, 103.
[4] P. Vinogradoff, *Historical Jurisprudence*, ii. 19.
[5] Indeed, H. Kelsen suggests that whatever has been taught about the essence of justice can be found in the works of Plato and Aristotle: *Interpretations of Modern Legal Philosophies*, 398–9.
[6] W. D. Ross, *Aristotle*, 209.
[7] H. Kelsen, *Interpretations of Modern Legal Philosophies*, 339, shows the weakness of this approach: it results only in the truism of 'to each his own'.

Aristotle also made a useful distinction between natural justice, which is universal, and conventional justice, which binds only because it was decreed by a particular authority. Thus it is a precept of natural justice that I must return what has been lent, but it is conventional justice that lays down whether the period of prescription is six or sixty years. To the Greeks the nature of a thing was discoverable not by studying its primitive form but rather its highest development. Hence to Aristotle the State was natural, since man was a political being who could realize his personality to the full only within such an organization.

The Stoics popularized the maxim, 'Live according to nature'. This did not necessarily mean 'in primitive simplicity'. A thing was in accord with nature when it was governed by its own leading principle, and in the case of man this was reason. The universe itself was governed by a reason similar to that which dwelt in man, and hence he who based his life on a rule of reason could face the world with confidence; for whether he understood or not the turn of fortune's wheel, a universe based on reason could not be hostile to him. The Stoic, perhaps in a superficial way, thus erected a popular theory of the unity of life out of the deeper elements of Greek thought.[1]

§ 29. Rome

The Roman classical writers used the Stoic theory as an ornament for their texts, without really weaving its implications into their theory of the law. As the Roman texts provided the basis for legal study for many centuries, it is not surprising that a theory of 'natural' law became established.

Gaius writes that every system of positive law can be divided into two parts: some rules are changeable because they depend on men's wills, others are universally accepted and immutable since they depend on reason.[2] Thus *ius naturale* was the fundamental basis of every legal system, for, however much conventional law may change, rules based on nature are beyond the power of man. But the Roman terminology became slightly confused. Great respect was paid to the work of the *praetor peregrinus* who had evolved rules to deal with transactions to which, because one of the parties was a foreigner, the rules of the *ius civile* did not apply. Sometimes this body of law was

[1] E. R. Bevan, *Stoics and Sceptics*, 47–9.
[2] *Dig.* 1. 1. 9; *Inst.* 1. 2; *Inst.* 1. 3.

given the name of *ius gentium*, which normally had the broader meaning of the actual common practice of mankind. But what was universally adopted by men was presumptively reasonable, and hence it was considered that the rules of *ius gentium* were in accord with natural law, or at least could be so treated until the contrary was proved. Thus, in Roman thought, there was a certain approximation between *ius naturale* (a philosophic theory of the fundamental element in all law) and *ius gentium* which had a twofold use: firstly, the actual common practice of mankind and, secondly, the particular rules which the *praetor peregrinus* had evolved for the use of foreigners.

But what did the Romans mean by nature or reason? Sometimes the jurists tried to draw rules from human nature itself.[1] Thus it was said that a usufructuary did not gain title to the young of a slave held in usufruct, for it was derogatory to human nature to deal with babies by the same rule of law that applied to animals.[2] But there is nothing immutable about this rule—indeed it was the institution of slavery itself that was opposed to the needs of man as a reasonable being. This contradiction always puzzled the jurists. If natural law prescribed that every man should be free, and if natural law was the fixed and immutable base of every system of positive law, how was it that all men recognized the practice of slavery?[3] The concept of man as a reasonable being may certainly provide us with ideal standards of value by which we may test the law in force, but, as civilization progresses, respect for human personality grows and the rules of law correspondingly develop. The search for *rules of law* that are unchangeable and universal is a futile one. As the Roman view got farther away from the deeper elements of Greek philosophy, it became superficial.

§ 30. The Christian Fathers

The Christian Fathers extended the authority of natural law by ascribing to it a divine origin, and even cited St. Paul as approving their doctrine.[4] This made it easier to pour practical doctrines into the mould of natural law, for the truths of revealed religion could

[1] N. M. Korkunov, *General Theory of Law*, 123.

[2] See the confusion in *Inst.* 1. 2. The Romans also attempted to draw universal rules from the nature of the physical world, e.g. they said that by natural law the sea, running water, and the air are common property. But as man's control over nature grows, so do the rules of property. See N. M. Korkunov, op. cit. 123 et seq.

[3] *Inst.* 2. 1. 37.

[4] Rom. 2: 14–15.

now be drawn upon. Hence it is not surprising that a theory of natural law should have great practical effect, since the element of reasonableness was interpreted in the light of Roman law (sometimes called *ratio scripta*) and the truths of Christianity. But, having forgotten Aristotle, the early writers treated the State as unnatural. Once, before the advent of sin, men had lived together in peace and happiness, needing not the constraint of government nor an exact division between *meum* and *tuum*. But with the fall of man, God created the State as a means of correcting the new tendencies to evil. Similarly, private property and slavery were instituted by God to correct the new sinful tendencies resulting from the fall of man. This illustrates the great gulf which separates the theory of the Christian Fathers from that of Aristotle who treated the State as a natural result of the social tendencies in man's nature.

§ 31. The Middle Ages

Why was the theory of natural law so popular in the Middle Ages?[1] There were reasons of conservatism and liberalism, of religion and of practical convenience. Firstly, we must realize that in the Middle Ages men defined law in a manner very different from that of Austin. Many today base law on will—whether it be the will of a sovereign or the general will of a community. Since the fall of Rome Europe was steering uneasily between the two dangers of tyranny and anarchy—Austinian theories might lead to the first, and, in the absence of a cohesive community, the doctrine of the general will may lead to the second. Men sought for a law that was based on something more enduring than the wills of men, that could provide an element of unity in the battle against chaos and an element of protection against the arbitrary will of a sovereign. In the Germanic community, the relationship between monarch and subject was expressed by the idea of mutual fidelity rather than unilateral obedience—the king was also subject to the law.[2]

Natural law satisfied the interests of conservatism, for it had a long and 'respectable' ancestry; it could be made to satisfy the demands of liberalism (or even 'the left') because no one knew exactly what it was and many radical propositions could be drawn from the needs of man

[1] A. J. and R. W. Carlyle, *Mediaeval Political Theory in the West*; O. F. von Gierke, *Political Theories of the Middle Ages* (ed. Maitland); W. Ullman, *The Mediaeval Idea of Law as represented by Lucas de Penna.*

[2] F. Kern, *Kingship and Law in the Middle Ages* (trans. S. B. Chrimes), 135.

as a reasonable being. Psychologically the theory was satisfying because the very chaos of the time made universalism precious, even in a theory. Generalizing minds in their search for some principle of unity seized on natural law as the easiest method of approach.[1] The theory satisfied the man of religion (for had not God revealed the truths on which natural law was based?),[2] and 'economy of thought' made it easier to tread the known paths of philosophy than to strike out afresh. Moreover, the infusion into the theory of many of the actual rules of Roman law was now bearing fruit.[3] Thus when the merchant pleaded that the rules of commerce should be based on natural law, he was not, contrary to the custom of his kind, engaging in philosophic mysticism, but arguing that the developed rules of Roman law should be adopted in place of the chaos of customary rules.

In the Middle Ages we find the germ of theories that later became of great practical importance. In searching for a principle by which the power of the State could be justified, writers evolved the theory of the social contract. There were many varieties of this doctrine, but the predominant medieval compromise was that the monarch was above positive law, but was bound by natural law.[4] This entails a complete break with the Roman view that natural law is the immutable and universal part of civil law. To the Middle Ages natural law may be the base on which positive law is built, but a tendency arises to regard natural law as a superior body of principles by the test of which the validity of positive law is to be judged. Thus even in this period we see the germ of the later theory of natural rights.

St. Thomas Aquinas (1225–74) is the most significant figure. He emphasizes that man's intellect and free will are the closest image of God in the material universe.[5] The eternal law governs the world through the will of God and according to His wisdom. For humanity this eternal law becomes the natural moral law, the basic rule being: act in conformity with your moral nature. The Decalogue provides

[1] 'The conception of absolute justice is one of the fundamental needs of the human mind': G. Del Vecchio, *Formal Bases of Law* (trans. J. Lisle), 14–15.

[2] Some argued that natural law depended on the will of God and hence that it was valid only because God had decreed it; the realists thought that it depended on God's nature, and therefore could not be changed, for if God changed his nature, would He still be God? O. F. von Gierke, op. cit. 75, 172, 173.

[3] Thus to Lucas de Penna in the fourteenth century, Roman law was the incarnation of reason and of culture; W. Ullman, op. cit. 75.

[4] Thus Azo believed that a rescript of the emperor contrary to natural law was void: A. J. and R. W. Carlyle, op. cit. ii. 32.

[5] M. J. Adler, *Essays in Thomism*, 205.

the contents of the natural law. This does not render the positive law superfluous—it is needed to work out the implications of the guiding natural law. Positive law should not conflict with natural law—if it conflicts, it is not law and does not bind the conscience of the subject. Thus law is reason and not the mere arbitrary whim of the ruler.

Adler points out that St. Thomas's theory has been misread, even by some of his followers, and that modern misunderstandings arise from the assumption that the term law is used in exactly the same sense in the phrases natural law and positive law. St. Thomas did not explicitly state that the word was used in two senses. The elements of truth in Thomism are more clearly seen if we adopt Adler's analysis:

(*a*) Natural law provides the *principles* which determine the ends of action—the first truths of the practical reason, which are universal;
(*b*) Secondly, there are the *precepts* which are derived from these principles, and are judgments about *means*;
(*c*) Thirdly, there are the rules of law which are the application of the precepts to changing circumstances—these rules are essentially variable as conditions change;
(*d*) Lastly, there are the decisions—the application of the rule to a particular case.

Natural law is not directive in the same sense as positive law: the former provides the ultimate end, the latter directs a certain course of action after considering all the circumstances here and now. Natural law binds the conscience: positive law binds because of a sanction, though if it is just it will also bind the conscience. Positive law is nothing else but an ordinance of reason for the common good, made by him who has the care of the community, and promulgated. Much confusion would have been avoided if the term law had been confined to positive law and another term used for the *ius naturale*, which essentially lays down general principles rather than detailed rules. The *principles of natural justice* is a phrase that expresses better the medieval notion.

§ 32. The Seventeenth Century

Grotius (1583–1645) is the most famous representative of the rationalist school. Natural law is based on the nature of man and

his inward need of living in society.[1] To discover what are the rules of natural law we must see what is in accord with the rational and social nature of man and then test our conclusions by seeing whether the rule has been adopted by all nations or at least the most civilized.[2] In Grotius's whimsical language, human nature is the grandmother, natural law the parent, and positive law the child. Human nature makes us desire society and hence creates natural law, which in its turn recognizes contracts as valid and thus sanctifies the social contract which is the basis of the laws that Jack obeys. But he shared the naïve view that the principles of natural law could be deduced with ease—they are as evident as the physical objects we see with our eyes.

Grotius's most significant contribution was in the realm of international law. Appalled by the savagery of the wars of his time, he wished to discover a basis on which to build rules that would restrain the ferocity of states. What more inevitable than that he should turn to natural law? As even a society of robbers could hardly be preserved without the recognition of some mutual rights, surely that society which contains the greater part of the civilized world must recognize that there are inherent in each state rights which can give birth to a system of law. Stripped of some of its crudities, his doctrine is essentially sound—that a community between nations is possible only if certain rules be accepted as the binding basis of a common life. The passing of time has only underlined his argument.

Grotius had emphasized that man had an impelling desire for society and that natural law was an outgrowth of this characteristic. To Hobbes (1588–1679), however, man in a state of nature lived at war with his fellows and his life was solitary, poor, nasty, brutish, and short.[3] Hobbes was trying to build a theory on an anticipation of the findings of realism and empirical psychology. He emphasizes that he derives the rights of sovereign power from the principles of nature and according to the light of experience.[4] He claimed that he based his conclusions on the 'known natural inclinations of mankind'.[5] Distressed by the civil war, he wished to show that the true course lay in

[1] *De Iure Belli ac Paçis*, bk. I, ch. i. 10. 1. It is 'the dictate of right reason indicating that any act from its agreement with the rational and social nature (of man) has in it a moral necessity'.

[2] H. Grotius calls these methods the more subtle *a priori* and the more popular *a posteriori*: op. cit., bk. I, ch. i. 12. 1.

[3] A convenient summary of T. Hobbes's views is found in Huntington Cairns, *Legal Philosophy from Plato to Hegel*, ch. vii; M. Oakeshott, *Hobbes's Leviathan*.

[4] *Leviathan*, ch. xxxii.

[5] Op. cit. 466.

admitting the power of the State. Man must for self-preservation escape from the misery of anarchy. The passions that incline men to peace are fear of death: desire of such things as are necessary for commodious living and hope by their industry to obtain them. The 'articles of peace' are what others call the law of nature. 'A law of nature is a general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same: and to omit that, by which he thinketh it may be best preserved.'[1] The fundamental law of nature is that every man ought to endeavour to obtain peace, as far as he has hope of obtaining it: and when he cannot obtain it, then he may seek, and use, all help and advantages of war. The second is that, if others are willing to follow the same rule, man should be content with so much liberty against other men as he would allow to others against himself. The third law of nature is that men perform their covenants made.[2] It is a striking commentary on the power of the tradition of natural law that such a realist as Hobbes, who broke with accepted tradition in so many ways, should still cast his theory in the language of natural law.

The only effective way to secure order was to reduce the warring wills of man by the imposition of a super-will which could command obedience. The sovereign was the sole source of law, was above it and alone had the power to change it. The laws of nature are contrary to our natural passions and there must be the 'terror of some power to cause them to be observed'.[3] But the foundation of the Commonwealth Hobbes finds in the agreement of men—this shows the influence of the theory of the social contract even on one who believed in absolutism.

Hobbes emphasized that law derived its authority from politically organized society. He did not ignore ethics for he admitted the ultimate force of ethical rules, but he sharply distinguished its sphere from that of law. Law existed, whether it be just or unjust, because it was laid down by the State. It is clear that Austin built on Hobbes. Hobbes's theory has two sides—as a formal theory of law it is still adopted by many realists. But it could easily be used to provide an ethical defence of absolutism, since Hobbes's analysis of man's nature left no hope for the creation of a general will save when it was

[1] Op. cit., ch. xiv.
[2] Hobbes altogether lays down nineteen rules of nature.
[3] Op. cit., ch. xvii.

imposed by force. His social contract is a *pactum subiectionis*, rather than a *pactum unionis*.

Hobbes's aim was to justify absolutism by contrasting it with the ills of the state of nature. Locke's[1] aim was to prove that government must necessarily be limited. Like Grotius, he believed that the moral rules could be easily discovered through reason. 'I doubt not, but from self-evident propositions, by necessary consequences, as uncontestable as those in mathematics, the measures of right and wrong might be made out, to anyone that will apply himself with the same indifferency and attention to the one as he does to the other of these sciences.'[2] Locke's inquiry is defined by him as follows: 'Political Power . . . I take to be a right of making laws with Penalties of Death and consequently all less Penalties, for the regulating and preserving of Property, and of employing the Force of the Community, in the Execution of such Laws and in the Defence of the Commonwealth from foreign Injury *and all this only for the publick Good*.' Pollock points out that the italicized clause gives the keynote to the whole Essay.[3] Locke emphasizes the imperfections of the state of nature: there is a want of established law, of an impartial judge, and of power to enforce rules—but he does not take such a gloomy view as Hobbes of the nature of man. He agrees with Hobbes that the organization of the State is essential, but the great difference lies in the fact that the surrender of liberty to the sovereign is not absolute but conditional—the power of the State 'can never be supposed to extend further than the common good'. His contribution, therefore, is that government is a trust for the benefit of men. The awkward question what was to happen if the ruler committed a breach of trust is skated over rather lightly.

§ 33. Natural Rights

Even today, many theories of natural law have a religious base, but in the eighteenth century we notice an increasing secularization of the approach to legal and political questions. This ultimately makes more difficult the solution of the question whence comes the binding force of natural law, for the easy solution that it is based on the will of God does not prove acceptable to all men. But this period was too complacent for carping doubt—this was the 'golden century of human reason, when the miraculous was expected of it. In it was

[1] 1632–1704.
[2] Essay, IV. iii. 18; Huntington Cairns, op. cit. 349.
[3] *Essays in the Law*, 84.

found what the Middle Ages had found in religious faith, and what the nineteenth century was to find in science—a key to unlock all doors, a panacea for all the ills of the world.'[1] Great respect was paid to the achievements of Euclidean geometry. Why could not jurisprudence follow the same method and, after discovering the necessary axioms or self-evident principles, determine all its problems by rigorous deduction? But the actual contribution made was rather disappointing, and the attempt to distinguish between the rules that were fundamental and immutable and those that were merely convenient ended in failure.

In the eighteenth century the theory of natural rights became the spearhead of revolutionary activity. There had long been a tendency to set up natural law as a body of principles superior to positive law, and, if pursued too far, such a tendency may easily lead to anarchy. The doctrine arose that there were certain innate rights, arising from the very nature of man, which were beyond the assaults of positive law—in the famous words of the Virginian Declaration of Rights, 'all men are by nature equally free and independent and have certain inherent natural rights of which when they enter a society, they cannot by any compact deprive or divest their posterity'.[2] On the whole, theories of natural rights tended to be individualistic, to consider man as a unit rather than as a member of society. The Protestant revolt emphasized the liberty of the individual; and, economically, individualism was favoured by the rising middle class. Whatever started the spark that led to the French Revolution, the middle classes finally took control and impressed the vague theories of the philosopher with a bourgeois stamp. The liberty that was protected was that of the middle classes to run their businesses as they willed, that of the peasants to till their land free of the burdensome exactions of privilege.

There had long been a theory that natural law was immutable, and even today most theories of natural rights retain a trace of individualism. But times have changed, and hence the same gospel which was once the cry of the revolutionary is now the cliché of the conservative who wishes to check attempts on the part of governments to remedy inequalities.[3] Ritchie speaks of the grim delight with which

[1] J. Dickinson, *Administrative Justice and the Supremacy of Law*, 114.

[2] D. G. Ritchie, *Natural Rights*, 15; J. W. Jones in *Cambridge Legal Essays*, 228. Declarations of rights are not confined to the eighteenth century—the United Nations has produced a *Universal Declaration of Human Rights*.

[3] D. G. Ritchie, op. cit. 14–15.

Tom Paine would have listened to a Tory preaching the rights of man in 1891.[1] The middle classes, having won freedom, did not desire that freedom to be hampered by restraints imposed in the interests of the labouring classes. Thus the doctrine of natural rights has had great influence in America. The early American judges had a strong regard for the liberty of the individual. 'I cannot subscribe to the omnipotence of a state legislature. . . . An Act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.'[2] The Fourteenth Amendment,[3] whatever may have been its object,[4] has been interpreted to give the courts power to safeguard natural rights and to declare unconstitutional any statute that unreasonably interferes with life, liberty, or property. Grant submits that the modern definition of due process is merely the natural law of Story and Field under a new name, that of reasonableness. Too often the courts tended to adopt fixed views of natural rights based on the doctrine of *laissez-faire* and boldly wrote these doctrines into the constitution itself.[5] Holmes J. has pointed out the dangers of this policy:

> A constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez-faire*. It is made for people of fundamentally differing views and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution.[6]

Thus under the guise of the supremacy of law, America has achieved the supremacy of the judges,[7] and some of the political conflicts over Roosevelt's New Deal were transferred to the courts. Friedmann states that natural law thinking has dominated the Supreme Court more than any other law-court in the world.[8] It is true that the courts did not directly rely on a doctrine of natural right, but the inter-

[1] Loc. cit.
[2] Per Chase J., *Calder* v. *Bull* (1798), 3 Dallas 386, discussed by J. A. C. Grant, 31 *Col. L. R.* (1931), 56.
[3] Passed in 1868. No state shall 'deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws'.
[4] 47 *Yale L. J.* (1938), 371.
[5] Thus in *Lochner* v. *New York* (1904), 198 U.S. 45, the majority decided that it was unconstitutional for the legislature to limit the hours of work in a bakehouse to ten hours a day.
[6] Ibid.
[7] J. A. C. Grant, 31 *Col. L. R.* 56; C. G. Haines, *Revival of Natural Law Concepts*, 176, 188.
[8] *Legal Theory* (5th ed.), 150.

pretation of what was an unreasonable interference with liberty or property was sometimes affected by the older doctrine that certain rights were fundamental or innate.[1]

Later the doctrine of natural law made the Supreme Court the active guardian of civil liberties such as freedom of the person, of thought, and of religious expression.[2] Moreover, the court has taken, since 1937, a more realistic approach towards new legislative experiments and the criticism that was justified earlier in the century is now out of place.[3]

On the other hand, the court has been so active in protecting personal rights that one school of thought attacks the Warren court for interventionism. Learned Hand, J. asks whether we could *a priori* determine that the court is more qualified to intervene on the question of personal rights than it was on the question of property rights.[4] An incisive attack was made on the activity of the court by Professor Bickel[5] as 'over interventionist in purpose, sloppy in reasoning and mistaken in result'. Judge Wright attempts to put the question in its historical perspective and defends the court.[6] All that is relevant for our purpose is to show that whereas in the early part of the century the court was being attacked by the liberals, it is now being attacked by the conservatives. This merely demonstrates the difficulties surrounding the interpretation of broad principles in a constitution.

It remains true that one disadvantage of any theory of higher law is that it is subject to abuse—thus the Nazis employed the higher law theory to undermine the position of certain classes of the community.[7] Is there a theory, however, which cannot be misused?

[1] R. H. Jackson, *The Struggle for Judicial Supremacy*, points out that only two acts of Congress were held unconstitutional by the court in the first seventy years of its existence. In the second seventy years, fifty-eight acts were set aside, and between 1890 and 1938 *State* legislation was set aside under the Fourteenth Amendment 228 times: see also C. G. Haines, in *Rec. Lambert*, ii. 286; W. Y. Elliot in the same volume at 324, and C. E. Clark at 311. The rising tide of collectivism led to greatly increased activity on the part of the court.

[2] W. Friedmann, *Legal Theory* (5th ed.), 143; and for accounts of the legal battles during the last decade in the United States of America over fundamental rights enshrined in the Bill of Rights and in the Fourteenth Amendment, see e.g. Learned Hand, *The Bill of Rights* (1958); W. O. Douglas, *The Right of the People* (1958); E. S. Corwin, *The Constitution and What it Means To-day*; J. Williams, *The Supreme Court Speaks* (1956), Part VI.

[3] A. S. Miller, 25 *Mod. L. R.* (1962), 641.

