NINTH WILFRED FULLAGAR MEMORIAL LECTURE: THE COMMON LAW JUDGE AND THE TWENTIETH CENTURY—HAPPY MARRIAGE OR IRRETRIEVABLE BREAKDOWN?*

THE RIGHT HONOURABLE LORD SCARMAN, LORD OF APPEAL IN ORDINARY

It is my misfortune that I never met Sir Wilfred Fullagar, whose great career in the law we commemorate this evening. He died in 1961—the year in which I was appointed a judge. But, like common lawyers all over the world, I know him by his work. I would, at the very outset of my lecture, take a leaf out of Lord Denning's Fullagar lecture, in recalling to your minds the memory of a common lawyer of world-wide renown. I must, however, confess that I am not sure that Sir Wilfred would have agreed with what I have to say this evening. But I know that he would applaud and encourage this youngster in his attempt to prove, explore, and extend the frontiers of the common law.

An English lawyer on his first visit to Australia is sure to feel, as I do, excited. If, like me, he has been fortunate enough to sit with distinguished Australian judges, and to hear eminent Australian counsel, in appeals to the Privy Council, he will have had a taste of the style and character of Australian jurisprudence. And, if he should have had, as I have had, the opportunity of studying Australian achievement in the field of law reform, his excitement will be intense. But the causes of his excitement go deeper. England was the original seed-bed of the common law. Transplanted, the seed has flowered gloriously and has put down new and more extensive roots. This is particularly true in Australia and the United States of America. The creature of a tightly knit unitary state, the common law has grown, in its new habitat, so as to provide an acceptable rule of law for federations of continental range. There has been nothing like it since Roman law moved out from the city state in the wake of the legions to become the universal law of Western Europe. The *pax Romana* and the *pax Britannica* are legal achievements which have endured long after the disappearance of the empires which gave them their opportunity.

It is unwise to generalise on the reasons for the success of these two systems of law. Much is due to non-legal factors. Trade, war, the outward thrusting energies of the peoples, and, of course, good fortune are part of the complex causation. Perhaps as a practising lawyer I may be allowed to suggest that the practical common sense of the Roman jurist and the

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common lawyer, each in his different way emphasising the importance of the facts of each particular case, has played a great part. The two systems never allowed a rigid theory to overwhelm reality. Law, like medicine and architecture, has to face the hard test of experience. If the rule is inflexible, or the patient never survives, or the building falls down, the discipline is suspect.

Indeed, this recognition that the test of success is to be found in the practice rather than the theory of the law may well be the explanation not only of the common law's past successes, but also of its development after transplantation in the great continents of the new world.

But, first, what is the common law? It is a chameleon-like creature, taking its colour from its environment. All of us, even the great Blackstone, describe it in terms which suit the context in which we are considering it or the argument we are concerned to advance. If your subject be law-making, you begin with Blackstone's "immemorial usages and customs of the nation",[1] and end with emphasis upon the judge-made character of the law. If your subject be private law, you mean the judicially developed rules governing contract, tort and property together with the remedies of damages, injunction, specific performance, and declaration developed by the courts of common law and equity. If your subject be, as mine is, public and constitutional law, you have in mind judicial review of the acts and omissions of central and local governmental authorities, the history of the prerogative writs and orders, and the judicial adaptation to public law purposes of private law remedies (notably the injunction and the declaration). If your subject be the criminal law, the law's approach to the issue of innocence or guilt, the law of evidence and the presumptions in favour of life and liberty built by the judges into the legal process are, in modern times, the essence of the common law. The one recurring element in all its manifestations is that it is judge-made law. It is a source of law independent of Parliament.

Historically, the common law has been a unifying force. The Norman and Plantagenet Kings, notably Henry II, unified their English kingdom by centralising the judicial system. Their itinerant judges, wielding the weapon of the royal writ, took over from the local courts; but, in doing so, they accepted, applied and developed the substance of the customary law which was already part of the people's way of life. The law lent itself to the royal will for centralisation: but the King's Justices incorporated the people's law in his legal system. The judges emerged, in this way, as champions of King and people.[2] This early reconciliation of central authority and customary law, of order and individual rights, which, of course, suited

[1] 1 *Bl. Comm.* 69.
[2] I have drawn my conclusions on the basis of the masterly and authoritative account of our early law in Holdsworth, *A History of English Law*, (7th ed., London, Methuen & Co. Ltd, 1956) vols. I and II.

the Kings in their struggle with the Barons, is, I believe, the key which opened the way to the successful survival of the common law. Adaptability has, ever since, been one of its major features.