[4] *The Bill of Rights*, 50–1, cited Friedmann, op. cit. 149.

[5] *The Supreme Court and the Idea of Progress* (1970).

[6] 84 *Harv. L. R.* (1971), 769.

[7] Friedmann, *Legal Theory* (4th ed.), 352. This passage is omitted in the 5th ed.

§ 34. Modern Theories

The revolutionary character of natural law for a time led to the disappearance of the doctrine from official teaching. The Reformation had introduced diversities into the unity of European thought and the doctrine of the divine right of kings was unfavourable to any theory of a higher law. Moreover, the central thesis of the historical school was impressive—that it is impossible to determine the content of law *a priori*, for law is relative to time and place and is a peculiar product of each nation's culture. For all time the historical school disposed of the notion that immutable and universal *rules of law* could be discovered, and the recognition of the close relationship between man and the community has rendered less popular the attempt to discover rules drawn from the needs of man considered in isolation. But after the first flush of success had passed, men began to see that the historical school presented only a partial picture. To place the basis of law in an instinctive sense of right seems but to outline, instead of solving, the fundamental problem of the relationship of justice to law.

Hence to deal with the question of the rational and moral bases of law, new theories of *ius naturale* have arisen; but, thanks to the historical school, they are free from the worst vices of their predecessors. Instead of searching for immutable *rules*, the thinker attempts to find ideal standards or principles which will give direction to law, but also be capable of adaptation to different circumstances—hence the phrase, 'natural law with a variable content'. The same *principle* of justice may require one *rule* for London, another for Colombo. Although many theories of natural law were static, there is no inherent necessity why this should be so. Reason does not assume that the world remains the same, and a theory based on reason can easily be made progressive. The opposition between natural law and positive law is frequently solved by regarding the former as the ideal by which law should be tested, the latter as the actual law in force. Kant is the bridge between the earlier theories and those of today.

But there are still many different approaches, and it is perhaps unfortunate that the old terminology of natural law is used, for, at least in the Anglo-Saxon world,[1] there is a certain inbred hostility because of the crudities of the earlier theories—nor has all ambiguity disappeared today. But, whatever the terminology we use, the same

[1] Nevertheless, natural law had great influence in the formative period of American law: R. Pound, *The Formative Era of American Law*, ch. i.

problem must be faced. For all Bentham's scorn of natural law, his standard of utility is typical of much natural law writing and the actual term *utilitas* was used in the Middle Ages.[1] For those who wish to go beyond formal theories basing the validity of law on the will of the sovereign, or on an examination of the nature of legal systems investigated objectively whether as systems of rules or as systems of a more complex nature, there may be only three solutions —force, the will of the majority, or the needs of community life.[2] Thus Goodhart defines law as 'those rules of conduct on which the existence of the society is based and the violation of which, in consequence, tends to invalidate the existence of the society'.[3] This (in clearer language) is a solution similar to those of many natural law theorists, for the close relationship between law and the essential foundation of the community life is stressed. Le Fur describes natural law as law discovered by reason working by the light of ethics on the data provided by social facts.[4]

In the twentieth century we see the beginning of a functional and relativist approach. Theories of law become secularized: pragmatism emerges as a legal philosophy and the advance of science turns the minds of men into materialistic channels. New economic conditions and social philosophies made it impossible to apply literally the older doctrines, and until they could be restated in modern terms there was a tendency to reject them *in toto*. Moreover, Freud and the psychoanalysts introduced new theories of the human mind—the doctrine that we 'rationalize' our actions introduced cynicism towards absolute ideals. The first result of the widespread adoption of the functional approach was destructive—many lost their faith in reason and religion as the basis of natural law, but there was nothing constructive to put in its place. A functional theory is rightly interested in how the engine of a car works—but it does not help us in deciding the journey which the car is to take. Hence it was inevitable that there should be ultimately a renaissance of natural law.[5]

Natural law is rejected, for very different reasons, both by Kelsen and Kohler. Kelsen realizes that the fundamental thesis of natural law is that the validity of law is sought elsewhere than in a formal

[1] F. Pollock, *Essays in the Law*, 47 (although not precisely in Bentham's sense).
[2] L. Le Fur, in *Droit, Morale, Mœurs*, 55.
[3] *Transactions of the Grotius Society* (1936), xxii. 40.
[4] *Droit, Morale, Mœurs*, 55. The Austrian Code laid down that in default of authority problems should be resolved according to 'les principes juridiques naturels': M. F. Zoll, *Rec. Gény*, ii. 434.
[5] e.g. J. Charmont, *La Renaissance du droit naturel*.

postulate (e.g. the will of the sovereign). The jurist cannot accept two standards of validity, for in case of conflict his pure science would contradict itself. To Kelsen, justice is an irrational ideal, as it cannot be proved by rational cognition. If we are content with the formal approach, such a theory is unanswerable, but, since we can understand the development of law and its relationship to society only by digging deeper into the mind of man, we find the results of Kelsen's theory rather scanty. And when Kelsen treats of the problem of international law there seems to have crept in the 'ghost of natural law', for the primacy of international law is based on the needs of man rather than on any logical theory.[1]

Kohler[2] builds on the work of the historical school and adapts the premisses of Hegel, but his modifications are so extensive that cynics say that there is little Hegelianism and less philosophy. Law is essentially a social fact and jurisprudence is a branch of that philosophy which deals with man and his culture—which term he defines as the greatest possible development both of human knowledge and of human control over nature. But culture is relative to time and place, and, as it varies, so must law. Evolution is thus the keynote of his work. 'There is no eternal law. The law that is suitable for one period is not so for another: we can only strive to provide every culture with its corresponding system of law. What is good for one would mean ruin to another.'[3] But Kohler does not regard law as being automatically created. Jurisprudence must be a creative science—the legal order must perpetually be creating new values which are in accord with the advancement of culture, and those who are far-sighted should struggle with the masses whose views are more mundane. He is therefore opposed to the *juristic pessimism* of the historical school.[4] History he treats as the evolution of an Idea which must triumph in the end, although there may be many periods of retrogression.[5] But there are two strands in his thought which are never quite reconciled —sometimes culture seems to mean the actual state of a given civilization, sometimes an ideal force fighting the powers of evil. On one page we read of men imbued with one ideal fighting men who stand

[1] H. Lauterpacht, in *Modern Theories of Law*, 130; C. H. Wilson, 1 *Politica* (1934), 54.

[2] *Lehrbuch der Rechtsphilosophie*, translated by A. Albrecht as *Philosophy of Law*.

[3] *Philosophy of Law*, 5.

[4] R. Pound, *Interpretations of Legal History*, 145; J. Kohler, *Philosophy of Law*, 26, 58–9.

[5] There is much that is 'illogical and unrhymed' in human history: after the triumph of reason, we see that of its opposite; there are 'pathological' periods.

for another; on a subsequent page we see culture almost as an entity in itself unfolding from the spirit of reason.[1] Kohler seems to make two points: firstly, reason (or the Idea of culture) lies at the basis of law; secondly, the actual rules must be adapted to the state of development of any particular society. Stripped of its Hegelian trappings, this is only to say that law is based on the needs of community life, on the reasonable demands of man as a civilized being. Thus, although Kohler expresses hostility to the doctrine of natural law, his basic ideas are somewhat akin to some modern forms of that theory: the jurist must draw from the civilization of his time those 'jural postulates' or necessary laws which are essential to achieve the purposes desired.[2]

The neo-Kantian approach is illustrated by Stammler, who seeks for the *a priori* form of law and of justice.[3] Stammler considers that the purpose of law is not to protect the will of one but to unify the purposes of all, to create a society in which each member will have adequate means of self-expression. But if this is the purpose of law, is it not also the purpose of just law, which attempts to effect a reasonable reconciliation of men's purposes? Hence a just law is that which agrees with the purpose of law as such. In seeking to elaborate the form of just law Stammler has no difficulty in showing the confusion and ambiguity of previous theories of natural law. But in order to secure certainty he takes the heroic step of rejecting the view that a basis for law can be discovered by analysing the nature of man—it can be found only by analysing the nature of law. There is no law of nature in the old sense of the word, but there may be formal principles implied in the notion of law which are universally true. Hence the cliché, 'natural law with a variable content', explains Stammler's view so long as we remember that his natural law is a mere logical form. What, however, of legal systems which are unjust? Stammler's reply is that 'individual misuse does not destroy the purpose which essentially lies in the thing itself'. A given body of law may fail to secure harmony, but the fact that Smith is an irrational idiot does not interfere with the accuracy of the statement that rationality is the characteristic of humanity. It is the striving towards just law that is the necessary mark of law—this is much the view of Salmond,[4]

[1] Castillejo y Duarte, *Filosofia del Derecho* (1910); appendix to J. Kohler's *Philosophy of Law*, 335.

[2] *Infra*, § 36.

[3] *Die Lehre von dem richtigen Rechte: Theory of Justice* (trans. I. Husik); M. Ginsberg in *Modern Theories of Law*, 38; E. Bodenheimer, *Jurisprudence*, 168.

[4] *Supra*, § 23.

although the latter does not cumber his writing with the neo-Kantian technique. In fact Stammler produces only the formal principles of juristic thought. It is impossible to create principles of justice from the rules of logic alone, just as manipulation of the laws of architecture cannot produce a house without humble bricks and mortar.[1] Although it is claimed that the principles of just law are deduced from the premisses, this plea would be rejected by many. Indeed, Stammler's method proves nothing concerning the nature of justice, and the only conclusion that we can draw is that even a philosophical technique does not make the writer immune from being influenced by his own prejudices.[2]

Gény seeks the foundation of natural law in the truths of religion.[3] He wishes to discover directive principles which will act as a guide to the judge where there is no authority in point.[4] Can the disturbing element of justice, ethics, social interest (call it what you will) be so reduced to order that it will prevent arbitrary caprice? As a philosophic basis Gény chooses so many elements from different streams of thought that it is difficult to weld his heterogeneous material into a consistent whole.[5] He denies that reason alone can solve the problems of the universe, for he emphasizes the part of intuition in enabling us to grasp reality. Firstly, he makes a confession of faith—the distinction between man and all other created things, the immortality of the soul, the existence of God and the communion between God and man. But he does not attempt to draw detailed rules from these principles. A very useful distinction is made between the *donné* —the substratum of objective truth which the jurist must accept since *ex hypothesi* it is unalterable—and the *construit*, where the activity of the jurist has free play within the limits set by the nature of things. Hence a modern doctrine of natural law can supply merely directive principles, which must be applied by the constructive work of the jurist, who must never forget that legal technique is not an end in

[1] F. Gény, *Science et technique*, vol. ii, ch. vi; M. Cohen, *Law and the Social Order*, 173.

[2] H. Goldschmidt, *Archives de phil. du droit* (1937, 1–2), 94.

[3] *Méthode d'interprétation et sources en droit privé positif*, and *Science et technique*; W. Friedmann, *Legal Theory* (1967), 184 et seq.

[4] *Infra*, § 46.

[5] He draws on scholasticism, Bergsoniani ntuition, and even positivism. Thus he has been labelled a neo-scholastic, an idealist, and even a realist because of his penetrating analysis of the judicial method (see Morris Cohen, *Law and the Social Order*, 300). He accepts part of Duguit's doctrine and some of the results of Stammler: he agrees with the neo-Hegelian that there must be a metaphysic at the base of law and with the sociological school that there should be a precise analysis of the milieu in which law operates.

itself but only a means of putting into effect the fundamental truths on which human life is based.

Since Gény expressly founds his doctrine on an intuitive religious faith, clearly it will prove unacceptable to those who reject such religious teaching. Moreover, in dealing with the application of law, Gény has too facile a belief in the possibility of discovering solutions that will be universally favoured. Even if all jurists adopted the New Testament as a basis, there would be many differences of opinions as to the proper application of that ethic to concrete cases. Gény recognizes this difficulty, but fails to solve the problem, and when he talks of socialist doctrines which contradict the tenets of natural law, he is letting dogmatism take the place of thought.[1]

The clearest modern Catholic exposition is that of Heinrich Rommen.[2] Law is not mere will—it is based on reason. But he rejects the excesses of the rationalists. The fundamental principles he finds to be 'What is just is to be done' and 'Give to everyone his due'. These directive principles he fills out with Christian teaching and a consideration of the rational and social nature of man. But he agrees with Gény that the farther we descend from these first principles to particular rules, the more difficult becomes the decision and the greater the controversy. He regards the legal institutions of private property and inheritance as part of the natural law, but decisions as to the exact forms of property and of inheritance are subject to economic conditions. Thus severe restrictions on private property may be necessary in certain conditions—property must be made to fulfil its real function of serving the individual. His doctrine does emphasize the moral supremacy of the natural law: but rejects the anarchial individualism of some earlier theories. Man exists only in society and he owes a duty not to disrupt the social structure. If a law is only unjust, it is the citizen's moral (as well as legal) duty to obey. Only those laws are devoid of obligation which are immoral.

Moreover, Rommen claims that there is no essential divergence between the historical and the natural law schools, if both are properly understood. All law must take account of the peculiarity of individual people and their legal genius, the course of historical development and

[1] The point made is not that socialist doctrines are right, but that to dismiss them as dogmatically as Gény does is not the impartial attitude which jurisprudence should adopt. What exactly does Gény mean when he speaks of social utility? See J. Stone, 47 *Harv. L. R.* (1934), 721 at 724; J. R. Commons, *Rec. Gény*, iii. 124. K. N. Llewellyn (in reviewing R. Pound, *Jurisprudence*) asserts that Gény has been misunderstood, that his 'method' is superb though his philosophy is weak.

[2] *The Natural Law* (trans. by T. R. Hanley).

economic evolution. Only the fundamental ends of society can be claimed as universal. On the other hand, politics cannot be divorced from the moral universe—natural law remains the criterion by which the justice of law is to be determined. 'Just as the real and the true are one, so too the true and the just are ultimately one. *Veritas facit legem.* . . . True freedom consists in being bound by justice.'[1]

The modern deification of the State leads naturally to a denial of the existence of natural law, since the State is placed above moral rules which bind the individual alone. Such an approach is not confined to modern Fascist theories, for its roots lie in the Hegelian conception of the State as an end in itself. Modern doctrines have carried to its logical end this older philosophy, and both Fascism and Communism condemned as outmoded and bourgeois any doctrine that natural law should bind or guide the law-maker.

Many democrats also deny the doctrine of a higher law on the ground that the wish of the populace should be supreme. With past examples in mind, natural law is sometimes regarded merely as a device to protect vested interests. But can democracy survive unless certain ultimate values are protected? One difficulty is that the word democracy is used in two senses: firstly, as meaning a system of government which gives full expression to the will of the people (in practice this means obedience to the majority); secondly, as meaning a system of spiritual values which recognizes that the will of the majority must be supreme but also stresses that the majority must respect the intrinsic dignity of human personality. Democracy cannot survive if it merely means the naked power of a chance majority—all action must be guided by the needs of the community as a whole. Whether we can prove the validity or not of ideals based on the unique value of human personality, it is unlikely that democracy will succeed unless they are respected. All attempts to establish absolute values on any other than a religious base have failed—but religion is essentially a matter of faith rather than intellectual proof. The nature of human communities seems to be such, however, that each to survive must recognize some fundamental values and must devise means to protect those values and, in the long run, not only to protect them but to permit them to grow and change.

[1] Op. cit. at 267.

§ 35. The Common Law Approach

Finally, let us consider the attitude of the common law towards these questions of value. We cannot adopt the easy solution of saying that the actual law in force lays down all the standards that are to be applied and hence that such problems need not trouble us. For, while of necessity there are many detailed rules which adopt certain ideals, there are two means by which modern views may influence the law laid down by the past: firstly, where there is no authority, the court's view of what is socially expedient will influence the law; and, secondly, many accepted rules lay down broad standards which are mere moulds that can be filled with changing contents. Thus public policy is 'a principle of judicial legislation or interpretation founded on the current needs of the community'.[1] The standard of reasonableness is elastic enough to be adapted to present views. Yet in applying these principles and standards, the English doctrine is that the judge should apply not his own view, nor even that of philosophy, but the opinion of the average right-thinking member of the community. If the House of Lords interpreted public policy by Marxian standards, there would not only be surprise but a feeling that the proper bounds of the court had been exceeded.[2]

Hence while there has been some repetition of natural law learning in the English books, the English judge prefers to use more humble tests. Bracton, Coke, and Blackstone use the doctrine of natural law as a rhetorical figment, but do not incorporate it into their theories of law.[3] Nevertheless, English law was open to the same ethical influence as were those systems that relied on natural law; but, where the continental lawyer would flourish a philosophy, the English jurist pins his faith to common sense,[4] natural justice,[5] reason,[6]

[1] P. H. Winfield, 42 *Harv. L. R.* (1928), 76 at 92.

[2] *Stuart* v. *Bell*, [1891] 2 Q.B. 341 at 350; *In the Estate of Bohrmann*, [1938] 1 All E.R. 271 at 279, per Langton J.; *Fender* v. *St. John-Mildmay*, [1938] A.C. 1 at 38 et seq.

[3] Bracton copies Azo, but his theories of natural law are not incorporated into his theory of law—see *Bracton and Azo*, Selden Society, vol. 8 (1894), 32–9. *Calvin's Case* (1610), 7 Coke 1*a* at 136 and *Day* v. *Savadge*, Hobart 85 at 87, state that natural law is immutable. See also *Bonham's Case*, 8 Rep. 107*a* at 114, for a trace of the view that even an act of Parliament cannot overturn natural law (but see T. F. T. Plucknett, *Statutes and their Interpretation in the Fourteenth Century*, 69–71). Blackstone, *Commentaries*, i. 38 et seq., after saying that natural law is supreme, admits that Parliament is omnipotent (i. 91). The most that can be said for any doctrine of fundamental law is that statutes which conflict with fundamental principles are strictly construed.

[4] Cf. du Parcq L.J. in *Smith* v. *Harris*, [1939] 3 All E.R. 960 at 967; *In re Piracy Iure Gentium*, [1934] A.C. 586 at 594. A. H. F. Lefroy has collected many instances of the use of such terms, 22 *L.Q.R.* (1906), 293; *Mogul Steamship Co.* v. *McGregor* (1889), 23 Q.B.D. 598 at 620; *Barker* v. *Herbert*, [1911] 2 K.B. 633 at 644–5.

[*Note 4 cont. and notes 5 and 6 overleaf.*]

convenience,[1] practical considerations,[2] public policy,[3] or humanity.[4] As Scrutton L.J. pithily observed: 'I am sure it is justice. It is probably the law for that reason.'[5] 'There may be no difference in logic, but I think there is a great difference in common sense. The law is the embodiment of common sense; or, at any rate, it should be.'[6] A decision that is hard to justify logically, but is based on pragmatic realism, is that of Stamp, J. in *Woollerton & Wilson Ltd.* v. *Richard Costain Ltd.*[7] The jib of a tower crane occasionally projected over plaintiff's land. It is no defence to trespass that no damage was caused, and hence plaintiff was granted an injunction, but its application was deferred until the expected date of completion of the building. There were no merits in plaintiff's claim, as they could not show damage, and the cost to the defendant in redesigning the method of erection of this building would have been substantial. But the lip-service paid to the doctrines of trespass was tempered by a desire to achieve substantial justice.

The whole conception of equity is, of course, akin to natural law, but the Chancellor postulated, not a philosophy, but rather an Englishman with a conscience slightly more sensitive than the average.[8] Bentham's hedonistic calculus fits in well with the practical

'Ratiocination is good, but common sense is necessary': per Evatt J., *R.* v. *Connare* (1939), 61 C.L.R. 596 at 620.

[5] A. V. Dicey, *Conflict of Laws*, 7th ed., Rule 186, cf. phrase 'natural justice' avoided; *R.* v. *Local Government Board*, [1914] 1 K.B. 160 at 199–200; *Moses* v. *Macferlan* (1760), 2 Burr. 1005 at 1012; *Mitford* v. *Mitford*, [1923] P. 130 at 137; *Valentini* v. *Canali* (1890), 24 Q.B.D. 166; *Dickason* v. *Edwards* (1901), 10 C.L.R. 243 at 255; *Igra* v. *Igra*, [1951] P. 404. For a discussion of the application of the principles of natural justice to a company limited by guarantee, see *Gaiman* v. *National Association for Mental Health*, [1970] 2 All E.R. 362.

[6] The reasonable man of the law of tort, the doctrine that statutes should not, if possible, be so interpreted as to lead to an unreasonable result: the frequent reliance on the 'reason of the thing'. *Rees* v. *Hughes*, [1946] 1 K.B. 517 at 526. St. Germain in *Doctor and Student* points out that the common law tends to rely on reason where the continental lawyer would speak of *ius naturale*. Contrast the pessimism of Neratius that the reasons underlying a legal system should not be inquired into too closely, otherwise much of what is certain would collapse: cited F. Schulz, *Principles of Roman Law*, 98.

[1] *Russell* v. *The Men of Devon* (1788), 2 T.R. 667: *Millar* v. *Taylor* (1769), 4 Burr. 2303 at 2312; *Townley Mill Co.* v. *Oldham Assessment Committee*, [1936] 1 K.B. 585 at 613. But where the rules are settled, the law cannot worry about 'collateral inconvenience': per Lord Sumner, *Rodriguez* v. *Speyer Bros.*, [1919] A.C. 59 at 132.

[2] e.g. fear of a flood of litigation—*Winterbottom* v. *Wright* (1842), 10 M. & W. 109 at 115.

[3] See the cases collected by P. H. Winfield, 42 *Harv. L. R.* (1928), 76.

[4] *Bird* v. *Holbrook* (1828), 4 Bing. 628 at 643.

[5] *Gardiner* v. *Heading*, [1928] 2 K.B. 284 at 290.

[6] Per Lord Denning, *SCM (U.K.) Ltd.* v. *W. J. Whittall & Son Ltd.*, [1970] 3 All E.R. 245 at 250. [1970] 1 All E.R. 483.

[8] Equity is one of the most ambiguous terms of jurisprudence. See J. Austin, *Jurisprudence*, Lecture 33; C. K. Allen, *Law in the Making*, ch. v.

approach of the common lawyer. He is not interested in ultimate metaphysics but in framing a utilitarian test which could be used to encourage law reform.