The judges, in whose hands its development was placed in Norman times, and from whose hands it has never slipped, have to-day, as in the past, the inescapable responsibility of moulding the law to meet the needs of their generation. At the end of the day I suggest that the common law is no more, and no less, than an attitude of the judicial mind. If judges maintain that critical approach to the law, whatever its source, which has been the hallmark of the common law in their hands, it will, by development and adjustment, continue to be socially accepted as just and as an antidote to power. But, if the judges lose their touch, it will perish. Like the chameleon, the law must suit its environment to survive. A red chameleon in a green tree is an obvious prey to every passing predator.

The 20th century challenge, which the common law has to meet, is the increase in volume of statute law and the growth in importance of public and constitutional law. Statutes are predators in the sense that they can, and some of them do, destroy common law rules and principles. Public and constitutional law has, on the other hand, proved to be largely a demesne closed to the judges by the will of Crown and Parliament. To-day's crisis for the common law is to come to terms with statute law so that both may flourish and to enter the public sector, where the help of the judges is being seen as necessary to prevent abuse of power by public authority. And the judges have one potent weapon—statutory interpretation. For, ultimately, the law in its impact upon the citizen is what the judge says it is.

THE MIGRATION OF THE COMMON LAW

As an English judge, I ask myself: what can we, who live and work in the country which gave birth to the common law, learn from its success in the new, and much larger, world of its 20th century development? What are the lessons for us? This is no mere academic question. The legal systems of the United Kingdom, of which there are three, are facing their greatest challenge in their long history. Problems are arising, which were never contemplated by our predecessors. They go to the heart of the peace, order and good government of the realm. I shall be discussing some of them later. Meanwhile, I make the point that unless the law is adjusted to cope with them, they can overwhelm the rule of the law itself. In Australia and the United States of America the law has been adjusted, though in very different ways, to meet problems unforeseeable in the early days of the common law. In each the law has been moulded and developed to meet the requirements of a continental nation. I ask myself whether this adaptation has not some lessons from which we in the United Kingdom may profit.

Australia and the United States of America have demonstrated, in our time, the unifying power of the common law. In each country there was a fresh start—in the United States of America war followed by a constitutional convention; in Australia an imperial statute giving effect to agreement between the "original states" of the continent. For reasons which I shall develop, I believe that a fresh start is now needed in the United Kingdom.

Common lawyers drafted the American Constitution. Their purpose was to secure for themselves the British style of liberty, having successfully rejected the British style of tyranny. They sought to outlaw absolute power from their new world, while uniting into one nation the colonies which by success in war had become independent states. They secured both their objects by the device of federation. They incorporated into the Constitution a feature which, through the product of the 18th century's political philosophy, was not yet established in the Europe of that period: a judicial power extensive enough to review and control abuse of power by the executive and legislative arms of government. This was done to prevent an indigenous growth of the oppression which by force of arms they had eradicated from their soil. But they were not revolutionaries by inclination. They believed, rightly I think, that they were building upon the English *Act of Settlement* and *Bill of Rights*. But they went much further. In the United Kingdom judicial power had always been, and remains today, an emanation of the royal power which by the *Act of Settlement* was made subject to Parliament. No English judge has been able since 1689 even to suggest, as Coke did in the early part of the century, that the courts may declare a statute void.[3] Their subjection to the enacted word of Parliament is the modern meaning of Parliamentary sovereignty. The Americans would have none of it; and, since they were revolutionaries making a fresh start, they were able to reject it. They were determined that neither the federating states nor the individual citizen would be exposed to the risk of abuse of power by the Congress or President, or by any other public authority.

They secured the liberties of the citizen against governmental power by incorporating into the Constitution (by amendment), a Bill of Rights. So vital did this appear to some that a number of the States made the enactment of a Bill of Rights the condition of their assent to the Constitution. To-day, 200 years on, the success of the American solution is plain to see. They have achieved, on a continental scale, a united nation and a free society. But a question remains. Can they develop a fair and just plural society without destroying the unity of their nation? The continental scale brings with it the problem of minorities. The answer will depend on how the three arms of Government interpret and apply the Constitution. They have the framework for success, if they choose to use it. The Roman

[3] *Bonham's Case*, 8 Co. Rep. 107a, 113b (see 118a); 77 E.R. 638, 646 (see 652-3).

solution of subjection to a ruling class,—the *civis Romanus*,—is not acceptable to a society which has graduated in the school of Locke and Rousseau, which has accepted the implications of the French Revolution, and which cherishes the values of the common law.