The continental equivalent of public policy is the conception of *ordre public*, but it is interesting to contrast the English doctrine of public policy with the theory of natural law, for that throws light on the true nature of each. Compared with continental doctrines, the rule of public policy is practical and conservative, related to concrete cases rather than to abstract theory. It has been developed by dealing with actual abuses as they arose—hence public policy is disabling rather than constructive: it frequently prohibits, but rarely creates. The conception is peculiarly English and smacks of the particular genius of the common law. There are few bold leaps of doctrine, but step by step the territory has been mapped out. The doctrine is not individualistic, for (in theory at least) it considers the interests of the community rather than that of the parties before the court.[1] But in fact there is no investigation to discover wherein the interests of the community lie, the effect of a particular contract being assumed as self-evident,[2] and the application of the doctrine has sometimes been rather naïve.[3] The doctrine of public policy cannot be set in opposition to law (as was *ius naturale*), for it is part and parcel of the common law itself—it is respectable and respected. Nor could it be regarded as a universal or immutable body of rules, for the diversity of the heads of public policy is equalled only by the development of the rules under each head as circumstances changed.[4] Once cornering the market was regarded as 'a most heinous offence'[5]—now (if the operation be successful) it leads to universal admiration.

The common law determination of the ends that the courts should follow has thus been a work of practical adaptation to what are

[1] 'The law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition': per Lord Truro, *Egerton* v. *Brownlow* (1853), 4 H.L.C. 1 at 196.

[2] If a restraint of trade was reasonable as between parties, it was usually assumed that it was in the public interest. But Lord Hodson in *Esso Petroleum Co. Ltd.* v. *Harper's Garage*, [1967] 2 W.L.R. 871 at 900, regards 'public interest [as] being a surer foundation than the interest of private persons'.

[3] Did anyone ever suppose that the penalizing of illegitimate children would have any real effect on the prospective sinner?

[4] 'That unruly steed (public policy) now must be marked "aged" in the stud-book; but it gallops, nevertheless, with greater bounds than ever it did when the Common Law first ran it as a colt'—R. A. Eastwood and B. A. Wortley, *J. Soc. Public Teachers of Law* (1938), 23 at 30. For modern examples see *Beresford* v. *Royal Insurance Co. Ltd.*, [1938] A.C. 586; *Fender* v. *St. John-Mildmay*, [1938] A.C. 1; *Pigney* v. *Pointers Transport Services Ltd.*, [1957] 2 All E.R. 807.

[5] *R.* v. *Waddington* (1800), 1 East 143 at 155.

conceived to be the needs of the community rather than a philosophic study. It is akin to the spirit of Pound's analogy of social engineering —that the law should satisfy as many wants as possible with the least sacrifice.[1] But there can never be an exact correlation between the rules of law and the views of the average man. There are no precise methods of discovering what the community really thinks,[2] so we must trust the judge to be a typical representative of his day and generation.[3] Concerning many legal problems, we can hardly regard the average man as having any view at all. And occasionally the law has not hesitated to set a standard far higher than that actually observed. This method of the common law works well in times of quiet, but when there is rapid development the need for a deeper analysis is apparent. While jurisprudence may dispense with some of the jargon of the Continent, an appropriate dose of legal philosophy would stimulate the development of the subject. Even if we admit that philosophy has not yet evolved an acceptable scale of values, that its answers to the fundamental problems of jurisprudence are still confused, yet at least a study of philosophy shows us the futility of a dogmatic or unconscious assumption of a view that has already been shown to be false. Duguit is not the only writer who was most metaphysical when he attempted to divorce his writing from philosophy and ethics. Ignorance of the contribution of the philosopher causes us to stumble when we might walk with reflected light—even if the rays are not very powerful, they are preferable to the darkness which else would be our lot.

Whatever be the problems of philosophy, the law must actually translate a set of values into working rules of law. Pound points out, in reply to those who argue that a measure of values cannot be achieved, that the law has been forced to evolve a working test of values without waiting for all theoretical difficulties to be solved.[4] In this evolution the law cannot but be influenced greatly by the philosophy of life which a community holds.

[1] *Interpretations of Legal History*, 152. A realistic approach to the problem of trading with the enemy, so far as it related to Hong Kong under enemy domination, was taken by the Judicial Committee in *Hangkam Kwintong Woo* v. *Liu Lan Fong*, [1951] A.C. 707.

[2] J. Dickinson, 29 *Col. L.R.* (1929), 113 at 136: 'In truth it may well be doubted whether there is anything that may be called a customary or social opinion as to the right and wrong of perhaps most of the questions decided under modern conditions by a law court.' Cf. Hallett J. in *Chant* v. *Read*, [1939] 2 K.B. 346 at 357–8.

[3] Cf. P. H. Winfield, 54 *L.Q.R.* (1938), 155 and authorities there cited.

[4] *Contemporary Juristic Theory*, 81–2.

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V

LAW AS THE PROTECTION OF INTERESTS

§ 36. The Problems of a Jurisprudence of Interests

A great part of this work concentrates on the analytical approach. For convenience, the law creates certain pigeon-holes (labelled: property, contract, tort, and so on) in which it may file the rather untidy facts of life. In discussing these concepts, the treatment emphasizes the logical theory of law, though an attempt is made to off-set this by considering the function of these concepts in the life of today.

It is possible to classify the law on an entirely different basis, using as a criterion the interests which law is intended to protect. There has been recently much writing on the 'jurisprudence of interests',[1] and this can hardly be ignored in any work which attempts to survey modern thought. Some of the writing is, however, confused because of a failure to state with precision the exact problem which is being discussed. Moreover, there has been too much rhetoric wasted in exaggerated claims of the originality of the 'jurisprudence of interests'. There is a broad gulf between the fanatics who worship legal conceptions for their own sake, and those who believe in a free law where the judge relies merely on his intuitive common sense and is free of all authority. But the great majority of writers and of lawyers fall between these two extremes. For stability there must be certain accepted conceptions and definite rules, and there must also be some flexibility. The real question is one of degree—how far should there be freedom to mould the rules to achieve the interests which society demands? Some modern writing proceeds on the hypothesis that the discovery that law exists to protect individual and social interests was vouchsafed to mankind only in the twentieth century. The barest knowledge of legal history, to say nothing of philosophy, suffices to show the fallacy of this assumption.[2] The real problem was well understood by the creative judges of the past.

[1] See in general J. Stone, *Province and Function of Law*, ch. xx; R. W. M. Dias, 28 *Mod. L. R.* (1965). 397.

[2] A balanced survey will be found in *The Jurisprudence of Interests*, trans. M. Schoch, which contains excerpts from the writings of M. Rümelin, P. Heck, P. Oertmann, H. Stoll, J. Binder, and H. Isay. An excellent review is E. J. Cohn, 13 *Mod. L. R.* (1950), 117, who shows that this school sought to keep legal science free of

Moreover, the modern jurisprudence of interests is merely another side of the theory of natural law—it is the attempt to examine the connection between the law and the needs of man as a reasonable being. Why did the change in terminology take place? Firstly, there were those who thought that natural law was a confused term, as so many theories were placed under its head: secondly, natural law was identified by many with Catholicism and immutable rules, whereas the new schools were often secular and relativist: finally, the jurisprudence of interests arose in opposition to the jurisprudence of conceptions. The latter was alleged to make law rigid and a plaything of logic: the much vaunted jurisprudence of interests was claimed as a functional study which placed law in its proper perspective as a means of protecting the interests of man and society. But it is important to realize that the jurisprudence of interests merely deals with the fundamental problems of natural law under a new set of terms.

In any discussion of interests, the following points should be distinguished:

1. There lie hidden in the phrase, 'the purpose of law', two problems that should be separated—firstly, what are the ends which law has achieved in the past and is achieving in the present—this is a question of fact, however difficult it may be to give a precise answer. Secondly, there is the question of the ends that law should pursue. In treating of legal history we must beware of thinking that law has developed as unconsciously as the flowers on the tree. Ihering has shown that will, conscious effort, and struggle precede the creation of many rules of law.[1] But it is an exaggeration to consider that man always has a logical reason for his action; we all frequently act first and think afterwards, not only when we jump to save our lives from a speeding car, but also when we create social customs. Even where a reasoned policy precedes the formation of a law or an institution, frequently the end achieved is different from that desired.[2] Again, it is superficial to simplify the problem and regard legal history as the evolution of one or even several ideas (such as freedom), for the graph of history does not show us a steady rise but a confused series of curves both up and down. No one social or economic force, no single

ethical valuations and asks how we can have a jurisprudence of interests without a scale of fundamental values.

[1] *Der Zweck im Recht.*

[2] P. de Tourtoulon, *Philosophy in the Development of Law*, 32–3, 39. This is sometimes referred to as the doctrine of the heterogeneity of ends.

logical idea, will explain to us the evolution of law; for law is a resultant of all the forces that go to make up the life of the community. Hence at the most we can expect to lay down mere generalizations, not immutable laws of history. Perhaps with further study it will be possible to show a greater measure of accuracy in the formulation of historical laws of legal development, but that day is as yet far distant. The happiest feature of modern thought is its tolerance and its scepticism; to realize the complexity of the problem is to be nearer a solution than to falsify reality by premature simplification.

Pound has attempted broad generalizations[1]—that in early times the object of law was mainly to keep the peace, and emphasis was laid on the rules whereby each was kept in his ordered place. With the arrival of an era of commercial expansion, the demand was for the greatest possible protection of liberty and self-assertion and for the removal of old restrictions. Finally, instead of emphasizing the freedom of the human will, the law began to interfere in economic matters in order to protect the interests of the weaker elements of society. This view is more accurate than that of some neo-Hegelians who treat legal history as showing the increasing freedom accorded to the human will. The laws of most modern countries today show an increasing tendency to interfere with the will of individuals in order to protect what are deemed to be higher interests—e.g. the right of the labourer to decent conditions of employment. There is, in all countries, an increasing socialization of law—town and country planning shows in a dramatic way the destruction of individual rights in order to achieve an ordered development.

2. What are the interests in a given country which are denied protection and yet are backed by a real demand? This is a more dynamic study, although its ambit is still confined by the political and social opinion of the country in question. It is the attempt to discover what Kohler and Pound have called the 'jural postulates' of our time—those values which civilization demands should be protected by the legal system. Logically, once we speak of civilization we are introducing a moral concept, which must be based, consciously or unconsciously, on a theory of values. Hence, although attempts are made to keep this study of the 'jural postulates' on a factual basis, the attempt is rarely successful, as the writer's picture of the ideal colours his actual reading of the facts. There is a good deal of 'cryptic evaluation' as Stone terms it.[2] Pound writes, and we may well agree with him, that the

[1] *Philosophy of Law*, ch. ii; *Harvard Legal Essays*, 357.

[2] Op. cit. 363.

interest in the individual life is the most important of all. This statement, however, really depends on a philosophy and not merely on the 'facts'. A survey of the actual interests demanded by society provides no basis for preferring one to another save that provided by the strength of popular opinion. Only on a basis of absolutes can we logically determine the priority and the relationship of the various interests. Law that is in accord with the jural postulates of a particular country will not necessarily be good law—each community will obtain the kind of law it deserves.

The Universal Declaration of Human Rights[1] is really an attempt to lay down the 'jural postulates' which the civilization of our day demands. The Preamble treats the Declaration 'as a common standard of achievement for all peoples and all nations' which states are under a duty to implement. A survey of the rules actually enforced by the various countries shows that the common denominator is very low: the Declaration is not a statement of the interests actually protected by particular nations but of the ideal values which the more sensitive nations approve. As a programme of political objectives and of legal reform, the document is valuable, but it cannot be regarded as throwing light on what interests are actually protected.

3. What interests should the ideal legal system protect? This is a question of values, in which legal philosophy plays its part. It is essentially the problem of natural law, though other terminology may be used. But, however much we desire the help of philosophy, it is difficult to obtain. No agreed scale of values has ever been reached: indeed, it is only in religion that we can find a basis, and the truths of religion must be accepted by faith or intuition and not purely as the result of logical argument.

The various doctrines as to what *should* be the end of law are nearly as numerous as the writers who touch on the topic. Few writers can avoid setting up an ideal end for the law. The analytical school unconsciously postulated an ideal of logical harmony; the historical school assumed that evolution was progress; even such a positivist as Duguit with his doctrine of social solidarity is really building on an ideal of co-operation for the highest purposes. It might be thought that the cynical realists were free of ethical drives, but through a great

[1] An accessible source is 27 *Can. B. R.* (1949), 203. J. E. S. Fawcett, *The Application of the European Convention on Human Rights* (1969), points out that while the Universal Declaration has been a 'forlorn milestone', the European Convention has been relatively successful, as the draftsmen were realistic rather than ambitious.

deal of their work runs a burning desire for legal reform.[1] The teleological school make an irrefutable point when they argue that it is better to lay bare the presuppositions of our thought, and subject them to analysis, than to be governed by unconscious prejudices. In any developing legal system it is really impossible to consider laws entirely without 'reference to their goodness or badness'. But the actual attempts to postulate an ideal end for law have not been very happy. Once men sought for self-evident principles or axioms from which the rules of law could be deduced, as are the theorems of geometry from Euclid's postulates. But the march of science has rendered us sceptical of self-evident propositions, and the story of natural law shows the danger of hastily drawing the ends of law from a superficial consideration of the demands of reason. The neo-Kantian uses the method of the *a priori*, but finds it difficult to relate his conclusions to the world of fact. Others base their view on religious faith. Neo-Hegelians often assume what they wish to prove. Morris Cohen concludes that, search where we will, we find either that the ideals set down are purely formal categories without any real content or that the writer merely assumes them as self-evident.[2]

Hence relativism has become popular. Jurisprudence should study the ends of law, but treat them frankly as hypotheses instead of accepted truths. Gustav Radbruch's work[3] has not received in England the attention it deserves.[4] He considers that legal philosophy should study legal values, but should not attempt to choose between them. The choice is not a matter of science but of conscience, hence tolerance is essential.[5] The antinomies cannot be resolved save by a practical compromise valid only for that time and place. Justice is one end of law and it has for its object the adjustment of relations between men: law cannot ignore ethics which concentrates on the individual rather than society, and it is not always possible to reconcile justice for society with proper consideration for the individual: law must achieve finality, security, and order. The law of prescription, by barring even just claims after the lapse of a certain

[1] M. J. Aronson, 4 *Univ. of Toronto L. J.* (1941), 90 at 105.

[2] *Reason and Nature*, 419. 'No ideal so far suggested is both formally necessary and materially adequate to determine definitely which of our actually conflicting interests should justly prevail.' See also *Le But du droit* (Inst. int. de phil. du droit); R. Pound, *Contemporary Juristic Theory*, ch. iii.

[3] *Lehrbuch der Rechtsphilosophie* (3rd ed., 1932); *Archives de phil. du droit* (1934, 1–2), 105. Cf. B. J. Cardozo, *Paradoxes of Legal Science*, 4: 'Nomos . . . is the child of antinomies and is born of them in travail.'

[4] W. Friedmann, *Legal Theory* (5th ed.), 191. See now *The Legal Philosophies of Lask, Radbruch, and Dabin* (trans. K. Wilk).

[5] Ibid.

time, sacrifices ethics in the interests of order; we frequently see a conflict between the logical structure of the law and the needs of an individual case. To Radbruch one of the gravest errors of philosophy is to ignore this triangular battle between the ends of law. A conservative will tend to emphasize security, while justice is the cry of the radical, and the individual, thinking only of his own case, may advocate an ethical approach.[1] This conflict can be solved only by the sovereign choice of each community, as it makes such practical adjustments as seem proper. Radbruch regards a purely theoretical attempt to solve the antinomy as leading only to false simplification. The law of a country is a tentative compromise between ideals that are logically irreconcilable. Relativism has been attacked as a 'give-it-up' philosophy,[2] but whatever its ultimate value, it is an interesting approach for jurisprudence; for even if the philosopher could prove the validity of a scale of values, that would not of itself influence actual legal systems, save in so far as that scale of values was accepted by the ruling classes in each community. Moreover, many writers miss the distinction between relativism as a method of jurisprudence and as an answer to the ultimate questions of existence.[3]

Some, after struggling through the labyrinth, suggest that jurisprudence has nothing to gain from a philosophic study of the end of law. But, though the problem cannot be regarded as solved, at least philosophy lays bare the issues and saves us from the dogmatism of ignorance.

In attempting to answer even the simplest of the problems relating to the protection of interests, the following difficulties emerge:

(*a*) Frequently the law (whether statute or precedent) does not specifically deal with the question of the interests which a particular rule is designed to protect and hence it may be a matter of dispute what interest a particular rule of law in fact protects. Hence the same rule may be classified by various writers under different heads. Instead of broad generalizations, we need microscopic analysis and research.

(*b*) Even where there is a deliberate policy behind the enactment of a statute, sometimes the actual result is the reverse of that intended. This illustrates the importance of studying the actual effects of law, as

[1] See W. Sauer, in *Rec. Lambert*, iii. 34; G. Burdeau, *Archives de phil. du droit* (1939, 1–2), 48, 49.

[2] R. Pound, *Contemporary Juristic Theory*, ch. ii. See also P. A. Sorokin, *The Crisis of our Age*, ch. iv.

[3] In his later writing, G. Radbruch emphasizes the need for a theory of minimum absolutes.

well as its formulation in the books: some statutes miss their intended effect because a convenient means of evasion is found. A converse to this doctrine is the deliberate manipulation of an old rule, designed to protect one interest, into the means of protecting another recognized at a later date. Partly this is done by the use of fictions—it represents economy of effort to adapt an old rule rather than to create a new one. Thus many personal interests were protected by creating a fictitious tinge of *property* in order that an established doctrine might be used. Moreover, a legal rule may remain unchanged in form, yet its social function may become entirely different.[1]

(*c*) The real problem is one of compromise. 'Unfortunately, the struggle for the rights of man consists of a struggle between the rights of man.'[2] Law does not create these interests—they exist already and the function of the law is to effect a delicate compromise between them. Hence particular rules frequently do not protect one interest, but rather determine the boundary between two clashing interests. It is easy to lay down a scale of absolutes—freedom of religion, freedom of speech, freedom of association: the real difficulty is that of *technique*, the working out of effective rules which will provide reasonable protection for each without endangering the others. If a particular religious sect attacks the State, or refuses to salute the flag, when does religious freedom cease and the interest of social security begin to operate? Freedom of property is a right to which many subscribe, but if laid down as an absolute right, it may stultify social progress. Hence an abstract bill of rights or table of interests cannot afford much direct help to the judiciary in their work from day to day. A broad objective may be provided but life is too complex to be adequately covered by abstract generalizations.[3]

There is a danger, moreover, in concentrating too much on abstract formulation—the real essential for society is to create a public opinion that will protect rights. It is well known that in England there is no higher law—no constitutional bill of rights—yet the temper of public opinion is such that minorities are well protected. On the other hand most nations would doubtless subscribe, as they did at San Francisco, to the generalities of human rights on paper. Indeed almost every dictatorship has done so. The most absolute of the South American governments

[1] K. Renner, *The Institutions of Private Law and their Social Functions.*

[2] F. R. Bienenfeld, *Rediscovery of Justice*, 68.

[3] This is recognized by the Universal Declaration of Human Rights, Art. 29, which emphasizes that everyone has duties to the community and that due recognition of the rights and freedom of others is essential.

have operated under constitutions with bills of right modeled after that of the United States. . . . If such examples appear to Americans to reflect only perverse foreign practices, it is sobering to recall that under our own Bill of Rights we protected slavery for three-quarters of a century and still protect racial segregation . . .[1]

Thus one of Pound's statements is that 'in civilised society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labour and what they have acquired in the existing social and economic order'.[2] This is a statement of the interest in security of property, but the formulation shows the inherent difficulty of any generalization. Discovery can hardly give absolute rights, and even appropriation may need to be regulated. Again in modern society it is difficult, save in the simplest cases, to know what is created by a man's own labour, for economic arrangements are so complex.

(*d*) As Friedmann points out,[3] any such classification of interests is in the nature of a catalogue to which additions and changes have constantly to be made. The view of the function of the State has changed greatly, since Salmond originally described it as the administration of justice and the waging of war. The individualistic theories of natural law have been greatly modified. A survey of interests becomes quickly 'dated'. The postulates which Pound laid down in 1919 have ceased to represent the demands of today and in 1942 Pound modified his earlier formulation.[4] The discussion which follows shows how much development, and change of opinion, has taken place since the end of the war.

Clearly, as not all interests can be satisfied, we must make a choice. Pound suggests that in making this choice we must adopt a solution which will do least injury to the scheme of interests as a whole. This tacitly raises the whole question of values again.[5] It is inconceivable

[1] R. N. Baldwin, 243 *Annals of Amer. Academy of Political and Social Science* (1946), 134, but see now *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), and the useful summary of the position at the end of the 1950s by E. S. Corwin, *The Constitution and What it Means Today*, pp. 268–71. Great changes are taking place, and rapidly. The protection of racial segregation is being diminished as the result of Supreme Court decisions interpreting the 'equal protection' clause of the Constitution of the United States (XIVth Amendment).

[2] *Outlines of Lectures on Jurisprudence* (4th ed.), 108.

[3] *Legal Theory* (5th ed.), 339.

[4] J. Stone, op. cit. 367–8; R. Pound, *Jurisprudence* (1959), vol. iii, pt. 4.

[5] Pound here presents a contradiction—his theory of social interests is relativistic. But he so fears the 'service state' that he attacks 'sceptical realism' or the 'give it up' philosophies. Friedmann, op. cit. 347–8.

that any machinery for sampling popular opinion could afford solutions of difficult cases—moreover, the law refuses to admit that it is a mere reflex of the actual behaviour of the community. The law admits that its standards cannot be too far removed from those of the community, but law attempts to lay down what men ought to do—not what the majority actually do.

To repeat, the jurisprudence of interests raises the same problem as does natural law. Are there any ideal values which can guide the law in its evolution and furnish assistance in the task of choosing the interests which are to be protected and the extent of that protection? This problem can be solved by the community only in the light of the particular philosophy which it adopts. Every jurist or judge has his natural law theory—the only difference is that some deliberately set it out and others hold it unconsciously. All individual life proceeds on a choice of values and so must the community. We cannot wait till philosophy solves its problems—urgent problems demand an immediate answer. The orthodox natural law theory based its absolutes on the revealed truths of religion. If we attempt to secularize jurisprudence, where can we find an agreed basis of values?

If the writer must make his own confession of values, of the interests which law should protect, he would start from the intrinsic worth of the human personality. The various ideologies provide little real assistance. Individualism places the liberty of man at the centre of the theory, but at the cost of ignoring economic realities—moreover, it encourages a ruthlessness towards the weak which may strengthen society by leading to their extinction but which can hardly be tolerated by anyone with a respect for human personality. Various theories of collectivism rightly place in the hands of the community itself the control of the most important economic forces, but this is frequently allied with the practice of treating the common man as a cipher who cannot be trusted to decide anything for himself. The question is one of tentative compromise rather than academic theory. The human mind is illogical. In Australia it has been almost an axiom that tramways, railways, telephones, and electricity supply companies should be under public control, but when nationalization of banking was suggested it assumed the importance of a major political issue.

It may be doubted whether any philosophy will ever solve the problem of the ethical relationship of the individual to the community. If we treat the individual personality as an end in itself, we must also

admit that it is only in society that the true development of personality can be achieved. But how far may society go in sacrificing the individual in order to secure what are deemed social ends? How far can the interest of one be sacrificed to the interest of the many? The mysticism of Hegelianism provides too easy a justification of tyranny, for it regards the State as a moral end in itself in which the individual is submerged. As Friedmann writes: '. . . the values of human dignity and the development of the individual personality do not present us with ready-made solutions. . . . Legal philosophy can aid in the choice: it cannot and should not eliminate it.'[1]

Too much of the discussion of these issues has concentrated on the economic aspect of property. Clearly, one landowner cannot be allowed to prevent a plan for the development of a city. Any ultimate philosophy of values must place the property interest in its proper place. Some opportunity to enjoy the worldly things of this earth may be essential to the full development of human personality, but philosophy should adopt a functional theory which judges the institutions of a particular community by the part they play in assisting the common man to achieve fruition. But the spiritual values raise more delicate issues. How far may the community use force against one who conscientiously holds a religious view which that community finds inconvenient or even subversive?

Bentham would have tested every institution by asking whether it led to the greatest happiness of the greatest number. Philosophically it is easy to criticize this theory, with its emphasis on pleasure.[2] From the point of view of the individual, the greatest happiness is often achieved by ignoring 'pleasure' and losing self in the service of a great task. But as a working tool, Bentham's test has still great use if we reword it. Every law should be examined functionally to see if in the main it will assist in the development of the potentiality of the personality of the common man. Society must make its choice on an empirical basis: it cannot foresee the exact results of any reform but the ultimate justification for a particular society or state is in the quality—moral, intellectual, and personal—of the citizens it produces. Quality can be obtained only by some measure of diversity—education which produces 'factory-made minds' leads only to mediocrity.

[1] *Legal Theory* (5th ed.), 364.

[2] A. J. Ayer, *Jeremy Bentham and the Law* (ed. G. W. Keeton and G. Schwarzenberger), 245.

What interests of the common man need protection, if this end is to be achieved?[1]

Public, Social, and Private Interests

Pound[2] classifies interests under three main heads: individual, public, and social.

> Individual interests are claims or demands or desires involved immediately in the individual life and asserted in title of that life. Public interests are claims or demands or desires involved in life in a politically organised society and asserted in title of that organisation. They are commonly treated as the claims of a politically organised society thought of as a legal entity. Social interests are claims or demands or desires involved in social life in civilised society and asserted in title of that life. It is not uncommon to treat them as the claims of the whole social group as such.

But Pound immediately points out that one cannot force every demand into one pigeon-hole—the same interest may be regarded from many angles. There is a public interest in preventing disorder, but the protection of the citizen is also an important individual interest. The learned writer emphasizes that when we wish to justify the triumph of one interest over another, there is a temptation to label one interest 'social' and the other 'individual' and then to claim that the interest of society is paramount. Dias considers that there is in the common law 'a detectable priority at least between considerations of public safety, sanctity of the person and property in that order'.[3] In time of war, public safety becomes inevitably a predominant interest.

Society has an interest in the welfare of each individual—if we push this view far enough then most individual interests become social interests. Conversely the individual has an interest in the proper functioning of the society in which he lives. A minimum subsistence level for citizens is an important individual interest, but both Pound and Stone classify it under social interests.

[1] See ch. vi of W. Friedmann, *Legal Theory* (1967), where there are discussed the principal antinomies of legal theory.

[2] 'A Survey of Social Interests', 57 *Harv. L. R.* (1943), 1. For a discussion of R. Pound's views see E. W. Patterson in *Interpretation of Modern Legal Philosophies* (ed. P. Sayre), 558.

[3] 28 *Mod. L. R.* (1965) at 406. Salmon L.J. considers that the rules relating to an occupier's liability to trespassers were based on the nineteenth-century view that rights of property, particularly in relation to land, were regarded as more sacrosanct than any other human right. He thought that the old doctrine should be buried: *Herrington* v. *British Railways Board*, [1971] 1 All E.R. 897 at 901.

An interesting discussion appears in the speeches of the House of Lords in *Home Office* v. *Dorset Yacht Co. Ltd.*[1] It is progressive penal policy to allow Borstal trainees as much freedom and responsibility as possible. If, owing to the negligence of the officers in charge, trainees escape from custody on an island and damage a yacht belonging to the plaintiff, can liability be imposed? There is the public interest in following a progressive policy and the private interest of property. The Lords decided the preliminary issue in favour of the private interest, but this did not require the Home Office to change its policy, for liability was to be imposed only if negligence were proved.

Stone rejects the division of public interests on the ground that they are really a particular form of social interests.[2] Indeed, this is partly recognized by Pound in so far as he classes the security of political institutions as a social interest.

The correct view is that logically no exact division can be drawn at all between social and private interests. This becomes clear when any attempt is made to distribute the various interests under these two heads. In fact in many catalogues we see that the same interest is classified twice, though this is partially concealed by the use of different terminology.

There is no point in prolonging a discussion of methods of classification. What is important is the realization that one rule of law may protect many interests and that a single interest may require many rules for its protection. Indeed, on the basis of an interest such as that of free association, it would be possible to give almost a whole course on English law. Association raises the problem of corporate personality and of clubs. Arising out of the latter, we may discuss the trust, co-ownership, agency, contract, tort—all are used in the attempt to protect the rights of the association. It would be possible to teach the law on a basis of interests—to look at it functionally instead of analytically.

The short survey of interests which follows is not meant to be complete but only to indicate the complexity of the rules which may be necessary to protect a particular interest and the antinomies which law must daily face in solving practical problems. A broad sweep provides the background for the analytical survey of the law, but

[1] [1970] 2 All E.R. 294. Liability extended only to property which the officer could reasonably foresee would be likely to be damaged—per Lord Diplock at 334.

[2] *Province and Function of Law*, 491.

abstract theories are good servants though bad masters. In *Russell* v. *Russell*,[1] a majority of the House of Lords held that a husband could not give evidence of non-access, as public policy protected the legitimacy of the child. If this rule were confined to cases in which legitimacy was directly in issue, there would be much to be said for it—but the rule was laid down in so wide a fashion that it upset the practice of the Divorce Court, created difficulties in criminal cases, and led to hair-splitting distinctions. The results of the rule have been criticized throughout the Empire[2] and it has been formally abolished in England,[3] New Zealand,[4] and in Australia.[5] So-called protection of social interests may be productive of great individual injustice.

Table of Interests

Social interests

1. The efficient working of the legal order.
2. National security.
3. The economic prosperity of society.
4. The protection of religious, moral, humanitarian, and intellectual values.
5. Health and racial integrity.
6. Environment.
7. Control of growth of population.

Private interests

1. Personal interests.
2. Family interests.
3. Right to economic benefits.
4. Political freedom.

Natural Law and Public Policy as Measures of Interests

The older theories of natural law were the traditional defenders of individualism, e.g. the doctrine of natural rights.[6] But there is no reason why the theory of natural law should be confined in this way. Indeed, the modern theories emphasize that natural law is a yard-stick of the validity of all possible interests. In the same way it is impossible

[1] [1924] A.C. 687.
[2] For a Canadian criticism see 23 Can. ... (1945), 536.
[3] Law Reform (Misc. Provisions) Act, 1949, 12 & 13 Geo. VI, c. 100.
[4] Evidence Amendment Act, 1945, s. 1.
[5] 22 N.Z.L.J. (1946), ... Matrimonial Causes Act, 1959 (Commonwealth), § 98.
[6] *Supra*, § 33.

to regard public policy as protecting only one interest, or one type of interest. In some formulations of the doctrine it is emphasized that public policy does not consider the equities as between the individuals before the court, but the general tendency of the particular transaction in question. But it would not be correct to say that public policy ignored individual interests. The doctrine of public policy is rather naïve, however, and it has never been fully worked out so as to be an effective protection of social interests. Where the law comes into contact with economic theories, the result is not altogether happy. No evidence is given of what is in accord with public policy—this is left (in spite of some judicial doubts as to capacity)[1] to be decided by the judge on his knowledge of the world. The result of this is that the development of the doctrine has been rather haphazard as it has depended, firstly, on the accidents of litigation and, secondly, on the views of the judges before whom the problem arose. Especially in relation to economic problems, the law has failed to develop a consistent and realist theory.[2] Moreover, public policy has an essentially negative function—in the main it destroys certain types of agreements and transactions: only rarely can it be used to create a positive protection of interests.[3] Thus if a contract is held to be in restraint of trade, it is invalid; the court cannot cut down the provisions to allow reasonable protection to the purchaser of the goodwill of a business.[4] Natural law may claim to be the measure of all interests: public policy is only one of many doctrines used by the common law for the protection of particular interests.

The doctrine of public policy has suffered surprising changes in popularity and we cannot always connect these with changes in the attitude to individualism. In 1853, at a time when individualism was rampant, it is not surprising to see that the doctrine survived only by a narrow majority,[5] but today when collectivism is in the ascendant there is a tendency to hold that creative power is lost. The reference to the 'unruly horse'[6] is now classical and Winfield introduced a new metaphor by describing public policy as a football, which suffers the

[1] e.g. Best C.J., *Richardson* v. *Mellish* (1824), 2 Bing. 229 at 242; *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25 at 45.

[2] F. Pollock, *Genius of the Common Law*, 94; A. L. Haslam, *Law Relating to Trade Combinations*, 198, 201.

[3] Cf. W. Friedmann, *Legal Theory* (5th ed.), 479.

[4] The Law Reform Committee of New South Wales advocates that a promise in restraint of trade should be unenforceable only to the extent that it is against public policy.

[5] *Egerton* v. *Brownlow* (1853), 4 H.L.C. 1.

[6] Per Burrough J., *Richardson* v. *Mellish* (1824), 2 Bing. 229 at 252.

ill fate of being kicked by everybody, although it is essential to the game.[1]

How far is the doctrine of public policy still creative, so that it can become a guardian of new interests? Maugham J.[2] (as he then was) expressed unwillingness to extend its ambit and Lords Halsbury[3] and Wright[4] doubted the power to create new heads of public policy. Lord Thankerton stated epigrammatically that the court should expound and not expand public policy.[5] Another form of the same problem is the question of the relation of the doctrine of precedent to decisions on public policy. This problem did not become of practical importance till the end of the nineteenth century, when the doctrine of precedent became finally fixed. Lord Wright said that 'public policy like any other branch of the common law is governed by the judicial use of precedents'.[6] On the other hand, Lord Watson considered that decisions on public policy cannot possess the same binding authority as decisions based on purely legal principles.[7] If we adopt this view too literally, public policy could protect only the interests recognized in the past. However, it is clear that the most strongly marked feature of the doctrine is the variability of its application. The attitude to restraint of trade, marriage, and illegitimate children has completely changed within a century, and is reflected in the decisions of the courts. A reconciliation can be sought only by using Lord Haldane's analysis[8] which points out that some doctrines based on public policy have crystallized into detailed rules while others have not, but have remained in the terms of a broad principle.

In truth it is artificial to speak of 'heads' of public policy, as if they were unalterably fixed by statute.[9] A glance at the views of public policy taken by learned writers illustrates that it is impossible to confine the luxuriant growth within the terms of any rigid classification. It is almost academic to ask whether the court can create a new head of public policy, for the statements in the cases are so broad that authority could be found for almost anything legitimately desired.

[1] 54 *L.Q.R.* (1938), 155.
[2] *Janson* v. *Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484 at 491.
[3] *In re Hyde*, [1932] 1 Ch. 95 at 99.
[4] *Fender* v. *St. John-Mildmay*, [1938] A.C. 1 at 40, and see per Lord Goddard C.J. in *R.* v. *Newland*, '. . . no additions are now to be made' [1954] 1 Q.B. 158 at 165.
[5] Fender's case (*supra*) at 23.
[6] Same case at 39.
[7] *Nordenfelt* v. *Maxim-Nordenfelt*, [1894] A.C. 535 at 553.
[8] *Rodriguez* v. *Speyer Bros.*, [1919] A.C. 59 at 81.
[9] See per Windeyer J., *Brooks* v. *Burns Philp Trustee Co. Ltd.*, [1969] A.L.R. 321; C. K. Allen, *Law in the Making* (7th ed.), 303 n. 2.

Between the creation of a new 'head' and the application of an old rule to new circumstances, it is impossible to draw any definite line. The case of *Neville* v. *Dominion of Canada News Co.*[1] at least shows flexibility. There was no previous authority which laid down that it was against public policy for a newspaper to accept money in return for a promise that it would not comment on the transactions of a particular person. As Stone points out, this question really raises that of the creative power of the judicial process in general,[2] and it is too dogmatic to assert that public policy can never be developed to protect new interests. One book asks whether the courts are too tied to the outlook of the eighteenth century: has the judiciary failed to adjust to the needs of the modern state and the modern economy?[3] Is it the task of the judges to achieve this, or of the legislature, or of both?

§ 37. Social Interests

1. *The efficient working of the legal order*

This social interest lies at the basis of all others, in the sense that if order be lacking, then other interests cannot be realized. The repression of violence and self-help is an obvious necessity. The picture of international law shows the dangers of a party being a judge in his own cause and then taking action to secure rights by force. Whatever the philosophy of a particular community, this is an interest that must be achieved.

What is required under this head is a legal order which distributes power in such a way that the machinery can operate effectively and at the same time win the active support of public opinion. It is a waste of social effort to have a government the real foundation of which is brute force rather than consent. Here constitutional and administrative law play their part in distributing power and the rules of criminal law preserve order and respect for certain values.

The dilemma which every society must face is that between the creation of an omnipotent Parliament, which has effective powers of action in times of crisis but which may sweep away fundamental liberties overnight, and the establishment of a higher law beyond the reach of Parliament—a proceeding which may prevent real progress

[1] [1915] 3 K.B. 556.
[2] *The Province and Function of Law*, 500–1.
[3] B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (1967).

or effective action in times of emergency. Those who live in a federation realize the difficulties created by a division of powers and by a constitution which, although capable of amendment in theory, is almost incapable of amendment in fact. The conflict between the two theories of law as power and as a means of curbing power is ever present. The solution of the problem cannot be found in abstract theory. Constitutions are created to suit the particular conditions of a country and cannot easily be transported to an alien environment. Indeed, the success of democracy depends on the intangible factors rather than on the theoretical rules. This is shown by the difficulties that have arisen in transplanting the English system of responsible government to other countries. The secret of the English success lies not in the method, but rather in the temper of public opinion. A working democracy cannot depend merely on the theory of majority rule, for a bare majority may be tyrannical and contemptuous of the rights of a minority. Democracy in the philosophic sense includes qualities of spiritual value, tolerance, and respect for human dignity.[1]

The existence of an efficient system for the administration of justice, impartial judges, and an effective system of enforcement—these are qualities the importance of which is clear. But it was too often forgotten that no legal order can function satisfactorily unless access to the courts is kept open for all citizens. The common law protected this access by a doctrine which, on grounds of public policy, invalidated agreements to oust the jurisdiction of the courts.[2]

'There must be no Alsatia in England where the King's writ does not run.'[3] Sometimes this doctrine may be used to defeat the policy which it was intended to protect. Public policy requires that a wife should not contract away her right to go to the courts for maintenance. In *Brooks* v. *Burns Philp Trustee Co. Ltd.*,[4] a wife, before the divorce was granted, accepted a sum in full settlement of all her claims. The divorce was granted and the husband paid the agreed amount until his death. The court held that the agreement was unenforceable against the executors. Thus the wife lost her right, by the application of a doctrine of public policy invented to protect her interest.

[1] See the discussion by K. N. Llewellyn, *Jurisprudence* (1962), ch. xii.

[2] *Scott* v. *Avery* (1856), 5 H.L. C. 811; *Lee* v. *Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329. *Re Davstone Estates Ltd.*, [1969] 2 All E.R. 849. But it is not against public policy to agree to oust the jurisdiction of foreign courts, it seems: *Addison* v. *Brown*, [1954] 2 All E.R. 213.

[3] Per Scrutton L.J., *Czarnikow* v. *Roth, Schmidt & Co.*, [1922] 2 K.B. 478 at 488.

[4] [1969] A.L.R. 321.

Perhaps one of the most significant cases on 'ousting the courts' is *Anisminic Ltd.* v. *Foreign Compensation Commission.*[1] An Act of Parliament expressly declared that a determination of the Commission should not be called in question in any court of law. This seemed a clear provision, but the House of Lords held that the particular decision was a nullity, as it was made without jurisdiction.

The great difficulty in modern times is the cost of litigation. Schemes of legal aid exist in many countries, but in most cases the 'means test' provided is too harsh. The Poor Prisoners Defence Act, 1930, provided a good basis so far as the criminal law is concerned, and in civil cases the Report of the Rushcliffe Committee[2] led to the introduction of legislation in 1949[3] which greatly increased the scope of legal aid. But there are still many criticisms of its functioning, e.g. by the Law Society and the Citizens' Advice Bureaux; the extent of the real need is now being investigated at the London School of Economics.[4] There is today much more interest in these problems and also in the perennial problem of legal costs.[5] Even a perfect legal system cannot serve society if costs are beyond the reach of the average man.[6]

It is significant that two thousand administrative tribunals have been established in England which between them hear more cases than the High Court and the County Court combined. These tribunals provide a cheaper and more flexible procedure, but that, of course, was not the only reason for their establishment.[7] It would have been impracticable for the courts to deal with the mass of litigation engendered by modern developments.

Another suggested reform is nationalization of the legal profession. Many argue that if nationalization of medicine is essential for the provision of a proper health service to the community, nationalization of the legal profession is necessary for the provision of an adequate

[1] [1969] 2 W.L.R. 163. See the discussion by H. W. R. Wade, 85 *L.Q.R.* (1969), 198.

[2] Cmd. 6641, 1945; E. J. Cohn, 9 *Mod. L. R.* (1946), 58.

[3] Legal Aid and Advice Act, 1949, 12 & 13 Geo. VI, c. 51; Viscount Jowitt, 24 *N. Y. Univ. L.Q.R.* (1949), 757.

[4] M. Zander, *Lawyers and the Public Interest*, 244. See also Legal Aid Acts, 1960 and 1964.

[5] The sub-title to the book mentioned in the previous note is 'A Study in Restrictive Practices'.

[6] There has been much discussion whether in order to save costs the legal profession should be 'fused': see Zander, op. cit.; Lord Gardiner, in *Current Legal Problems, 1970*, 1. In Victoria (Australia) the profession was amalgamated by statute in 1890: but in fact there is a separate bar.

[7] B. Abel-Smith and R. Stevens, *Lawyers and the Courts*, 135–64, 315–48; Lord Wilberforce, 10 *J. Soc. Public Teachers of Law* (1969) at 256.

service of legal aid.[1] One obvious difficulty is that part of the work of the legal profession is to protect the citizen against the government, and security is diminished if the weapon of protection is entirely under state control. Another difficulty is that much of the expense in some lawsuits is the preliminary investigation and collection of evidence. Is a foreign corporation to be a *person* entitled to legal aid? In Russia the legal profession is organized through a *collegium*—a body which receives the fees of advocates and allocates to each a monthly salary. It is difficult to find expert evidence as to how the system works. The advocate is under a duty to defend any criminal case without fee when appointed by the court or by the executive of the college of advocates, and he must participate in the work of free legal aid.

The courts can function effectively only if they are protected by adequate rules. The judge should be immune from removal, save for misconduct. Judge, counsel, and witnesses must have absolute privilege so far as the law of defamation is concerned. Civil actions should not be available against witnesses, if the claim arises out of their evidence given in court, but an action may lie for abuse of the process of the court.[2]

The court must control effective process, e.g. power to summon a defendant, power to call witnesses, power to order execution when a judgment is not met. The power to commit for contempt (e.g. for disorder in court) is not meant to protect the dignity of the judge, but the inalienable right of the public that the courts should be left free to administer justice without obstruction or interference.[3]

It is these powers which distinguish common law courts from the International Court of Justice—the first have, and the second has not, effective power to enforce decisions, and to summon a recalcitrant party before the court. England has no constitutional bill of rights, but the temper of public opinion, and the creation of effective remedies against state departments if they act illegally, give a protection to the rights of the individual which is greater than that allowed by some countries which glory in their constitutional

[1] See e.g. B. Abel-Smith and R. Stevens, *Lawyers and the Courts*, 463. It is obvious that the effectiveness of a legal system must depend on the integrity and competence of the legal profession, and there must be adequate machinery for the investigation of complaints—see the *Justice Report on Complaints against Lawyers* (1970).

[2] *Roy* v. *Prior*, [1970] 2 All E.R. 729. 'Immunities conferred by the law in respect of legal proceedings need always to be checked against a broad view of the public interest': per Lord Wilberforce at 736.

[3] Per Salmon L.J., *Morris* v. *The Crown Office*, [1970] 1 All E.R. 1079 at 1086.

guarantees. A theory of individual rights is one thing, effective procedures for their protection are another. Thus the technical point whether discovery can be allowed against the Crown may in practice be decisive so far as the plaintiff's proof is concerned. The House of Lords in 1968 modified the rules to the advantage of the subject.[1]

2. *National security*

This interest concerns the relationship of a state with other states. All ideologies recognize the right of the State to protect itself, though theories may differ as to how that protection can best be achieved. Firstly, there is the predominant interest in maintaining peace, so far as is compatible with national honour and self-preservation. This is largely a political question, but there are rules of law directed to this end. The criminal law punishes certain acts which are likely to lead to ill-feeling between states, e.g. violation of the privileges of an ambassador; interferences in hostilities against a friendly power; a libel on a foreign power. Lord Mansfield once roundly said that 'no country ever takes notice of the revenue laws of another'[2] but in modern times an English agreement to smuggle whisky into the United States was held illegal as a matter of public policy based on international comity—otherwise a friendly government would have had just cause for complaint.[3] *A fortiori* any agreement which contemplates hostilities against a friendly power is unlawful.[4]

While it is not quite true to say that international law is part of the law of England, there is, nevertheless, a presumption that statutes should be interpreted, as far as possible, so as not to conflict with the rules of international law.[5]

Secondly, there is the interest in defence. The criminal law strikes at those who incite to public mutiny, disclose official secrets, or trade with the enemy. Modern 'total warfare' shows that there are practically no limits to the detailed regulation necessary to fit a community either for defence or offence. The availability of aeroplanes and missiles equipped with nuclear weapons means that hostilities cannot be confined to any 'front line' and almost every activity of the

[1] *Conway* v. *Rimmer*, [1968] A.C. 910.
[2] *Holman* v. *Johnson* (1775), 1 Cowp. 341 at 343.
[3] *Foster* v. *Driscoll*, [1929] 1 K.B. 470 at 510, followed by House of Lords in *Regazzoni* v. *K. C. Sethia (1944) Ltd.*, [1957] 3 All E.R. 286.
[4] *De Wütz* v. *Hendricks* (1824), 2 Bing. 314.
[5] *Zachariassen* v. *The Commonwealth* (1917), 24 C.L.R. 166.

population must be subordinated to the imperative need of self-preservation. National defence is, therefore, an interest which, of necessity, must in time of war be placed above many interests which are highly valued in time of peace. The conflict of ends is here obvious. In time of war the community must often forgo what in happier times would be regarded as its *raison d'être*.[1]

In time of peace the loyalty test for government service raises the same issues. It is one thing to dismiss those in the pay of a foreign power: it is another to act on rumour and unsifted evidence without any right of reply. The balancing of personal freedom and national security still remains an unsolved issue.[2] That the issue is not a minor one is illustrated by the fact that screening programmes apply to 13 million persons in the United States.[3] It is impossible to determine what dangers these programmes have averted, but it is beyond doubt that they have created 'an atmosphere of fear and insecurity, both in the public service and in other sectors of society, gravely disturbing men's confidence in the fairness of government and in the sense of justice of law'.[4] The question is not an easy one. In determining whether a man is a security risk, we are not asking whether he has committed a criminal act, but rather whether he is a *potential* criminal.