Superficially the Australian experience is very different from the American. Instead of rebellion, the Australians accepted a Constitution established by a British statute. The concepts of Crown and Parliament were carried into the new world. *Mutatis mutandis*, Australia acquired a parliamentary Constitution, Westminster mode. But below the surface there occurred a radical change directly comparable with what the Americans had achieved. Australia was not to be a unitary state like the United Kingdom, but a federation. The Constitution was a contract, and the rights of the contracting states had to be protected. The federal power was not, therefore, absolute like that of Crown and Parliament but restricted like that of President and Congress. The watchdog was to be the judiciary; and a weapon for restraint of power was to be judicial review of legislation, as well as of the executive process. But one British inheritance was preserved. There was to be no catalogue of human rights in the Constitution. Representative assemblies, at federal and state levels, as the institutions representative of the people, were entrusted with the redress of grievances. The judges have their common law powers to protect the individual: but the constitutional entrenchment of human rights was not thought to be needed. So far, therefore, as human rights are concerned, there is in Australia no greater constitutional protection, save in respect of freedom of religion and trial by jury,[4] than there is in England. In each the protection is essentially political, namely, the democratic institutions of a responsible executive and an elected Parliament—aided, of course, by a judiciary applying common law principles and exercising the power of judicial review of administrative acts, but not endowed with any supervisory power over human rights legislation.

The absence of a Bill of Rights from the Australian Constitution, and the presence of one in the United States of America, offer part of the explanation for the widely divergent judicial developments in the two continents. Both judiciaries have interpreted their Constitutions so as to promote, rather than diminish, the federal power. But their interpretative techniques differ. The Australian tradition, which leaves political, social, and economic consequences to be sorted out by the political process, is to be contrasted with the wide-ranging American approach. The study of the legislative history of an enactment, investigation of the relevant social and economic conditions, and assessment of the consequences for society of the court's decision are part of the American judicial technique of statutory interpretation. American judges have refused to confine themselves to the

[4] *The Commonwealth of Australia Constitution Act* 1900, ss. 80, 116.

classical common law analysis of the words of the statute, or to the traditional search for a legal formula designed, irrespective of consequences, to answer the question as to their meaning. But Australian judges approach the task of construing their Constitution much as they would any other statute. They have even hesitated to apply a "purposive construction". Could one ever mistake the reasoning of the *Engineers'* case[5] for that of an American court? Can one envisage an Australian or English Court paying any regard to the Parliamentary record? Indeed, when I, an English judge, read some of the decisions of the High Court of Australia, I think they are more English than the English. In London no-one would now dare to choose the literal rather than a purposive construction of a statute: and "legalism" is currently a term of abuse.

Nevertheless, both Australia and the United States of America have, with the aid of their judges, united societies spread over a continent into a viable sovereign state. They have made federation work without submerging the identities of the federated states or endangering human rights. The common law now operates in a new dimension. It has shown itself to be capable of adaptation to the requirements of a written Constitution. It has emerged, through the work of the judges, as the protector of the Constitution. This is the new departure. A system of essentially private law has developed an effective public law. The common law has come to grips with the complex and extensive societies of the new world, and in America has been strengthened immeasurably by a Bill of Rights included in the Constitution and protected by the judges. In neither country do I find any evidence that the common law is breaking down. The evidence is the other way: that the common law is being adapted to new conditions.

HUMAN RIGHTS AND A BRITISH CONSTITUTION

Federation having been underwritten in America and Australia by imposing upon the judiciary the duty of protecting the Constitution against erosion by statute, the question now being asked by some in the United Kingdom is whether there may not also be a place for judicial review of statute law in a unitary state. The need to protect individuals and minorities against abuse of power is not confined to federal states; it arises whatever the Constitution. Indeed, British judges have responded to the need by significantly developing judicial review of the administrative processes of government. But is there not also a genuine risk of oppression by legislation in a unitary state, notwithstanding the presence of democratically elected institutions?