Conscription for military service, especially in time of peace, is an issue that has raised much controversy. In the U.S.A. and Australia the sending of conscripts to Vietnam has caused violent demonstrations.

3. *The economic prosperity of society*

The social interest (as does the individual) demands a society that is economically prosperous. This requires some security with regard to property, acquisitions, and transactions.[5] In other words the law of property and contract must function satisfactorily or else the real basis of economic life is absent. This does not necessarily mean that there must be capitalism and private property, but only that the legal order must provide a basis on which man can plan with relative security.

[1] *Liversidge* v. *Anderson*, [1942] A.C. 206; *Communist Party Case* (1951), 83 C.L.R. 1.

[2] E. V. Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law*, ch. viii.

[3] Rostow, op. cit. 273.

[4] Op. cit. 274.

[5] J. Stone, op. cit. 561. And note the realistic approach of the Privy Council in *Hangkam Kwingtong Woo* v. *Liu Lan Fong*, [1951] A.C. 707.

The theory of economic determinism suggests that legal theories are merely a reflection of the economic base on which the life of the community is built. This is an exaggerated view, but rejection of early crudities should not blind us to the great influence of these economic forces, and in a section concerned with the human interests protected by law, the economic philosophy held by a particular community is all-important. Russia protects interests very different from those of the capitalist world, and even if we take the history of England, there is a broad gulf between the *laissez-faire* of last century and the increasing national planning of today. The slave-owner, the landholder, the great industrialist, and now, finally, the working man, have each in turn sought to control the means by which law is created, and we can understand the reason for the laws of any particular epoch only by discovering what the controlling class thought all-important. The conflict today is between those who value the protection of property and individual freedom and those who would sacrifice both to the extent made necessary by the demand of the economically weaker classes for an assured protection in the present chaotic economic state of the world.

But it is not only in the creation of statute law that the philosophy of a community declares itself. In filling the gaps left by precedent, the judge will draw on those views which he considers are vital to the welfare of the community. English public policy shows a surprising swing from the individualism of last century. The courts in the past sometimes eviscerated statutes introducing new social experiments by arguing that it was a presumption of interpretation that the statute was not to be taken as interfering with vested rights of property save by clear words to that effect. But Parliament has so often interfered with vested rights that this presumption is losing much of its force. No one today could accuse the English courts of misunderstanding the great social experiments now being carried out. There is a real willingness to interpret the statute in the light of its social purpose.[1]

One task of the State is the development and conservation of natural resources. This is seen most clearly in an older civilization when the stress of war requires effective planning, determination of priorities, and economical uses of the resources that exist, and in new countries where either the task of development is beyond the

[1] D. Lloyd, *Current Legal Problems* (1948), 89, 101. It was not always so: cf. W. I. Jennings, 1 *Mod. L. R.* (1937), 111.

ject to public control; (*b*) in some cases the development of the State may demand the extension of a railway or the installation of hydro-electric plants which, though essential for national development, will not produce an economic return for a considerable time—hence it is the State rather than the private investor which should be called on to meet the cost; (*c*) in other cases national security may demand the development of a particular industry which will be economically wasteful in peace-time, but essential in time of war.

The public corporation has now become a common feature of modern political life—it provides an interesting compromise between the need for independence from political pressure in the conduct of a utility and the need for ultimate control in the interest of the community.[1]

The legal control of public companies is of growing importance. The nature of the responsibility of directors and auditors has caused dispute. The director is bound to act honestly and with reasonable diligence, taking into account his own knowledge and experience. There is a strict duty of loyalty and good faith, but rather lighter obligations concerning skill.[2] Directors may properly leave certain matters to another official or director.[3] There are strict duties concerning the prospectus, and a conviction may be recorded if the effect of the prospectus is substantially misleading, even though each sentence may be technically justifiable. What is left out may be as important as what is placed in.[4]

The responsibility of the director is primarily to the company, not to the employees or the public at large.[5] It has been argued that, at least in the case of the large corporation, it should be recognized that there is a duty to employees and the public in general.[6] The general manager of B.H.P. Ltd. stated at a meeting of shareholders, in answer to a question, that the company was responsible to four sections of the community—shareholders, employees, customers, and the public in general. This is a laudable approach, but is not yet established in law.

In fact, the law has not yet caught up with the managerial

[1] Many features of the public corporation were first made clear by Australian experience in the running of state railways and electricity commissions. In a young country, such undertakings are frequently 'nationalized' from their inception: W. Friedmann, 10 *Mod. L. R.* (1947), 233.

[2] Gower, *Modern Company Law*, 515; M. J. Trebilcock, 32 *Mod. L. R.* (1969), 499.

[3] *Huckerby* v. *Elliott*, [1970] 1 All E.R. 189.

[4] *R.* v. *Kylsant*, [1932] 1 K.B. 442.

[5] *Parke* v. *Daily News Ltd.*, [1962] 2 All E.R. 929.

[6] B. L. Murray, 7 *Univ. of Western Australia L. R.* (1966), 311.

revolution. The classical theory is that the board and the shareholders determine policy, and the executives administer within those guidelines. But the complexity of modern industry and the size of modern companies make it nearly impossible for the 'outside' director to understand all the issues involved.[1]

An illuminating series of reports was produced in Victoria into the affairs of Reid Murray Holdings Ltd. and its subsidiary companies, and this discusses the duties of directors and of auditors.[2] Directors are bound not only to be reasonably diligent, but also to consider the interests of the company on the board of which they are sitting at the moment, and not the interests of a group of companies as a whole. To lend money without security is not justifiable, merely because it will assist a subsidiary. Each company may have different shareholders and one must consider their interests.

With regard to auditors, B. J. Shaw reported that the 1961 accounts of Reid Murray Holdings Ltd. 'combined what was plain dishonesty with misleading exploitations of recognized accounting practices'. 'We have been greatly disturbed to find that thousands of people invested in the group in reliance, not upon their own judgment, but upon the advice of men who held themselves out in the community as skilled to give such advice.'[2] The accounting practices used were criticized as not giving a realistic picture of the situation.[3] A balance-sheet may be literally accurate, compiled according to accepted accounting practices, and yet be most misleading—because of what is not stated rather than what is.[4]

It is difficult to police all these matters. The appointment of company inspectors, after a company has been 'declared' under the Companies Act, comes after the event: and the declaration itself is not a step to be taken lightly, for inevitably it destroys the credit of the company. Moreover, the criminal sanctions of the Companies Acts, while producing valuable deterrents, often do not become really effective because a very expensive investigation may be necessary to satisfy the onus of proof.

The protection of investors and creditors is, therefore, a problem which has not yet been solved. Effective company legislation goes part—but only part—of the way.[5]

[1] F. J. Willett, 5 *Melb. Univ. L. R.* (1967), 481.
[2] Victoria: Parliamentary Papers 10856/68, 1468/65, 7859/66.
[3] B. L. Murray and B. J. Shaw, Victoria: Parliamentary Papers 10856/64, p. 107. Cf. R. Baxt, 33 *Mod. L. R.* (1970), 413.
[4] *R.* v. *Kylsant*, [1932] 1 K.B. 442.
[5] Companies Acts usually employ the 'philosophy of publicity' (requiring companies

The law relating to restrictive trade practices is an interesting example of the limits of effective legal regulation. The common law had reached the doctrine that no action lay for civil conspiracy, if (*a*) there was no specific unlawful act and (*b*) the combination was for the purpose of pursuing what the law regarded as a legitimate objective. The common law had, therefore, reached a dead end, for the 'stop-list', 'price fixing', and other means of industrial coercion were lawful, within the limits set by the previous sentence. Forcing an employer to dismiss a non-unionist was also legitimate, provided no breach of contract was induced.[1]

In the United States the Sherman Act in 1890 attempted to deal with combinations in restraint of trade, and this was followed by the Clayton Act of 1914. Opinions differ as to the effect of these statutes, but they certainly did not achieve all that their framers desired.

In England, the Restrictive Trade Practices Act, 1956,[2] started a new jurisdiction. The Act laid down the general principle that restrictive agreements are against the public interest, although they may be justified if it can be shown that the agreement serves the public interest or that its advantages outweigh the disadvantages. The court set up under the statute consisted of laymen as well as lawyers. It is not our purpose to canvass the detailed complexities of the legislation, but merely to examine the broad issues involved.

The court must not only study the present situation of the particular industry, but also forecast what the actual result of the restrictive agreement is likely to be in the future. It is absurd to say that because questions of policy are involved the issues are not justiciable—clearly the doctrine of public policy, as its name implies, has forced the common law courts to venture into these realms.[3] The real test is whether the legislature has been sufficiently precise in laying down the general principles which the court must apply.[4] Public interest is a wide concept which it is not easy to interpret. The English Act, unlike the American legislation, assumed that some restrictive agreements had redeeming virtues. Sir Kenneth Diplock writes: This does involve a value judgment on economic matters and it is at

to give certain information in prospectuses and balance-sheets) and the 'philosophy of regulation' (a mixture of administrative control and criminal sanction): G. Sawer, 44 *A.L.J.* (1970), 303.

[1] *Rookes* v. *Barnard*, [1964] A.C. 1129. See A. D. Hughes, 86 *L.Q.R.* (1970), 181.

[2] 4 & 5 Eliz. II. c. 68.

[3] R. B. Stevens and B. S. Yamey, *The Restrictive Practices Court* (1965).

[4] Op. cit. 43.

least debatable whether the judicial process does provide a suitable machinery for its determination.'[1] Parliament obviously preferred that the issues should be determined by the court step by step. In the early cases, the cost of the proceedings was high, owing to the length of the trial—£30,000 would be an average cost for a thirty-day trial. It has been suggested that more systematic research by objective experts is necessary to throw light on the real issues involved, and that the adversary procedure of the court is rather a clumsy method.

The Restrictive Practices Court has certainly taken a broad view of the meaning of *agreement*. If this had been interpreted as a legally enforceable contract, the Act would have had little scope. There may be an 'agreement' for the purpose of the Act if it can be proved that eight companies made identical contracts with another.[2] The courts realistically refused to believe that this was a mere coincidence.

The early cases, at somewhat of a cost, laid down the general principles, but there was some restiveness in industry despite a general realization that the Act had worked well. Under the Restrictive Trade Practices Act, 1968, the Department of Employment and Productivity was given power to exempt from the necessity of registration any restrictive agreement which satisfied certain conditions, e.g. if it is calculated to promote the carrying out of an industrial project of importance to the national economy, to promote efficiency, or to improve capacity, provided that the restrictions are no wider than is reasonably necessary and that, on balance, they are in the public interest. Is this a transfer (at least partial) of decision-taking in this sphere from a court to the administrative processes of the Board of Employment and Productivity? Will a businessman prefer to talk in person to an administrator rather than through a lawyer to a court?[3] Is negotiation as to the terms of a particular agreement easier than trying to justify an existing agreement to a court? Only time will answer these questions.

Take-overs and mergers may be used as a means towards monopoly. Both may raise important questions for the national interest, if there is an attempt by foreign capital to gain control of a local industry.[4] Here there is a direct national interest in controlling this aspect of the economy. A developing country must balance the need for foreign capital against the fear of domination by foreign interests.

[1] *The Role of the Judicial Process in the Regulation of Competition* (1967).
[2] *Re British Basic Slag*, [1963] 2 All E.R. 807.
[3] See 32 *Mod. L. R.* (1969), 302.
[4] J. R. Peden, 44 *A.L.J.* (1970), 208.

The peaceful conduct of industrial relations is a most important social interest. At first the trade union was regarded with hostility by the law. The weapon of criminal conspiracy and the Combination Acts of 1800 made it difficult for a trade union to function. In 1824 the worst abuses of the Combination Acts were removed, but in 1825 the law was tightened and in effect left open the question of criminal conspiracy.[1] It was 1871 before this was removed.[2] In 1906 the Trade Disputes Act[3] freed unions from liability in tort, but individual members might be made liable for damages in tort for civil conspiracy. Finally the courts decided that an agreement for a legitimate economic objective, provided that it did not contemplate any specific illegal act, was not actionable in tort.[4] Now the trade union is regarded as a most valuable adjunct to ordered industrial relations, and in the Australian federal system may be registered under the Commonwealth Conciliation and Arbitration Act.

The exact statement of the law with regard to the liability of individual members of a union is still a cause of difficulty.[5] Inducing or procuring breach of contract, preventing performance of contract, or intimidation[6] may still create liability in certain circumstances. Many trade unions regard *Rookes* v. *Barnard*[7] as going behind section 1 (1) of the Trade Disputes Act of 1906 which gave immunity in tort to a person who commits an act in furtherance of a trade dispute if the act related only to a threat that a contract of employment will be broken or that he will induce another to break a contract of employment. These cases illustrate the conflict of interests in this part of the law, and again the legislature intervened with the Trade Disputes Act, 1965.

Australia, as early as 1904, established a court for Conciliation and Arbitration, but its jurisdiction was limited to industrial disputes extending beyond the limits of any one state.[8] It was confidently hoped that the conciliation procedures set down and the power to arbitrate would create 'a new province for law and order . . .'.[9] The

[1] Holdsworth, *History of English Law*, xiii. 346.
[2] 34 & 35 Vict. c. 31.
[3] 6 Edw. VII, c. 47.
[4] *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, [1942] A.C. 435.
[5] A. D. Hughes, 'Liability for Loss caused by Industrial Action', 86 *L.Q.R.* (1970), 181.
[6] *Rookes* v. *Barnard*, [1964] A.C. 1129; *Torquay Hotel Co. Ltd.* v. *Cousins*, [1969] 2 Ch. 106.
[7] *Supra.*
[8] There are also Wages Boards in the states with power to declare a minimum wage. Victoria was the first state to establish a Wages Board—1896.
[9] H. B. Higgins, appointed President of the Court in 1907, published in 1922 a book under this name.

court early enunciated the theory of the basic wage, based on the 'normal needs of the average employee, regarded as a human being living in a civilised community'.[1] Compulsory margins for skill or special qualifications were also laid down. The payment of rates higher than the legal minimum is left to bargaining. It is only lately that the court has approved the principle of equal pay for equal work where women are concerned.[2] The court has coercive powers—it is an offence to pay less than the legal minimum wage; the court has power to summon the parties before it for a compulsory conference; it has power to fine for breach of an award, e.g. if there is a strike in defiance of the procedure laid down in a particular award for the settlement of disputes. There has been much controversy over the exercise of the power to fine unions—this is held to interfere with the 'right to strike'. Union secretaries have gone to gaol rather than submit.

In Australia, there is still scope left for the collective agreement—indeed it may become, by consent, an award of the courts. In England, there has been much dispute concerning the legal enforceability of a collective agreement. It was held in the *Ford Motor Company* case[3] that the parties did not intend to enter into legal obligations.

The Donovan Report of 1968[4] and the White Paper of 1969[5] adopt the policy of encouraging collective agreements, and recommend the establishment of a Commission on Industrial Relations, with which collective agreements could be registered if desired. The policy of giving all collective agreements legal force was rejected, but the suggestion was made that section 4 (4) of the Trade Union Act, 1871, should be amended to allow the parties to make such an agreement legally enforceable, should they expressly so declare. The most controversial proposals relate to restrictions on the freedom to resort to strikes, e.g. a compulsory 'conciliation pause' for twenty-eight days. This, however, would not make legal sanctions available for all strikes.

A possible source of industrial injustice may arise out of the expulsion by a professional association or trade union of one of its members; this may involve loss of livelihood. The law gives pro-

[1] Op. cit. 7. The original assumption was that the wage should be sufficient for a married man with three children.

[2] And this principle will not be fully implemented for some time.

[3] N. Selwyn, 32 *Mod. L. R.* (1969), 377; *Ford Motor Co.* v. *Amalgamated Union of Engineering and Foundry Workers*, [1969] 1 W.L.R. 339.

[4] Cmnd. 3623.

[5] Cmnd. 3888; see note, 32 *Mod. L. R.* (1969), 420.

tection only if the expulsion is a breach of the rules, or contrary to natural justice. In some cases there are statutes, e.g. with regard to solicitors and doctors. In cases not covered by statute, there is no appeal on questions of fact to the law courts. Where there is a 'closed shop', the union, by controlling access to membership, affects the right of an individual to have access to the labour market.[1] These problems raise issues of fundamental importance for the individual.

Taxation is used by the modern state, not merely to obtain revenue, but to achieve certain economic objectives.[2] A selective employment tax may attempt to transfer labour to industries considered important; tax may be reduced for a manufacturing company if exports are increased; mining dividends may earn a lower tax rate, so as to encourage exploration; graduated land taxes may be used to break up large agricultural estates. Estate duties redistribute wealth. The annual treasurer's budget, therefore, has important economic results. High taxation has undoubtedly led to the proliferation of incorporated companies in the hope of reducing the personal incidence of tax.

4. *The protection of religious, moral, humanitarian, and intellectual values*

Here we enter upon one of the most controversial fields of jurisprudence. The philosophy of a community will determine its laws, but a discussion of the problem of 'law and sin' will demonstrate that certain ethical ends are not easily attained by law. As in the regulation of restrictive trade practices, there are limits to the effective operation of the law. As Starke J. succinctly phrases it: 'moral indignation must not be mistaken for public policy.'[3]

The relationship between Church and State has varied at different times in different countries. Religion is essentially concerned with the mind and character, with worship of a Creator.[4] Law is concerned

[1] See O. Kahn-Freund, 33 *Mod. L. R.* (1970), 241. Cf. *Nagle* v. *Feilden*, [1966] 2 Q.B. 633 (C.A.), where the plaintiff had been refused, on the ground of her sex, the grant of a licence to train racehorses. The court held that this was against public policy. *Edwards* v. *Society of Graphical and Allied Trades* (C.A.), [1970] 3 All E.R. 689.

[2] L. C. B. Gower, *Law and Opinion in England in the 20th Century* (ed. Ginsberg), 153, points out that taxation was ignored by Dicey in the first edition of *Law and Opinion*. In the second edition he expressed great alarm at the increase of the standard rate of income tax to one shilling and eightpence.

[3] *Smith* v. *Jenkins*, [1969] V.R. 267.

[4] See the discussion in *R.* v. *Registrar General, ex parte Segerdal* (C.A.), [1970] 3 All E.R. 886, where a scientology 'chapel' was refused registration as a place of religious worship.

with external conduct, for it knows well that no statute can force a man to love his neighbour as himself or prevent him from coveting his neighbour's wealth. The value of religious observances depends on the willing participation of those who engage in them and the crude weapon of legal compulsion can do no more than secure external compliance. Tolerance is increasing, and most modern states penalize a religious sect only if it encourages conduct which is detrimental to the community life. The change in approach may be illustrated by the law of blasphemy. Once such conduct was punished as an offence against religion; today the most determined attacks on Christianity are not illegal, provided the tone of the discussion is not such as to be likely to provoke a breach of the peace.[1] Thus a rule which was once based on a desire to protect religious interests is continued in order to preserve order.[2]

The rules relating to the protection of the institution of marriage and the discouragement of immorality really fall under this head, although they are here considered under 'family interests'.[3] Lord Mansfield is reported to have said that 'the law of England prohibits everything which is *contra bonos mores*'.[4] This statement is neither true, nor is it desirable that it should be true. The common law has been rightly cautious in creating rules designed merely to protect moral interests, for such attempts often defeat the ends which they were designed to attain.[5] The law adopts three different attitudes to moral or ethical rules: firstly, the rule may be so vital that breach of it is made a criminal offence; secondly, the law may not make the act criminal, but may discourage it by any means short of this; thirdly, it may regard the rule as pertaining only to ethics and as not concerning a matter in which the law should be directly interested. The first and third of these approaches explain themselves. The second is illustrated by the maxim *ex dolo malo non oritur actio*;[6] the law may refuse to punish immorality, but may regard as void bargains

[1] *Bowman* v. *Secular Society Ltd.*, [1917] A.C. 406.

[2] The wider approach where obscenity is concerned is illustrated by Stable J. in *R.* v. *Martin Secker Warburg, Ltd.*, [1954] 2 All E.R. 683; and see for an extensive judicial discussion of the question *United States* v. *Roth* (1956), 237 F. 2d. 796, per Frank J., pp. 801–27.

[3] *Infra*, § 38.

[4] *Jones* v. *Randall* (1774), 1 Cowp. 37 at 39.

[5] 'It is not for this court to set itself up as a general *censor morum*'; per Latham C.J., *The King* v. *Connare* (1939), 61 C.L.R. 596 at 609. For an instructive report on the difficulties which attend attempts to make the law enforce moral rules, see *Report of the Committee on Homosexual Offences and Prostitution* (1957), Cmd. 247; and cf. *Director of Public Prosecutions* v. *Shaw*, [1962] A.C. 220.

[6] *Alexander* v. *Rayson*, [1946] 1 K.B. 169.

private should no longer be punishable. The law should not try to enforce morals as such, but only attempt to prevent actions which will do harm to others.[1] This recommendation has now been adopted by the legislature.[2]

The question whether abortion should remain a criminal offence has also become a matter of great controversy. *R.* v. *Bourne*[3] held that the burden rested on the Crown to prove that the operation was not done in good faith for the purpose only of preserving the life of the mother. The last phrase was construed widely as including a case where continuation of the pregnancy would make her a physical or mental wreck. The Catholic church regards abortion as akin to murder, and the conflict is whether we should consider the interests of the unborn child, or that of the mother and her family. There was always the possibility that *R.* v. *Bourne* might not be followed, and so the Abortion Act of 1967[4] laid down the law, broadly on the principles of that case, with the additional justification where there was a serious risk that the prospective child would suffer from such physical or mental abnormalities as would be a serious handicap.

The Obscene Publications Act, 1959, was a valiant attempt to reconcile the interest of the community in stamping out obscenity with that of the artist in freedom of expression. Unfortunately, as was perhaps inevitable, the application of the statute places a very heavy burden on the courts.[5] 'The jury must consider on the one hand the number of readers they believe will tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt, and the nature of the depravity and corruption; on the other hand they should assess the strength of the literary, sociological or ethical merit which they consider the book to possess. They should then weigh all these factors and decide whether on balance the publication is proved to be justified as being for the public good.'[6]

If the law protects the right to live, should it also grant the right to die? This raises the problem of suicide and euthanasia. Should suicide be a crime? Clearly one cannot punish the person who

[1] It is curious that lesbianism was never regarded as a criminal offence.
[2] Sexual Offences Act, 1967, c. 60.
[3] [1939] 1 K.B. 687; *R.* v. *Davidson*, [1969] V.R. 667.
[4] C. 87. The question of injury to the physical and mental health of the pregnant woman or of any existing child of her marriage are declared to be relevant factors.
[5] C. H. Rolph, *Books in the Dock* (1969).
[6] *R.* v. *Calder & Boyars Ltd.*, [1968] 3 All E.R. 644; G. Zellick, 33 *Mod. L. R.* (1970), 289.

successfully ends his life, but should attempted suicide be visited with a criminal sanction?[1] The early English law treated suicide as felony with a consequential forfeiture of goods and chattels. Now views have changed, and the Suicide Act, 1961,[2] removed the stigma of criminality from self-destruction, though complicity of another person in the suicide is still a criminal offence. The modern view is not that suicide is justifiable, but that the criminal law is not an effective means of dealing with this problem.

Euthanasia still remains a criminal offence. To administer a fatal dose to a suffering patient would be murder—to assist in suicide would attract penalties under the Suicide Act.

Lord Devlin argues strongly[3] that a society possesses a public morality simply because it is a society, and that the criminal law cannot ignore the collective moral judgment of the community. If there is a strong and pervasive feeling that certain conduct is extremely threatening and extremely reprehensible to basic rules of community life, then the sanctions of the criminal law should be applied. 'Immorality for the purpose of the law is what every right-headed person is presumed to consider immoral.'[4] A recognized morality, protected by the criminal law, is as essential to society as a recognized government.

This runs counter to the philosophy of the Wolfenden Committee, and is regarded by E. V. Rostow as 'entirely natural to a common law judge and peculiarly irritating to an academic philosopher'.[5] It is submitted that the crucial test is whether the act is merely revolting (in which case the criminal law should not intervene) or whether it injures society (i.e. persons other than the actor), in which case there is a justification for using the rather crude sanctions of the criminal law. This broadly is the test used by the Wolfenden Committee. It is not easy, of course, to apply any abstract principle to the complex issues of social life—this illustrates again that law is a compromise reached by a particular community, valid only for that time and place.

It is interesting to contrast two dicta: 'There remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order, but also the moral welfare of the state and . . . it is their duty to guard

[1] N. St. John-Stevas, *Life, Death and the Law*, ch. vi.
[2] C. 60.
[3] *The Enforcement of Morals*, 15.
[4] Op. cit. 15.
[5] *Camb. L. J.* (1960), 174 at 177; see also the discussion by the same writer, *The Sovereign Prerogative: the Supreme Court and the Quest for Law*, ch. ii.

against attacks which may be the more insidious because they are novel and unprepared for.'[1] (This dictum raises questions which would need a volume of philosophy to answer. How do we determine the moral welfare of the State?)

Judge Maude, after referring to onduct that was utterly and disgustingly immoral, stated: 'we are not a court of morals.'[2] In a recent case, Lord Diplock suggested that it was not still open to the courts to enlarge the number of categories of purposes which are so contrary to public policy that those who act in concert to achieve them are guilty of criminal conspiracy.[3] Four other Lords agreed with his speech. This suggests that *Shaw*'s case should be confined to situations already covered by previous decisions. 'It is no offence under the law of England to do, or agree with others to do, acts, which though not prohibited by legislation, nor criminal nor tortious at common law, are considered by a judge or by a jury to be calculated to defeat, frustrate or evade the purposes or intention of an Act of Parliament. If it were otherwise, freedom under the law would be but an empty phrase.'[4]

Humanitarian interests are protected by various rules of the criminal law—e.g. the prohibition of slave-trading, cruelty to children or animals. It is the duty of the master of a ship to take reasonable steps to save life after a collision at sea. The difficulty of classifying interests, to which reference has already been made, is shown by the fact that a large proportion of human interests could be placed under the heading of humanitarianism. The possession of economic security and reasonable means of livelihood is pursued largely for the humanitarian reason of preventing want and suffering.

The social need for education is recognized from the very beginning of the community. The initiation of an Australian aborigine into the rites of his tribe is merely the attempt to mould him into a product that will be satisfactory to his peers. The attempt to make all the population literate is a relatively late development. In education, there is always a conflict between the pursuit of learning as such and the demands of practical training. The natural bias towards the practical in those who have to make their own way in the world is

[1] *Shaw* v. *Director of Public Prosecutions*, [1962] A.C. 220 per Viscount Simmonds; A. L. Goodhart, 77 *L.Q.R.* (1961), 560.
[2] *R.* v. *Silver*, [1956] 1 All E.R. 716. Actually this decision was overruled in *R.* v. *Thomas*, [1957] 1 W.L.R. 747.
[3] *Director of Public Prosecutions* v. *Bhagwan*, [1970] 3 All E.R. 97.
[4] Per Lord Diplock, same case, at 106.

reinforced today by the need, in the interests of national survival, to create a body of research workers and technical assistants for the purpose of producing new weapons of offence and defence. In some of the newer countries, particularly, the emphasis on vocational and technological training is tending to upset the proper balance of the universities. The excessive concentration of the twentieth century on science and the failure to study adequately the ends of society and the mechanics of government may bring a grim retribution in the years to come.

There is also a conflict between education, the drawing out of the capacities of the human personality and mere propaganda which is designed to produce a standardized man. Education is usually undertaken with the hope of producing a particular type—education without a guiding idea would be rather pointless. But, so long as all education is not controlled by the State, there is a certain degree of experimentation and flexibility.

The demand that education should be compulsory and free inevitably brings in the State—for private munificence can rarely afford the cost. The danger arises of excessive standardization. If local authorities and voluntary bodies are given a share in the responsibility, some variation is inevitable, but if the whole scheme is centrally controlled, then it becomes too rigid. Where there is no established Church, state education is normally secular. This is probably inevitable, but it increases the tendency to concentrate on the material side.

5. *Health and racial integrity*

Racial integrity is protected by certain rules of the criminal law, e.g. those relating to incest and unnatural offences. Carnal knowledge of a female lunatic is prevented partly because of its possible detrimental effect on race. In many states marriage laws have endeavoured to prevent the intermixture of races, as in the Nazi prohibition of marriages between Aryans and Jews; sterilization of mental defectives is another illustration of the same policy. The prohibition of suicide falls most easily under this head,[1] since the desire of the community to preserve life seems to be the reason why attempted suicide is still

[1] C. K. Allen places suicide under the head of race preservation: *Legal Duties*, 303, but see now Suicide Act, 1961, c. 60, discussed *supra*. The suicide of the assured avoids an insurance policy: *Beresford* v. *Royal Insurance Co. Ltd.*, [1938] A.C. 586; A. L. Goodhart, 52 *L.Q.R.* (1936), 575. But that rule of the common law has been varied by legislation in a number of jurisdictions, e.g. Australia, Life Insurance Act, 1945–61, § 120.

punishable in many jurisdictions. It is murder for a doctor to administer an excessive quantity of a drug in order to kill a patient, even though with true humanity, he but hastens the inevitable in order to put an end to suffering. Is it a criminal offence for a doctor merely to withdraw a machine to keep the heart beating, when he knows that death is inevitable and life unendurable? Euthanasia has been used, however, not only to end suffering, but to get rid of mental defectives or even those who are considered socially dangerous.[1]

The importance to the State of the protection of public health is too obvious to need stressing. Preventive medicine and the storage of food has saved mankind from the worst disasters of pestilence and famine. In the West, the increasing prosperity of the individual is linked with a fall in the birth-rate, but the fecundity of the East is already presenting enormous problems.

The nationalization of medicine has provoked an interesting discussion of the reasons why, and the extent to which, the State should interest itself in the provision of health services without cost to the patient. Such a scheme entails some control of the medical profession which runs counter to some of the most rooted beliefs of a profession, the keynote of which has been independence. In Australia the Pharmaceutical Benefits Act was held invalid by a majority of the High Court, partly on the ground that, contrary to the constitution, it involved civil conscription.[2] England has introduced a national health scheme, which has caused great controversy, but it at least avoids the position which exists in Australia that only the very poor (in the public hospitals) or the very rich can receive the best specialist attention. Hospital benefits insurance goes some way for the middle class, but a long illness may show the weakness of the scheme. As the Carnegie Quarterly shows,[3] even the wealth of America leaves many significant gaps in medical care—thus it is now rated fifteenth in the table of infant mortality. The problem is not lack of resources, but rather the system of application of medical skills for the benefit of the poorer sections of the community.

6. *Environment*

We cannot have an absolute right to an unspoiled environment,[4] for modern industry must at least in some areas destroy rural beauty.

[1] Cf. the Nazi use of euthanasia discussed by G. Ziemer, *Education for Death*, cited S. P. Simpson and J. Stone, *Law and Society* (1949).

[2] *British Medical Association* v. *The Commonwealth* (1949), 79 C.L.R. 201.

[3] Vol. xviii, no. 3 (1970).

[4] Lord Wilberforce, 43 *A.L.J.* (1969), 414.

The best that the law can do is to curb the worst excesses of industrialization by town planning.[1] Noise[2] and pollution are two of the greatest offenders—the latter affects air, water, natural growth, and the health of humanity.

The realistic approach is illustrated by a dictum of 1874: 'It would have been wrong, as it seems to me, for this Court in the reign of Henry VI to have interfered with the further use of sea coal in London, because it had been ascertained to their satisfaction . . . that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple Gardens. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this Court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town which would drive the Dryads and their masters from their ancient solitudes.'[3]

But the advance of technology has brought an increasing number of problems. Writing in 1970, David Sive states: 'The explosion of concern for the environment, at every private and governmental level, is the great political phenomenon of the last twelve months.'[4] Courses in 'environmental law' are appearing in the law schools of the United States. Legal journals contain articles on 'The Persistent Problem of the Persistent Pesticides'.[5] The United States passed a National Environmental Policy Act in 1969 which set up a 'Council on Environmental Quality'. Once one could escape to the unspoilt forest to avoid noise, but today even these are not exempt from the sonic booms of air transport. The modern kitchen is blamed for causing deafness, for an exhaust fan, dishwasher, and garbage disposal unit operating together may reach 100 decibels.[6]

Concerning approval of buildings, there are strict rules in most communities concerning fire precautions, stairways, ceiling height, and safety of structure, but while these may be reasonably policed, no satisfactory method has ever been found for aesthetic control. An ugly building is not only an eyesore, but it may depreciate the value of surrounding property. Aesthetically, the entire character of a village or town may be destroyed by destruction of historic buildings

[1] *Infra*, § 118.
[2] D. A. Anthrop, 20 *Univ. of Toronto L. J.* (1970), 1; J. L. Hildebrand, 70 *Col. L. R.* (1970), 652.
[3] Per James L.J., *Salvin* v. *North Brancepeth Coal Co.* (1874), L.R. 9 Ch. 705 at 709.
[4] 70 *Col. L. R.* (1970), 612. [5] W. H. Rodgers, ibid. 567.
[6] J. L. Hildebrand, ibid. at 666.

and the construction of glass boxes. There is an increasing interest in the preservation of what is good, and the prevention of what will detract from the elegance that already exists. Advertising boards on public highways are frequently subject to regulation on aesthetic grounds.

7. *Control of growth of population*

Each community faces the problem of population density in a given area—there is also the problem of an increase in population in the world as a whole. Famine, flood, disease, and war for centuries kept the human population in check. Malthus considered that lack of food would remain a constant limiting factor. However, his actual forecasts were falsified by the increase of productivity in agriculture. The skills of the medical profession in reducing infantile mortality and prolonging the span of human life are now creating new problems. It took the human race 200,000 years to reach 2,500 million: it will take only thirty years to add another 2,000 million, and experts predict a total of 6,000 million by the end of the century.[1] The population explosion, unless checked by birth-control methods, may be a greater threat to the welfare of humanity than the nuclear bomb.

§ 38. Private Interests

The institution of the *ombudsman* in Sweden in 1809 was an interesting experiment to provide a machinery which would enable the individual to submit to a special official any alleged grievances arising as a result of executive action. New Zealand followed in 1962. In 1967 the Prime Minister of the United Kingdom introduced the Parliamentary Commissions Act 'to humanise the administration and to improve relations between Westminster and Whitehall on the one hand and the individual citizen'. The first Parliamentary Commissioner for Administration, Sir Edmund Compton, took office on 1 April 1967.[2] He cannot deal with any matter in respect of which the complainant could apply to a tribunal. The complaint must be referred to the Commissioner by a Member of Parliament and relate to the actions of departments responsible to Parliament which action is alleged to have caused injustice by maladministra-

[1] N. St. John-Stevas, *Life, Death and the Law*, 106.

[2] See the article by Sir Edmund Compton, 10 *J. of Society of Public Teachers of Law* (1968), 101. There is a staff of 49.

tion. The latter term is nowhere defined in the Act. There is no power to question the merits of a decision, if maladministration cannot be shown. The Commissioner has no power of executive action, but there is the weapon of a special report to Parliament, if he finds that injustice has been done and that a remedy is refused.

A problem raising similar conflict of interests is that of administrative law in general. How far should the courts control the functioning of administrative tribunals and executive decisions?[1] Do we need a new bill of rights for this 'administrative age', and if so should we turn to Parliament or to the courts, or to both?

The courts are certainly alive to this problem, as can be seen from a dictum of Salmon L.J.:

> I hope that nothing I have said can be taken to mean that I consider that anyone in this country is allowed to shelter behind any kind of *droit administratif*. Indeed I consider that one of the most important functions of our courts is vigilantly to protect the rights of the individual against unlawful encroachments by public officers and by the administration. The courts' powers to this end might well, in my view, be enlarged. Certainly such powers as we possess should be vigorously exercised.[2]

1. *Personal interests*

(i) *Physical protection.* The criminal law[3] and the law of tort[4] contain many rules designed to grant physical protection. 'Save in defence of his own life against unlawful attack, no private citizen may take the life of another even to save his own.'[5] 'No person can license another to commit a crime',[6] and death caused in a duel is murder, even though both parties consented to fight. There is authority for the view that even statutory provisions should be so interpreted that a sane murderer (or his representatives) should not succeed on intestacy to the estate of a man he has murdered.[7] The rules of the sea recognize a duty to attempt to save life.[8] Even in the interests of justice,

[1] K. C. Davis, 61 *Col. L. R.* (1961), 201; H. W. R. Wade, 78 *L.Q.R.* (1962), 188.
[2] *Ministry of Housing* v. *Sharp*, [1970] 1 All E.R. 1009 at 1024.
[3] The offences of murder, manslaughter, malicious injury to the person, assault. The punishment of rape and indecent assault is intended to give physical protection in addition to guarding other interests such as morality.
[4] False imprisonment, negligent injury, assault, strict liability for certain physical injuries; e.g. under *Rylands* v. *Fletcher*, the rules relating to chattels dangerous *per se*.
[5] R. O'Sullivan, 1 *Mod. L. R.* (1937), 31.
[6] *R.* v. *Donovan*, [1934] 2 K.B. 498 at 507.
[7] *Re Pitts*, [1931] 1 Ch. 546; *In re Sigsworth*, [1935] Ch. 89.
[8] *Scaramanga* v. *Stamp* (1880), 5 C.P.D. 295 at 304.

Lord Reid considers that a court cannot order an adult to take a blood test against his will, though Lord MacDermott thinks that this can be done in an appropriate case by use of the ancillary jurisdiction, e.g. a stay.[1] Heart transplants require formal procedures to ensure that the donor's death is not accelerated.[2]

(ii) *Freedom of the person.* Slavery is no longer consonant with the temper of our time. 'The growth of the common law was unfavourable to the existence of a class of slaves.'[3] The Universal Declaration of Human Rights states: 'No one shall be held in slavery or servitude: slavery and the slave trade shall be prohibited in all their forms.'[4] Doctrines of public policy avoid contracts which entirely deprive a man of freedom of action and reduce him to the position of *adscriptus glebae*.[5] But a certain measure of surrender of liberty is valid, e.g. a covenant not to associate with certain undesirable persons, or a covenant not to drink to excess.[6]

Other predominant rights claimed by the individual are: freedom from arbitrary arrest, the right to a speedy trial,[7] and the adoption of the maxim *nulla poena sine lege*.[8] The essentials of a fair trial are—an impartial and independent bench,[9] the existence and enforcement of reasonable rules of evidence which protect the accused, the presumption that a person is innocent until he is proved guilty, and the power to know the charge in advance and to employ counsel in defence. The law should treat confessions of criminal conduct with some suspicion. As Mr. Justice Byrne once said: 'The atmosphere of a police station seems to be singularly conducive to confession.'[10]

The antinomy that law must face is to secure protection for these individual claims and yet allow the police sufficient powers to stamp out crime. In times of war the conflict between individual liberty and national security may become particularly acute. It is to the credit of the English judiciary that they have been willing to sound a note of

[1] *S.* v. *S.*, [1970] 3 All E.R. 107.
[2] See in general G. Dworkin, 33 *Mod. L. R.* (1970), 353.
[3] W. S. Holdsworth, *H.E.L.* ii. 202; *Somersell's Case* (1772), 20 St. T. 1.
[4] Art. 4.
[5] *Horwood* v. *Millar's Timber and Trading Co. Ltd.*, [1917] 1 K.B. 305 at 311.
[6] *Trustee of Denny* v. *Denny and Warr*, [1919] 1 K.B. 583.
[7] Here the importance of the writ of habeas corpus is outstanding.
[8] *Infra*, § 83.
[9] *Adan Haji Jama* v. *The King*, [1948] A.C. 225; *Metropolitan Properties (F.G.C.) Ltd.* v. *Lannon*, [1969] 1 Q.B. 577.
[10] Cited G. Gardiner and A. Martin (eds.), *Law Reform Now* (1963), 252.

warning even in the gravest times of national peril. Lord Atkin has trenchantly said:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[1]
>
> The liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other. This case will have served a useful purpose if it enables your Lordships once more to proclaim that a man is not to be deprived of his liberty except in due course and process of law.[2]

The internment of the Japanese on the west coast of America during the Second World War has been described by an American writer as 'the worst blow our liberties have sustained in many years'. The judgments of the Supreme Court in these cases canvass the issues of personal liberty and national security.[3]

How far can the property of an innocent person be held by the police on the ground that it may provide evidence of the commission of a crime by a third party, e.g. my car is stolen and the police suspect that the car was used in carrying out a murder? 'We have to consider, on the one hand, the freedom of the individual. His privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime.'[4] Liberty of the person and conscription (e.g. for service in Vietnam) is an issue that has raised strong emotions in Australia. Even those who accept conscription as necessary for national self-defence may feel that intrusion into an Asian quarrel is not in the national interests of Australia. These are the conflicts of interests which democracy must solve one way or the other.

[1] *Liversidge* v. *Anderson*, [1942] A.C. 206 at 244. This was a dissenting judgment, the majority upholding the view that the courts could not test the reasonableness of the decision of the Home Secretary to detain under Reg. 18B. See also *McEldowney* v. *Forde*, H. Lds., [1969] 2 All E.R. 1039 and 86 *L.Q.R.* (1970), 171.

[2] *Christie* v. *Leachinsky*, [1947] A.C. 573 at 595 per Lord Simonds.

[3] E. V. Rostow, *The Sovereign Prerogative: the Supreme Court and the Quest for Law*, 193 at 194.

[4] Per Lord Denning, *Ghani* v. *Jones*, [1969] 3 W.L.R. 1158; L. H. Leigh, 33 *Mod. L. R.* (1970), 268; D. C. Pearce, 44 *A.L.J.* (1970), 467; *Butler* v. *Board of Trade*, [1970] 3 All E.R. 593.

(iii) *Freedom of the will.* No legal system can guarantee freedom of the will in general—this raises psychological questions and also matters of economic freedom. All that can be done is to invalidate transactions where there has been gross abuse. Physical duress, undue influence, and fraud are elsewhere discussed.[1] So far as economic duress is concerned, the law has wavered between the desire to protect freedom of the will and the desire not to interfere with free competition. In the early part of this century there was much talk of a tort of intimidation. But in all contractual bargaining, save where the parties are of equal economic strength, there is an element of coercion.[2] The result of forty years of litigation from *Allen* v. *Flood*[3] to *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*[4] is to demonstrate that, provided there is a legitimate objective, no remedy lies even if there is an agreement between two or more, the result of which is economic ruin to the plaintiff.[5] Since protection of business interests is a legitimate objective, economic duress (where no specific tort is committed) would be actionable only in a case of disinterested malevolence. If there is no conspiracy, one individual is entirely free to use his economic power as maliciously as he pleases. This raises the problem of abuse of rights,[6] and also the effect of the Restrictive Trade Practices Act which is discussed in the preceding section.

(iv) *Liberty of thought and speech.* The law can hardly interfere with liberty of thought but only with its expression. Religious liberty logically falls under this head, for true tolerance demands protection for the reasonable expression both of religious and anti-religious views. 'Religious freedom is too sacred a right to be restricted or prohibited without convincing proof that a legitimate interest of the State is in great danger.'[7] Individual freedom of thought and conscience, to hold and change beliefs, is an absolute and sacred right. Everyone has the right, 'either alone, or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'.[8] An interesting decision was that of the U.S. Supreme Court in 1968, invalidating a statute of Arkansas

[1] *Infra*, § 100.
[2] J. Stone, op. cit. 511.
[3] [1898] A.C. 1.
[4] [1942] A.C. 435.
[5] But legislative attempts to prevent monopolies and to preserve some measure of fair competition are part of modern government, e.g. the Anti-trust laws in the United States of America and the English Restrictive Trade Practices Act, 1956.
[6] *Infra*, § 106.
[7] Per Murphy J., *Prince* v. *Massachusetts* (1944), 321 U.S. 158 at 175: cited 32 *Cornell L. Q.* (1946), 177 at 201.
[8] Universal Declaration of Human Rights, Art. 18.

which forbade the teaching of evolution in public schools. 'There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.'[1]

Liberty of expression of political and religious views can never become an absolute right—it must be limited by the need for society to protect itself. Indeed tolerance is the virtue of a secure and settled society—when the government is insecure or totally out of touch with the feeling of the community, then free speech may be most necessary, but it is unlikely to be achieved as self-preservation will dominate the views of those in power.