Questions such as these lie behind the assertion of Lord Hailsham L.C. and others, including myself, that the British Constitution is in need of revision. Lord Hailsham has described our constitutional position as one

[5] *Amalgamated Society of Engineers* v. *Adelaide S.S. Co. Ltd* (1920) 28 C.L.R. 129.

of "elected dictatorship". Professor Wade, in this year's Hamlyn Lectures,[6] has spoken of a constitutional imbalance. The danger is a real one and has been highlighted by British experience of the right of petition to the European Commission of Human Rights.

Britain was an original signatory of the European Convention of Human Rights and the first state to ratify it—which it did in 1953. It has acted under Article 25 of the Convention to permit individual citizens the right of petition to the European Commission of Human Rights against infringements of the Convention. The inadequacies of our law in the field of human rights, which have been exposed by some of these petitions, is disquieting. Put bluntly, the case for a written Constitution in Britain monitored by the judges stands or falls on the human rights issue. For the threat of a federal United Kingdom has, for the time being, diminished. Had devolution for Scotland and Wales come to pass—and, you will remember, the statutes were enacted but, failing to win a sufficient popular vote on referendum, were never brought into operation, and are now defunct—Britain would already have been on the path to federation: and the judicature, in the shape of the Privy Council, would have had the task of pronouncing upon the validity of legislation enacted by the proposed new Scottish assembly. The loss of devolution was undoubtedly the loss of a constitutional opportunity. The Westminster Parliament saw its sovereignty at risk and was ready to use the judicial power of the State to protect it. But it does not feel the same urgency about human rights. And, indeed, why should it? For the British record of freedom and toleration is, rightly, a matter of national pride.

Yet, the nagging doubts will not go away. Does our Constitution, based as it is on the legislative sovereignty of Parliament, offer sufficient safeguards? Is it not open to abuse by a bare majority in the House of Commons? Have we not progressed too far down the slippery slope of unicameral government? Is there not a case for using the judges to impose a measure of restraint upon abuse of legislative power?

Let use look at some of the evidence. Anxiety is felt not only by constitutional lawyers; it has been expressed on three occasions in recent years by the House of Lords. In November 1979 the House, by a substantial majority, gave a second reading to a Bill, introduced by Lord Wade, which, if enacted, would incorporate into municipal British law a Bill of Rights modelled on the European Convention. Significantly, the Bill made no headway in the Commons. Lord Wade has, however, already given notice that he will re-introduce it next session.

The Northern Irish Standing Advisory Commission on Human Rights has produced a detailed report[7] advocating the introduction of the European

[6] *Constitutional Fundamentals* (London, Stevens & Sons Ltd, 1980). This is the latest analysis of the constitutional weakness of the U.K.

[7] Great Britain Parliament, Standing Advisory Commission on Human Rights, *The*

Convention as a Bill of Rights into the law of the United Kingdom. Lord Denning is also anxious. For long an opponent of a statutory Bill of Rights, he now admits that he has been driven by recent trends to the view that it is necessary to incorporate into our law the European Convention.[8] He sees the necessity for standards and principles to be set by statute so that Parliament, judges, and civil servants may have the guidance they need. And in a letter published in *The Times* newspaper this month, Mr Anthony Lester Q.C., who has had experience as a special adviser in the Home Office and played an important part in formulating our race relations and sex equality legislation, used these desperate words:

> "Thank Heavens for the continued acceptance [by British Governments] of the right of individual petition to Strasbourg [the seat of the European Commission for Human Rights]; for if Parliament misuses its absolute powers there is no other legal remedy."[9]

Are these anxieties exaggerated? Are they academic doubts rather than practical fears? The answer is a depressing negative. Ministers, Parliament, and judges have failed, under our existing law and constitutional arrangements, to provide adequate safeguards for human rights.

There is the case of the prisoner, Mr Golder, who was denied by the Home Secretary, acting under Prison Rules, the opportunity of consulting a solicitor when he was claiming that he had been assaulted by a prison officer. English law afforded him no remedy. He petitioned the European Commission for Human Rights.[10] Years after he had served his sentence he obtained a declaration from the European Court of Human Rights that he had suffered at the hands of the British Government an infringement of the right of access to his lawyer which the Government had undertaken to secure to him under Article 8 of the Convention.