The sect of Jehovah's Witnesses has provided the Supreme Court of United States of America with a unique opportunity to reconcile the principle of religious freedom with the right of society to protect itself against subversive or annoying practices.[2] Can a schoolchild be expelled for refusing to salute the flag, if it is alleged that the objection is based on religious scruple? If with missionary zeal an organized attempt is made to interview every householder, can a town protect itself against such activities, or is any such action protected by a guarantee of the freedom of religion?

The policy of the Official Secrets Act, 1911, is a matter of controversy. It is reasonable to protect information, the disclosure of which would be injurious to national security, but not to protect information merely because it might lead to criticism of a government.[3]

(v) *Liberty of association.* This involves three elements: the right of peaceable assembly, the right to form associations, and the right not to be forced into associations. The right of free association is won only after many battles, as is illustrated by the history of trade union law throughout the nineteenth century. Both Parliament and the courts have changed their view as to the nature of the trade union and the advisability of collective bargaining. In Australia the whole system of industrial arbitration depends on the recognition of the trade union as an essential factor in industrial relations. This is but one example of the struggle for the right of free association. States are notoriously suspicious of organizations of citizens, lest they develop subversive tendencies. An association may become so strong as to threaten the

[1] *Epperson* v. *Arkansas* (1968), 21 L. Ed. 2d. 228.

[2] V. M. Barnett, 32 *Cornell L. Q.* (1946), 177 at 188; R. H. Pear, 12 *Mod. L. R.* (1949), 167, and cf. *Jehovah's Witnesses* v. *The Commonwealth* (1943), 67 C.L.R. 116.

[3] See G. Gardiner and A. Martin (eds.), *Law Reform Now* (1963), 45.

security of the State or the interests of citizens who are outside the association. Too great an accumulation of wealth in the hands of one group may render the political institutions of that society a mere tool of one section.[1] The law is here faced with a delicate balancing of interests as the civil conspiracy cases show.

The theory of communism provides a real dilemma for a democracy. If we believe that an important value of democracy is the right to debate even the basic political creeds, we should hesitate to suppress any organization, however subversive it may be, in the faith that the good sense of the community will ultimately make the right choice. But at what stage does freedom of debate end, and the wrecking of democracy begin? How far can a society legitimately suppress an association if its declared object is to destroy the foundations on which that society is built? No satisfactory theoretical answer can be given. We must balance the danger of the activity of the group against the evil of the suppression, coupled with the recognition that social, as well as religious, doctrine is sometimes spread by martyrdom.

(vi) *Protection of name and privacy.* There is no copyright in the name of an individual in English law: a name is protected only if material interests are affected. If a criminal borrows another's name in order to pass himself off as that person, the law will intervene. If a trader 'passes off' his goods as those of a rival, the law will grant protection to the latter. If a person trades under his own name, the law will not prevent him even if the public is confused because the name of his competitor is the same, unless there is evidence of deliberate intent to 'pass off' his goods as those of the other. The question of trade-names and proprietary marks is so important that much legislation relates to it. For our purpose it is enough to say that the law does not protect the exclusive use of a name unless material interests are at stake.

An extensive literature has grown around the so-called right of privacy,[2] which is not recognized as such in English law, though it has been developed in certain American states. In English law, 'at the first hint of breach of contract, trust, or confidence, the courts seem to

[1] S. Timberg, 46 *Col. L. R.* (1946), 533 at 535, claims that in 1907 the U.S. Steel Corporation owned real property equivalent to the areas of Massachusetts, Vermont, and Rhode Island: in 1935 the premium income of the Metropolitan Life Insurance Co. was three times the tax collection of the State of New York.

[2] M. Littman and P. Carter-Ruck, *Privacy and the Law* (1970); S. D. Warren and L. D. Brandeis, 4 *Harv. L. R.* (1890–1), 193; P. H. Winfield, 47 *L.Q.R.* (1931), 23; W. Prosser, 37 *Mich. L. R.* (1939), 874; Note, 37 *Mich. L. R.* 988; R. Pound, 29 *Harv. L. R.* (1916), 640.

be willing to give protection to what is, in reality, privacy',[1] but unless such a reason can be found there is no protection for privacy as such.[2] A lady who pays a photographer to take her photograph can prevent the photographer from selling copies without her consent only because the law reads an implied term into the contract. But there is no general 'right to be left alone'. No man can prevent the press publishing his photograph taken by a journalist, and the most intimate details of private life may be published, provided the sanctions of the law of defamation can be avoided. If the truth of the statement can be proved, a newspaper may publish an account of a forgotten lapse on the part of a now blameless citizen—or so it was at common law, but several jurisdictions by legislation now require the publisher to show public interest as well as truth in defence. Trespass to land is a specific tort, but a broadcasting company may spy on a race-course from neighbouring land and publish to the world a description of the races, and, even if the race-course proprietor suffers loss through falling attendances, he has no redress.[3] The development of electronic devices for listening in on private conversations, hidden microphones for recording, and telephone tapping have made the problem much more urgent than in the past. A substantial number of American states recognize a common law right of privacy—the right of a private individual to be 'left alone'.[4] The Universal Declaration of Human Rights denounces arbitrary interference with privacy, family, home, or correspondence.[5]

The right to publish letters illustrates the problem that the law must face. The recipient of a letter acquires property in the paper, but it would be anomalous if he could publish the letter without the writer's consent. Hence English law, in order to protect this personal interest, has talked of the writer's property in the composition. Some systems of law also recognize that publication is unlawful without the consent of the addressee.[6] In these cases the law is, in reality, attempting to protect a personal interest and is using the language of property in order to obtain a legal justification. Effective protection of property

[1] G. W. Paton, 16 *Can. B. R.* (1938), 433.
[2] The Report of the Committee on the Law of Defamation, Cmd. 7536, 1948, was against a remedy for breach of privacy.
[3] *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor* (1937), 58 C.L.R. 479.
[4] For an example see *Mau* v. *Rio Grande Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939), discussed 88 *Univ. of Pa. L. R.* (1940), 374; W. Feinberg, 48 *Col. L. R.* (1948), 713.
[5] Art. 12.
[6] L. F. Vinding Kruse, *The Right of Property*, 136–7.

rights was evolved before that of personal rights, and hence the courts, wishing to protect a personal interest, frequently feign a tinge of property in order to accomplish their end.

(vii) *Protection of the mind and feelings.* 'Mental pain or anxiety the law cannot value and does not pretend to redress when the unlawful act complained of causes that alone.'[1] At one time this doctrine was carried so far that damages were refused even where serious illness resulted from a nervous shock.[2] It was argued that it was too difficult to secure convincing proof of causal connection between the shock and the illness and that 'compensation neurasthenia' was very frequent—the illness lasted until the healing power of an award of damages had been applied. It has been said that in some of the early cases we can almost detect a masculine astonishment that any woman could be so silly as to allow herself to be frightened or shocked into a miscarriage. But the advance of medical science has deprived these arguments of their base, and modern English cases recognize a cause of action for nervous shock.[3] Lord Denning defines this as 'any recognisable psychiatric illness caused by the breach of duty by the defendant'.[4] But even the intentional infliction of mental suffering is not a cause of action in itself, if actual shock does not follow. There is, however, the parasitic element in damages—although mental anxiety or suffering may not be actionable *per se*, once an action lies on other grounds, it may be allowed to inflame the damages.[5] The father who sues for seduction of his daughter seeks in theory damages for loss of service, but if this can be presumed inflated damages may be awarded as a *solatium* for the outrage to the family honour.[6] Spitting in a man's face may cause no actual loss, although heavy damages may be awarded as compensation for the humiliation involved. But there are still many cases in which a person can with impunity, either intentionally or negligently, inflict mental suffering on another.

[1] *Lynch* v. *Knight* (1861), 9 H.L.C. 577 at 598.

[2] *Victorian Railways Commissioners* v. *Coultas* (1888), 13 A.C. 222.

[3] i.e. not mere anxiety, but shock which results in physical illness. *Hambrook* v. *Stokes*, [1925] 1 K.B. 141; *Owens* v. *Liverpool Corporation*, [1939] 1 K.B. 394; *Chester* v. *Waverley* (1939), 62 C.L.R. 1; *Bourhill* v. *Young*, [1943] A.C. 92.

[4] *Hinz* v. *Berry*, C.A., [1970] 1 All E.R. 1074.

[5] e.g. at common law in seduction, assault, or an insulting trespass. In general the rules of contract give damages only for financial loss—the most outstanding exception being breach of promise of marriage where the 'parasitic element' is involved. The action for breach of promise of marriage has now been abolished by the Law Reform (Miscellaneous Provisions) Act, 1970.

[6] This action is now abolished by the Act cited in the previous note.

(viii) *Reputation.* A man's reputation is his most treasured possession—hard to win and easy to lose. The dilemma of the law is to protect freedom of speech and yet allow remedies for unjustified personal attacks. In English law the rules are fairly strict—proof that the defendant took the greatest possible care is no defence. The test is not what the writer meant, but what a reasonable reader would infer from his words.[1] This strict rule has been much criticized, particularly by those concerned with freedom of the press. In recent years legislative attempts have been made in England and some other jurisdictions to redress the balance; e.g., by providing for correction and apology as a sufficient remedy in cases of unintentional defamation by newspapers and periodicals.[2] In libel damage is presumed, whereas in slander (save in four cases), actual loss resulting from the statement must be proved. Since many courts regard broadcasting as constituting slander,[3] the result is that words written on a postcard are treated more seriously than an address to thousands over the air. Here 'the law went wrong from the beginning in making the damage and not the insult the cause of action; and this seems the stranger when we have seen that with regard to assault a sounder principle is well established'.[4] However, the legislature has now declared that broadcast words and words spoken during the public performance of a play shall be regarded as being published in permanent form.[5]

On the other hand justification is in civil cases a complete defence at common law. Whatever the motive in publishing the past frailties of a now blameless citizen, there is no redress if what is stated can be proved true. Some parts of the common law world require, in addition to justification, proof that the publication was in the public interest.[6]

Where fair comment is concerned the law allows a greater freedom for artistic criticism than for personal attacks. In the former case Lord Esher suggest that the test is: 'Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is

[1] *Hulton & Co.* v. *Jones*, [1910] A.C. 20; *Hough* v. *London Express Ltd.*, [1940] 2 K.B. 507—except in regard to subordinate disseminating agencies.

[2] England, Defamation Act, 1952 (15 & 16 Geo. VI and 1 Eliz. II, c. 66), s. 4; Tasmania, Defamation Act, 1957, s. 17; New Zealand, Defamation Act, 1954, s. 6.

[3] *Meldrum* v. *A.B.C. Ltd.*, [1932] V.L.R. 425. The Report of the Committee on the Law of Defamation, Cmd. 7536, 1948, recommended that broadcasting should be treated as libel.

[4] F. Pollock, *Torts* (14th ed.), 193. In New South Wales, slander is assimilated to libel.

[5] Defamation Act, 1952, and Theatres Act, 1968, s. 4.

[6] e.g. Queensland, New South Wales.

criticised?'[1] This is a curious idea of a fair man, but it does illustrate the desire of the law to allow latitude to artistic criticism.

(ix) *Equality.* The removal of discrimination on the grounds of race, religion, and sex has been a slow evolution. Racial discrimination caused many controversies in the United States in the 1960s.[2] In Britain the Race Relations Act was passed in 1965, and a Race Relations Board has been set up to investigate and report on cases of racial discrimination.[3] Enoch Powell made the issue one of his principal policy speeches in the general election of 1970. The growing acceptance of the principle of racial equality is shown by the reaction against South Africa and Rhodesia for their advocacy of the doctrine of white supremacy. The problem becomes really serious when a cricket tour by a South African team is cancelled.

The achievement of religious tolerance and of equality of status for women has been a slow evolution, but it is the mark of a developed civilization to remove all discrimination based on religion and sex.

2. *Family interests*

This is a heading which cuts across the analytical divisions of the law, and affects the law of contract, tort, property, succession, guardianship, and crime. In Europe both Church and State helped to mould the rules with the result that marriage, though in one sense a contract based on the free consent of the parties, actually created a status, since the incidents of the relationships are compulsorily imposed by law. Some rights arising from marriage are similar to rights in other parts of the law (e.g. a husband's usufruct over a wife's property);[4] other rights are unique (e.g. those arising out of the relationship of husband and wife, parent and child).[5]

(i) *Husband and wife.* First the law has to decide what is meant by marriage. In most societies one form of sexual union is treated by the law as on a superior plane to others. The classic English definition is that marriage is the 'voluntary union for life of one man and one woman to the exclusion of all others'.[6] Hill J. went so far as to deny that a marriage which took place in Russia was a marriage in the eyes

[1] *Merivale* v. *Carson* (1888), 20 Q.B.D. 275 at 281.
[2] See the comment, 84 *Harv. L. R.* (1971), 1109.
[3] See *Ealing London Borough Council* v. *Race Relations Board*, [1970] 3 W.L.R. 921.
[4] The influence of the family on the law of succession is discussed *infra*, § 121.
[5] Lord Penzance, *Hyde* v. *Hyde* (1866), L.R. 1 P. & D. 130 at 133.
[6] For a discussion of reforms in family law, see G. Gardiner and A. Martin (eds.), *Law Reform Now*, ch. vi.

of English law, because divorce was then obtainable at the will of either party. The Court of Appeal pointed out, however, that divorce depends not on the *lex loci celebrationis*, but on the law of the domicil of the husband at the time proceedings commence.[1] The English definition excludes polygamy—the remedies of the matrimonial courts are designed for monogamy alone. But English law recognizes polygamy for some purposes. 'It cannot, I think, be doubted now (notwithstanding some earlier *dicta* by eminent judges) that a Hindu marriage between persons domiciled in India is recognised in our court, that the issue are regarded as legitimate, and that such issue can succeed to property in this country with a possible exception.'[2]

The interest of the community is in a married partnership which treats each party on an equal basis, and imposes only the limitations which the theory of marriage requires. The law has come far from the original approach which treated the wife as a mere chattel under the control of her husband. Originally marriage was seen in terms of contract, dissolution in terms of property, and divorce in terms of a matrimonial offence.[3] But the recognition of the individuality of the married woman has been a slow process. As late as 1891 a husband claimed the right to lock up his wife, and though the claim was rejected, it was surprising what an antiquated view of marriage the legal authorities took.[4] What is equally as important as physical freedom is economic independence. Classical Rome gave to the wife in the upper classes an element of financial independence in the institution of dowry, which the husband was compelled to restore if the marriage was dissolved through his fault. In England, the wife's lack of proprietary capacity was for long a defect in the law. Equity allowed property to be vested in trustees for the wife and the legislature somewhat tardily extended this protection by allowing the wife to hold property at law. The training of women for business and professional life results in economic independence for an increasing number of wives. The wife's right to sue her husband for maintenance and to pledge his credit for necessaries is also an important economic protection. In Russia it is so common for wives to earn their own

[1] *Nachimson* v. *Nachimson*, [1930] P. 85, 217.
[2] Per Lord Maugham L.C., *Sinha Peerage Claim*, [1946] 1 All E.R. 348 at 349 (the possible exception related to real estate); G. C. Cheshire, *Private International Law* (6th ed.), 308 et seq.
[3] H. A. Finlay, 43 *A.L.J.* (1969), 602.
[4] *R.* v. *Jackson*, [1891] 1 Q.B. 671.

living that the wife, if she has means, is bound to support a destitute husband.

The law recognizes the unity of married life in the old doctrine that husband and wife are one person. This maxim was never literally true.[1] It may be justified in so far as it attempts to preserve the unity and intimacies of family life, but it may also be used to reduce the wife to a subordinate position. The law of evidence still places the disclosures of husband and wife in a somewhat privileged position—a spouse is not a competent or compellable witness against the other spouse in certain criminal cases, and spouses are not compellable to disclose communications between each other during marriage.[2] On the other hand, in a murder trial the House of Lords held admissible a letter written by the accused to his wife. The wife had not received the letter as it was intercepted before delivery. Viscount Radcliffe dissented.[3]

If, however, the alleged offence was committed against the wife, her evidence is admissible.[4] Ungoed Thomas J. has held that the court, in the exercise of its equitable jurisdiction, will restrain either party to a marriage from committing a breach of confidence arising from the intimacies of married life, even though the parties had been divorced before the action was brought; for there is no need to prove either a contract, or a right of property, since equity can act even if there is no remedy at common law.[5] There is some support for the rule that a husband and wife cannot be guilty of conspiracy together. No action in tort lies between the spouses, save that the wife may sue for protection of her private property. In some jurisdictions, however, changes have been made in this rule; in Victoria, for example, husbands have been given the same right to sue for protection of their private property as was enjoyed by the wife,[6] and some United States jurisdictions have gone even further in removing restrictions against suits in tort between husband and wife.[7]

[1] Glanville Williams, 10 *Mod. L. R.* (1947), 16.

[2] Op. cit. at 20. And see *Rumping* v. *D.P.P.*, [1962] 3 All E.R. 256: this apparently applies even to a polygamous marriage: *Mawji* v. *Reginam* (J.C.)., [1957] 1 All E.R. 385, or where a decree of nullity is subsequently granted: *R.* v. *Algar*, [1953] 2 All E.R. 1381.

[3] *Rumping* v. *Director of Public Prosecutions*, [1962] 3 All E.R. 256.

[4] *R.* v. *Verolla*, [1962] 2 All E.R. 426.

[5] *Duchess of Argyll* v. *Duke of Argyll*, [1967] Ch. 302.

[6] Marriage Act, 1958, s. 160.

[7] See W. E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 *Harv. L. R.* (1930), 1030; and the authorities collected by A. C. Jacobs and J. Goebel, *Domestic Relations* (4th ed., 1961), pp. 565–88.

In some American states, a minor child cannot sue a parent in tort on the ground that this introduces 'discord and contention where the laws of nature have established peace and obedience'.[1] Some courts also allow an action to the child against one who entices the father to leave the family.[2] In private international law the domicil of the wife follows that of her husband. A promise between husband and wife is not always actionable, for 'each house is a domain into which the King's writ does not seek to run and to which his officers do not seek to be admitted'.[3] At common law the husband was liable for the torts of his wife, but this did not depend on the doctrine of legal unity, but upon the necessity of finding a defendant who could meet an adverse judgment. Once the wife ceased to lose her chattels on marriage the reason for the old rule ceased and it has now been abolished by legislation in England and many parts of the common law world.

Many public policy rules illustrate the desire of the law to uphold the institution of marriage. A condition attached to a bequest is void if its object is to separate husband and wife;[4] a promise made by a married man to marry another woman is void, but valid if made after a *decree nisi* has been granted, although before it has been made absolute.[5] Once even an agreement to separate was regarded as void; now it is recognized that the parties should be free to end an intolerable situation in a dignified way.

But the law in its desire to strengthen the institution of marriage must not go too far in its attack on sexual intercourse outside the marriage bond. The criminal law regulates certain aspects of sexual behaviour, where special reasons of public policy are concerned—e.g. where there is no consent as in rape, where the female is not competent to consent because of age or lunacy, where there is a close relationship between the parties as in incest, where the offence is unnatural—but immorality *per se* is not now a crime.[6] Nor is it a civil offence unless it causes loss of service to the parent (or one *in loco parentis*) of the girl seduced,[7] or is a breach of a marital right. But

[1] Per Owen J., *Wick* v. *Wick* (1927), 192 Wisc. 260.
[2] *Daily* v. *Parker* (1945), 152 F. (2d) 174; 48 *Mich. L. R.* (1949), 242.
[3] Per Atkin L.J., *Balfour* v. *Balfour*, [1919] 2 K.B. 571 at 579; see also *Hoddinott* v. *Hoddinott*, [1949] 2 K.B. 406, which seems to bear harshly on the wife, whose skill had assisted the husband in winning prizes in football pools.
[4] *Re Thompson*, [1939] 1 All E.R. 681; *Davies* v. *Elmslie*, [1938] 1 K.B. 337.
[5] *Fender* v. *St. John-Mildmay*, [1938] A.C. 1.
[6] But in ecclesiastical law adultery was a punishable offence, and many countries have treated it as a crime. Some still do, e.g. India, Malaya, Illinois (U.S.A.).
[7] This action is now abolished (*infra*).

many rules of public policy are designed to discourage immorality. If a promise is made in respect of past cohabitation, the promise is made for no consideration at all; if a promise is given in respect of future cohabitation, the consideration is unlawful.[1] At one time it was considered that harsh rules concerning illegitimate children would discourage immorality, but objections to gifts by will to illegitimate children on the ground of their being contrary to public policy are 'not quite so strong now as they were a century ago',[2] for it seems unfair to penalize an innocent child. This is now recognized by the Universal Declaration of Human Rights.[3]

The husband has a right to the *consortium* of his wife, and hence in English law an action lies for loss of services if the wife is negligently or intentionally injured or is enticed away. At first the view was that the wife had no corresponding right to her husband's *consortium* and hence no action against a wrongdoer.[4] The support for that view was historical.[5] The legal and social position of the married woman changed so much during the last hundred years, however, and she has so far come to be regarded as her husband's equal and not in any way his servant, that it has been argued strenuously that she should have the same remedies for loss of *consortium* as have been enjoyed by her husband.[6] It was accepted that the wife should have a similar right to her husband to sue for loss of *consortium* brought about by enticement,[7] but the House of Lords held[8] that no action for loss of *consortium* would lie at the suit of a wife where the loss was caused by the negligence of the defendant. The House took the view that the husband's right of action in this case was an historical anomaly and that it should not be extended. Many cases in the various common law jurisdictions illustrate the change in legal approach to the relation of husband and wife. But the ways of meeting the change vary widely. In some, for example, a remedy based on the old law of master and servant has been adapted to meet the view of marriage as a free partnership. In others, the acceptance of the

[1] See *Ayerst* v. *Jenkins* (1873), L.R. 16 Eq. 275 at 282–3.
[2] *In re Hyde*, [1932] 1 Ch. 95 at 98.
[3] 'All children, whether born in or out of wedlock, shall enjoy the same social protection', Art. 25 (2).
[4] See the majority decision of the High Court in *Wright* v. *Cedzich* (1930), 43 C.L.R. 493.
[5] P. Brett, *Consortium and Servitium—A History and Some Proposals*, 29 *Aust. L. J.* (1955), 321, 389, 428.
[6] See for example the dissent of Isaacs J. in *Wright* v. *Cedzich* (1930), 43 C.L.R. 493.
[7] *Gray* v. *Gee* (1923), 39 T.L.R. 429; *Place* v. *Searle*, [1932] 2 K.B. 497.
[8] *Best* v. *Samuel Fox & Co. Ltd.*, [1952] A.C. 716.

notion that marriage is a free partnership has led to a rejection of old rules designed to protect the interests of husbands or to allow women to sue for breach of promise to marry.[1]

The rules of divorce vary from those systems which regard the wife as a mere chattel to be dismissed at will, the wife herself having no power to terminate the relationship, to the strictness of the religious doctrine which regards marriage as an indissoluble sacrament and back to the original theory of U.S.S.R. which emphasized that marriage was a contract and should be terminable at the will of either party. It is significant, however, that U.S.S.R. has recently made more difficult the securing of divorce, as the importance of the family unit to society is recognized.

In dealing with divorce the law is faced with the dilemma—if divorce is made too easy, the institution of marriage is weakened; if it is made too difficult, the cost to the happiness of the individual may be great. The general tendency is to recognize that too strict a view does not uphold morality—but there are still states where divorce is unobtainable.[2] English courts take a realistic view, where both parties ask for the exercise of discretion. Simon L.C. stated that in addition to the interests of the children, the interests of the co-respondent, the question of possible reconciliation between husband and wife, there was the interest of the community in maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has entirely broken down.[3]

There is thus a complete revolution in the attitude to marriage since the nineteenth century. If marriage is not thought of in terms of property, but in terms of a partnership between persons of equal status, irretrievable breakdown of the relationship should be the test of dissolution rather than sin or matrimonial misconduct. This is the approach adopted by the Divorce Reform Act, 1969.[4]

If the court is bound to stigmatize one party as guilty of misconduct, then parties will contest every fact, for alimony may depend

[1] See the material collected by A. C. Jacobs and J. Goebel, *Domestic Relations* (4th ed., 1961), pp. 492–550. New York has abolished actions for alienation of affections, criminal conversation, seduction, and breach of promise. The U.K. Law Reform (Miscellaneous Provisions) Act, 1970, has abolished actions for breach of promise of marriage, the right to claim damages for adultery, to sue for seduction of a child.

[2] Argentine, Bolivia, Brazil, Chile, Colombia, Eire, Italy (until 1970), Paraguay, and Spain. But other means of dissolution (by way of nullity proceedings) of marriages exist and go some distance towards diminishing the difference.

[3] *Blunt* v. *Blunt*, [1943] A.C. 517.

[4] C. 55: Jennifer Levin, 33 *Mod. L. R.* (1970), 632.

on the respective guilt of the parties. In *Tumath* v. *Tumath*[1] the Court of Appeal took the realistic approach that where the marriage had irretrievably broken down, it could be a waste of public time and money if both parties introduced voluminous evidence as to which party should be granted the decree. Hence if there were further proceedings relating to the financial provisions to be made for maintenance, the court accepted as a corollary that a husband who had not contested every issue of fact in the divorce proceedings was not precluded on the ground of public policy from introducing new evidence which was relevant to the question of the scale of support.[2]

Is the real purpose of marriage the procreation of children? In America an interesting decision held void a condition in a lease that occupation was to be by adults only and refused to allow a married couple to be evicted when a child was born.[3] The Court of Appeal has held that the persistent refusal of one spouse to have intercourse without the use of contraceptives was a wilful refusal to consummate the marriage.[4] The House of Lords, at a later date, refused to accept this view, Lord Jowitt emphasizing that there were other objects for which marriage was instituted than the procreation of children.[5] Many systems now emphasize that the community cannot afford to ignore the effect of marriage on the future of the race and hence demand certificates of health before the parties are allowed to marry.[6]

The legality of birth control and abortion raises questions of the interests which law should protect. In the nineteenth century a book on contraception would have been classified as obscene.[7] Today the opinion of society and the law has changed, as is illustrated by the decision of the House of Lords in *Baxter* v. *Baxter*:[8] 'Control by men and women over the numbers of their children is one of the first conditions of their own and the community's welfare.'[9] In the United States there are differing rules, e.g. in Connecticut it is an offence not only to sell, but also to use, a contraceptive.[10] Among the

[1] [1970] 1 All E.R. 111.
[2] *Warren* v. *Warren and Russell*, [1970] 2 All E.R. 189. See the discussion by O. Kahn-Freund of recent legislation on matrimonial property in 33 *Mod. L. R.* (1970), 601: Matrimonial Proceedings and Property Act, 1970.
[3] *LaMont Building Co.* v. *Court* (1946), 66 N.E. (2d) 552, noted 22 *Notre Dame Lawyer* (1946), 131.
[4] *Cowen* v. *Cowen*, [1946] P. 36.
[5] *Baxter* v. *Baxter*, [1947] 2 All E.R. 886.
[6] e.g. Illinois and many other states of the U.S.A. The Nazis introduced such a law in 1935: S. P. Simpson and J. Stone, *Law and Society* (1948).
[7] N. St. John-Stevas, *Life, Death and the Law*, 56 et seq.
[8] [1948] A.C. 274.
[9] Royal Commission on Population (1949), Cmd. 7695, para. 427.
[10] N. St. John-Stevas, op. cit. 64.

christian churches, all take a liberal view save the Roman Catholic and the Orthodox churches.[1] The Lambeth Conference of 1920 condemned contraception, but by 1958 it was approved.

Artificial insemination raises questions to which the answers are still obscure.[2] If the husband provides the semen, it is difficult to suggest that adultery is committed, but in A.I.D. (as it is called), where a third party is the donor, is the wife guilty of adultery? Lord Wheatley in a Scottish case held that it was not adultery even if the husband had not consented[3] (although he considered that it would be a heinous breach of the marriage contract). In 1956 the Royal Commission on Marriage and Divorce recommended that A.I.D. without the husband's consent should be a ground for dissolution of marriage.[4]

Is a child born as a result of A.I.D. legitimate? There is no decisive common law authority; A.I.D. is not publicized, and if the husband consents, no one is likely to raise the point. There is also a strong presumption of legitimacy.

Probably sterilization, except on grounds of medical necessity, is illegal at common law:[5] some American states have statutes providing for the compulsory sterilization of mental defectives,[6] although many of these statutes have been challenged as unconstitutional. Nazi Germany used it as a means of race extermination, and this has caused a wide revulsion against the practice. It was at one time thought that criminality was a biological characteristic, and that a careful use of sterilization would reduce the criminal propensities of the community—but this view is not accepted today.[7]

(ii) *Parent and child.* The age of majority has varied through the years. Historically the young burgess reached full age when he could count money and measure cloth, the young sokeman at 15, and the tenant by knight service at 21. The latter became the age for the whole community.[8] The recommendation of the Latey Committee[9] was that, in view of the increasing education and maturity of the younger generation, the age should be reduced to 18, and this was

[1] Ibid. 72–3.
[2] G. P. R. Tallin, 34 *Can. B.R.* (1956), 1, 166.
[3] *Maclennan* v. *Maclennan* (1958), *Scots Law Times* 12, cited N. St. John-Stevas, *Life, Death and the Law*, 130.
[4] Cmd. 9678, paras. 90, 318; N. St. John-Stevas, op. cit. 133–4.
[5] Lord Denning, *Bravery* v. *Bravery*, [1954] 3 All E.R. 59 at 67–8; quaere if it is to prevent the transmission of a hereditary disease.
[6] N. St. John-Stevas, op. cit. 165.
[7] See *infra*, § 80.
[8] Pollock and Maitland, *History of English Law*, ii. 438.
[9] (1967), Cmd. 3343.

adopted by Parliament in 1969.[1] The interests concerned are set out in this quotation:

> Whatever age may be fixed as the general age of majority, people will still make improvident contracts which they would not have made if they had been more experienced . . . The problem is to foresee whether, if the age of majority is reduced, the scale of improvident contracts made by people of the critical ages, will be too high a price to pay for the freedom of contract and the security of transactions which the reduction would achieve.[2]

Legal systems provide a wide range of types of relationship between parent and child, for, as in the case of husband and wife, civilization, with its increasing emphasis on the value of human personality, tempers the power of the strong out of consideration for the weak. The father's right to expose the new-born babe or to inflict the death penalty has been succeeded by rules which not only protect the life of the child but compel the parent to take active measures for the well-being of his offspring.

As between husband and wife, the former normally exercises the parental power, but, if the parties are divorced, English law requires the court to consider the welfare of the infant as the paramount consideration in deciding to whom custody of the children should be awarded. Thus the right of the parent is tempered by an emphasis on the duty to consider the needs of the child. Most modern systems also provide means by which a father may be forced to contribute to the upkeep of the child, and in extreme cases of cruelty or neglect, the parental power may be destroyed by an order of the court.

An interesting point of custody arose in a Victorian case. A mother claimed that she was given the wrong baby in hospital and brought a writ of habeas corpus to recover the child whom she claimed to be hers. The child was then over three years old. Barry J. held that the evidence was sufficient and granted custody to the applicant.[3] But he emphasized strongly the inappropriateness of the adversary procedure. The other family was quite convinced that no mistake had been made—the Court was not asked to order the exchange of the two babies, but only to deal with the custody of one. Yet if there had been an error, realistically the order of the court should deal with both children. The Full Court reversed this decision on appeal,

[1] Family Law Reform Act, 1969, c. 46.
[2] Report of the Law Reform Commission (N. S. Wales) (1969), L.R.C. 6, p. 8.
[3] *The King* v. *Jenkins*, [1949] A.L.R. 411.

holding that the evidence did not establish the matter as one of practical certainty.[1] This was a high burden of proof, but apparently the justification adopted was that the welfare of the child was paramount and that the court should not lightly remove a child from a home where it was happy. In the exercise of discretion, only the highest degree of proof would justify the court in disregarding other factors relating to the welfare of the child.

If paternity is in issue, a blood test may provide evidence—it cannot be proved by this means who is the father, but it may be confirmed that a person cannot be the father. Whether in particular circumstances the court should order the child to undergo a blood test, is a question of difficulty as is shown by two decisions of the Court of Appeal, in each of which there was a dissent.[2] The judgments show great concern with the welfare of the child. Thus Sachs L.J. considers the danger that the test might prove the child illegitimate, and he realistically emphasizes that the attitude to illegitimacy of the general population must be considered: one must not merely apply the humanitarian thought of the court, the attitude of London, or even that of the legislature and then decide that illegitimacy is really no disadvantage. 'It is a very practical, human question and I say no more than that the onus is on those who seek to assert that the human outlook has changed.'[3] London is not necessarily representative of England, and who can tell what will be the attitude of the child himself to his illegitimacy? These two cases are a striking example of the desire of the courts to get beneath the technical rules to a discussion of the human issues involved.[4]

In an application by four illegitimate children for provision to be made under the Victorian equivalent of the Testator's Family Maintenance Act, Smith J. stated:[5] 'The task of determining what provision a wise and just person in the situation of this father would have made for the four plaintiffs is rendered difficult by the fact that, in this community, attitudes towards persons, whether infants or adults, who have been born out of wedlock, have been changing.'

[1] [1949] V.L.R. 277 and 80 C.L.R. 626.

[2] *W.* v. *W.*, [1970] 1 All E.R. 1157, and *S.* v. *McC. and M.*, same volume, 1162. The House of Lords in *S.* v. *S.*, [1970] 3 All E.R. 107, affirmed the second case, but reversed the first.

[3] *S.* v. *McC. and M.*, *supra* at 1167.

[4] Lord Reid in *S.* v. *S.*, [1970] 3 All E.R. at 111, agreed that on average it is still a considerable disadvantage to be illegitimate. Whatever the attitude of the law, the community may be slow to change its views.

[5] *Re Wren (deceased)*, [1970] V.R. 449.

Parental power ends when the child reaches the age of majority. This has varied from the fourteen years of Roman law to the twenty-five years of middle French. Because it was clear that the Roman limit was too low, the praetor developed special protection for those under twenty-five years. Many systems allow a parent to emancipate a child at any age, or on the attainment of a certain age before majority would be achieved. In some countries marriage of an infant ends parental power, but normally the consent of a parent is necessary before such a marriage can take place. Adoption may destroy the power of a natural parent and place the child under the control of another. At common law the power of the parent lasts till the age of twenty-one years is reached. On the other hand, if the child is over sixteen years of age, the court would consult the wishes of the child and might, in the exercise of its discretion, refuse to act in habeas corpus proceedings.[1] By statute, majority is now achieved at the age of eighteen years.[2]

The parent or guardian has a right availing against persons generally that there shall be no unjustifiable interference with the control over the child. This is a right *in rem* on breach of which a remedial right *in personam* arises against the particular wrongdoer. Various rules of English criminal law protect a father's rights over his children, e.g. abduction of a girl under sixteen is a crime. The law of tort compensates a father for any loss of service caused by an injury tortiously inflicted on the child.

There is the question of the power of the parent over property acquired by the child. In Roman law the *paterfamilias* automatically obtained title to everything acquired by those in his power. But the strictness of the law was tempered by the institution of the *peculium* —the *paterfamilias* could grant to the son a sum of money of which the latter had actual control although legal title remained in the father. The rules concerning the *peculium castrense* went even farther—the father had no immediate interest in money earned by the son on military service, although the father took it if the son died without disposing of it by will. The individualism of modern systems allows a child to hold title to all property earned by or given to him, although naturally it is necessary to circumscribe his actual control in his own

[1] *Lough* v. *Ward*, [1945] 2 All E.R. 338 at 348. And even where infants of tender years are concerned, the court may interview them to obtain information which will assist in the exercise of the court's discretion: *Ward* v. *Laverty*, [1925] A.C. 101 at 107. *R.* v. *Murdoch ex p. Hoath*, [1940] V.L.R. 61.

[2] *Family Law Reform Act*, 1969, c. 46.

interest. In English law the trust has proved so useful that few legal difficulties arise. But in countries where this device is not used, a 'statutory agent' is set up to act on behalf of the infant who is fatherless.

3. *Right to economic benefits*

(i) *Property*. This must inevitably be discussed fully in the analytical survey which follows.[1]

(ii) *Right to rely on the representations or promises of others*. This is the sphere of juristic acts, the most important of which is a contract.[2] The tort of deceit furnishes a remedy for a wilfully false statement made with intent that the plaintiff shall act in reliance on it, with the result that he does so act and thereby suffers loss. The wrong of injurious falsehood protects a plaintiff against misrepresentations made concerning him. Deceit lies only if the defendant knew that the statement was false; apart from the rules governing special relationships, there was no action for negligent statements which cause loss.[3] If I repair a motor-car, I owe a duty of care in tort towards subsequent users of the car, but if I report on a company balance-sheet, the Court of Appeal held in 1951 that I am not responsible in tort for loss which results from my negligent statement, provided that I can prove that I honestly believed the statement to be true. The House of Lords overruled this case in 1964,[4] holding that there could be liability for the consequences of a negligent statement where the defendant possesses special skill and ought to know that the other party relies on his statement.

(iii) *Professional activities*. The law begins with a bias towards freedom. 'Ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve and . . . this right of choice constituted the main difference between a servant and a serf.'[5] Article 19 of the Universal Declaration of Human Rights condemns discrimination based on race, sex, language, religion, political or other opinion, property status or national or social origin. A restraint of trade is prima facie against public policy and must be justified within the narrow rules which English law enforces—i.e. the

[1] *Infra*, Ch. XXI.

[2] *Infra*, Ch. XVII.

[3] *Candler* v. *Crane, Christmas & Co.*, [1951] 2 K.B. 164.

[4] *Hedley Byrne & Co. Ltd.* v. *Heller and Partners Ltd.*, [1964] A.C. 465. In this case the defendants had expressly disclaimed responsibility, and so escaped. Cf. also *M.L.C. Assurance Co. Ltd.*, v. *Evatt*, [1971] 1 All E.R. 150.

[5] Per Lord Atkin, *Nokes* v. *Doncaster Amalg. Collieries Ltd.*, [1940] A.C. 1014 at 1026.

restraint must be reasonable from the point of view of the parties and of the public, the burden of proof that the restraint is reasonable in the first sense being on him who desires to enforce it. 'Liberty to trade is not an asset which the law will permit (a man) to barter for money except in special circumstances and within well-recognized limitations.'[1] Where the relationship of master and servant is concerned it is permissible for the master to exact covenants protecting trade secrets and prohibiting solicitation of clients if the servant leaves his present employment, but the law will scrutinize jealously any covenant which unreasonably prevents the servant exercising in a new employment the subjective skill which he acquired in his former post. The master is not entitled to stifle all competition, for the community is interested in the free exercise by every man of his powers. But where a contract is made between the vendor and the purchaser of a business, the law recognizes two significant differences from the law of master and servant: firstly, the servant needs protection because he is in a weak economic position[2] whereas business firms or companies are more likely to be economic equals; secondly, unless the vendor can be prevented from re-entering the same business in the same locality, it will not be possible to obtain an effective price for the sale of the goodwill. Hence where the agreement is between two companies, the court will not be quite so difficult to satisfy that the restraint is reasonable as between the parties. Theoretically it is also necessary to prove a second point—that the restraint is reasonable in the interests of the public, but there are not many cases where the first point was satisfied and the agreement was held invalid on the second.[3] The courts seem to assume that what is reasonable in the interests of the parties is also reasonable so far as the public is concerned.

A decision that breaks new ground is that of *Hivac Ltd.* v. *Park Royal Scientific Instruments Ltd.*[4] The Court of Appeal laid down that in the circumstances there was an implied term in a contract of service that the employee should serve with good faith and fidelity.

[1] *Vancouver Malt and Sake Brewing Co.* v. *Vancouver Breweries Ltd.*, [1934] A.C. 181 at 192.

[2] Per Evershed J., *Routh* v. *Jones*, [1947] 1 All E.R. 179 at 184. 'In contracts between a master and servant the latter is necessarily at a disadvantage and . . . there is . . . an obligation on the part of masters to be scrupulous to see that such covenants are framed with precision and care and do not attempt exaction beyond the requirements of propriety.'

[3] *Wyatt* v. *Kreglinger & Fernau*, [1933] 1 K.B. 793 does illustrate the emphasis on public interest.

[4] [1946] 1 All E.R. 350.

Plaintiffs had skilled workmen on their staff and defendants secretly persuaded them to work on Sundays for defendants' benefit. Where ordinary manual work is concerned, what a servant does in his own time is broadly his own affair, but in this case the servants were highly skilled and trained—in effect the defendants were secretly getting the benefit of plaintiffs' training in order to compete with them.

Economic security has been considered under the heading of social interests. This interest includes the right to work,[1] the right to minimum standards of remuneration, unemployment and sickness insurance, provision of reasonable hours of work, reasonable conditions of work, and holidays. The repudiation of *laissez-faire* is illustrated by the fact that articles are written on unfair dismissal and the right to reinstatement.[2] Trade unions and universities must observe the rules of natural justice in expelling a member.[3] If a union is strong enough to enforce a 'closed shop', expulsion of a member may destroy his livelihood.

How far should the State go in providing work in a time of economic stress? Can full employment always be achieved? There is increasing rejection of the iron laws of economics and an increasing realization of the duty of the State to create opportunities for employment, either directly by public works or indirectly by fostering new industries. The philosophy of the depression of the 1930s is now regarded as too quiescent.

4. *Political freedom*

Participation in government is an essential personal right, according to our modern democratic theory. It was Locke's merit to stress that the ruler was under a trust to regard the welfare of his subjects. It is not enough, however, to emphasize that the State exists for the benefit of men and not men for the glory of the State. A doctrine of the philosopher king may easily lead to despotism, however benevolent it may be. The dignity of human personality demands that the individual takes part in the selection of the fundamental policies which are to guide the welfare of the State.

[1] Universal Declaration of Human Rights, Art. 23.

[2] Cf. G. de N. Clark, 32 *Mod. L. R.* (1969), 532.

[3] *R.* v. *Senate of the University of Aston*, [1969] 2 All E.R. 964; *Leary* v. *National Union of Vehicle Builders*, [1970] 2 All E.R. 713. For the position of a teacher see *Hannam* v. *Bradford City Council*, C.A., [1970] 2 All E.R. 690.

Only in the Greek city state of moderate size could there be active participation by all citizens in a democratic assembly—and when we praise the Greek state we must remember that the slave was not considered a *persona*. In the modern state the power of the individual can be exercised only indirectly.

There are two aspects of political rights: the right to vote and the right to be elected. High property qualifications may prevent the exercise of the people's will, or the existence of a second chamber elected on a restricted franchise may act as a brake on progress.[1] True democracy, in the sense of an active exercise of political rights by all adult members of the community is a rare phenomenon. It can be achieved only if there is a minimum standard of education and of political insight. Without these factors universal suffrage provides only an instrument on which the demagogue, or strongly organized vested interests, may play. The fact that in Australia voting has been made compulsory provokes cynical reflections on the modern attitude to the rights for which our fathers fought.

Hence while a first and obvious step is to remove the more obvious discriminations, that is only the beginning of the long road to self-government. The philosopher would emphasize that self-government has an individual as well as a social meaning—it is only so far as the individual is willing to show restraint and play the game within the rules that a stable and progressive community can be achieved. For all its faults, it is the glory of the English tradition that it has achieved respect for the law and on the other hand a willingness to change that law as social philosophy develops. What other countries have achieved through revolutions, England achieves by the ballot box.

The desire to place a fundamental law above the dangers of popular change has virtues, but it may easily become anti-democratic if the fundamental rights thus protected are interpreted by a court with its eye on the past rather than the future. This is illustrated by the attitude of the American Supreme Court in the past to social reforms.[2]

The so-called 'right to demonstrate' has provoked much discussion.[3] Opposition to the war in Vietnam or to a tour by South African cricket teams provokes a desire to express dissent by overt action.

[1] This is not confined to the Old World. In Victoria (Australia) the upper house until 1950 was elected on a very restricted franchise.

[2] *Supra*, § 33, dealing with the doctrine of natural rights and the interpretation of the XIVth Amendment.

[3] See Note, 86 *L.Q.R.* (1970), 1; D. G. T. Williams, 28 *Camb. L. J.* (1970), 96.

Democratic states recognize the right to demonstrate as such, but a procession may disrupt traffic or provoke violence by those with opposing views. To wave placards attacking racial discrimination is one thing: to dig up a cricket pitch goes beyond freedom to dissent and is a gross interference with property rights.

'Everyone has the right publicly to protest against anything which displeases him and publicly to proclaim his views, whatever they might be. It does not matter whether there is any reasonable basis for his protest or whether his views are sensible or silly.'[1] But such a right does not justify planning a demonstration that disrupts the hearing of a case in the law courts.[2]

[1] Per Salmon L.J., *Morris* v. *Crown Office*, [1970] 1 All E.R. 1079 at 1086.
[2] Same case.

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