There is the case of the *Sunday Times* and the Attorney-General.[11] Here the judges missed their way. Impressed by the importance which the common law attaches to keeping pure the stream of justice, the House of Lords (but not the Court of Appeal) was led to a decision which gravely restricted the freedom of the press. The Distillers Company had manufactured the drug Thalidomide in Britain. Many pregnant women had taken it. Babies were born, dreadfully disabled and ill-shapen. The cause was shown to be the drug. Parents went to law, suing on behalf of themselves and their babies for damages. Many cases were on the point of settlement: some had settled. Disquiet was voiced in the newspapers and elsewhere as to the terms of settlement. But few doubted that all claims

Protection of Human Rights by Law in Northern Ireland (Cmnd. 7009) H.M.S.O., 1977.

8 In a recent B.B.C. broadcast, summer 1980.
9 *The Times*, 4th August 1980.
10 *Golder* v. *United Kingdom* (1975) 18 Yearbook of the E.C.H.R. 290.
11 In the House of Lords: *A.-G.* v. *Times Newspaper Ltd* [1974] A.C. 273; in the European Court of Human Rights, *Sunday Times* v. *U.K.* (1979) 2 E.H.R.R. 245.

would ultimately be settled. In these circumstances the *Sunday Times* proposed to publish a piece of investigative journalism, the theme of which was that the Distillers Company, and others, had failed to exercise due care in testing the drug before putting it on the market. The Attorney-General moved to restrain publication. He succeeded at first instance: but the Court of Appeal rejected the submission that publication would be a contempt of court. In balancing the two public interests, the administration of justice and freedom of the press (with which, of course, is to be coupled the public's right to be informed), the Court decided that the balance was in favour of the press. The House of Lords (Lord Reid, I think, very doubtfully) took the opposite view. The newspaper exercised its right of petition to the European Commission of Human Rights. The case was referred by the Commission to the European Court of Human Rights, which declared, by a majority, that the English law of contempt of court as formulated and upheld by the House of Lords was an infringement of the Convention. Freedom of expression is a freedom guaranteed by the Convention: and the circumstances did not in the Court's opinion justify the prior restraint which the Attorney-General had sought, with success in the House of Lords, to impose upon publication of the article.

I have to declare an interest. I was a member of the Court of Appeal, (Lord Denning presiding), whose decision the House of Lords reversed. I have no doubt that, had the House of Lords been able to consider the case without the burden of the history of our law but with the advantage of the European Convention incorporated into the law, some of their Lordships would have reached the same conclusion as that of the European Court.

Immigration is another problem, which exposes serious confusions as to principle in the decisions taken by Parliament, Government and the judiciary. Of the many instances of our confusion I take only one. In the recent case of *Zamir* v. *Secretary of State for the Home Department*,[12] an immigrant, who did not disclose his marriage because he was not asked, on entry, the pertinent question by the immigration officer, was held to be an illegal immigrant because the fact which he did not disclose could well have led to an adverse decision by the immigration officer. When, much later, he was arrested and detained, he moved for habeas corpus. The House of Lords rejected his appeal, holding that he could not show that his detention was unlawful. But is it not a principle of the common law that the detainor must prove the case for detention? How long has it been the case that the detained must prove his case for freedom? The ancient principle of the common law has yielded to our complicated and restrictive immigration laws and the uncertainties of British nationality law. Aliens, citizens of the E.E.C., British subjects, U.K. citizens and patrials jostle

[12] [1980] 2 All E.R. 768.

each other in the passages of our airports. Few of them know what they are, or what are their rights and duties. Can we be sure that the House of Lords has found the path through the maze in *Zamir's* case? Zamir is, we are told, exercising his right of petition under the European Convention. Perhaps the European Court can do what no British court—not even the House of Lords—can do:—declare the confusions of our immigration and nationality laws so profound that they cannot be administered in a way which is consistent with the protection of the human rights and freedoms set out in the Convention, and which was accepted as worthy of protection by Britain when we ratified the Convention.

Industrial relations is another field where, as a nation, we appear to have lost our way. We recognise no right to strike, but only an immunity from legal liability in circumstances which Parliament declares to give rise to the immunity. And Parliament declares differently according to the party in power. Then there is the closed shop. Is it an infringement of the liberty of those who do not choose to join a union; or is it an indispensable element of effective trade union organisation? Parliament speaks with different voices at different times. The European Court of Human Rights, in the case of the British Rail employees sacked because they refused to be members of the appropriate union, has held the closed shop, as operated against them, to be an infringement of the Convention.[13]

My final illustration is the law of privacy. Neither Parliament nor the judges have found any acceptable principles. There is no English law directly protecting the right of privacy. Trespass to land or the person, nuisance, breach of confidence, have to be prayed in aid: but principle—there is none. And the law has not yet come to grips with the data-bank and the computer.

A BILL OF RIGHTS

The conclusion I draw from our present confusions is that English law lacks a coherent basis of principle upon which it can tackle the problem of human rights in their modern setting. To this extent the common law has failed. A new Bill of Rights could establish guiding principles, which would set standards for politicians, administrators, and judges. The European Convention, though far from perfect and already a little old-fashioned (it was signed in 1950), would give us a basis of principle, upon which the judges, legislators, and administrators could build. For this reason, I find myself in agreement with those who would incorporate it into British law. But two problems immediately arise. Would it be of the slightest use, if open to amendment, suspension, or repeal by a bare majority in a subsequent Parliament? Secondly, if it be possible to entrench

[13] 1980: no report as yet generally available.

it against subsequent Parliamentary amendment or repeal, would it be acceptable that so much power be entrusted to the judges?

To be effective, a Bill of Rights requires to-day to be entrenched. The danger of repeal by a bare majority in the House of Commons cannot be averted unless the Bill of Rights be enacted as part of a Constitution, which itself is a fundamental law not to be altered or suspended save in exceptional circumstances spelt out by the Constitution itself. Is this possible in Britain? I do not think it is, in the absence of a new constitutional settlement. The *Act of Settlement* and *Bill of Rights* of 1689/1701 establish the legislative supremacy of Parliament. The judges have interpreted this to mean that no Parliament can bind its successor. Ingenious minds have suggested ways out of the difficulty. Professor Wade has this year suggested that a solution might be found in an amendment to the judicial oath, the effect of which would be that the judges would be bound to reject statutes unless enacted in certain specified ways. But one cannot reform the law by such tinkering. A radical solution is needed, if the reform is to succeed. There must be a fresh start: for, as Blackstone[14] said, so long as the English Constitution exists, "we may venture to affirm that the power of Parliament is absolute and without control". The *Act of Settlement* must go and be replaced by a modern constitution which would not only declare the citizen's human rights and fundamental freedoms, but entrench them against erosion by bare majorities in subsequent Parliaments. And entrenchment would inevitably have to rely for its efficacy upon a judiciary having the duty to strike down as unconstitutional legislation infringing those rights.

And so, the ultimate question is reached. Can the judges be trusted to perform the function of safeguarding the Constitution? Given certain conditions, they can. The judicial process is effective only if the issues for decision are justiciable. That is to say, they must be capable of formulation and decision in a forensic setting. An ordinary man will, at this stage of the argument, hold up his hands in horror. What is meant by all this jargon? Justiciable? Forensic? Do the words mean anything other than "suitable for a court's decision"? And, if this be their meaning, is not the argument circular? Are you, my dear Lord Scarman, saying any more than that judges can be trusted to decide what is suitable for judges to decide—without indicating what is suitable?

We must, indeed, analyse our terms. A justiciable issue is one which can be raised by parties to legal proceedings and settled one way or the other by a legal decision. If the issue is one of policy in the sense that the decision is a choice between policies to be assessed on their merits as competing policies, it is not a justiciable, but a political issue. It is not for

[14] 1 *Bl. Comm.* 163. I am indebted to Sir Rupert Cross' elegant lecture on Blackstone and Chambers for the reference: "The First Two Vinerian Professors: Blackstone and Chambers" (1979) 20 *Will. and Mary L.R.* 602, 612.

a judge or a court to decide. Questions of policy cannot, however, be kept isolated from the forensic process. They will, from time to time, have to be considered by the courts. The policy of a statute is relevant when a court is interpreting its provisions. It is accepted law that, if there be ambiguity, the interpretation which matches the policy of the statute is to be preferred. In other words, courts cannot, and must not, create or formulate policy (save, perhaps, in the limited sense of "legal policy", which is another matter): but they are perfectly capable of applying policy, if it be presented to them in a legal context. Upon this analysis of function, courts are concerned with policy: but they are not policy originators. Nor have they any business to reject policy, if it be formulated within the law. Their duty is to apply it or not, as the case may require, according to the legal context in which it arises for consideration, and in accordance with accepted law.

Even "legal policy" is ultimately conveyed to, not originated by, judges. No deprivation of liberty save by due process of law, fair trial, the presumption against retrospective legislation, double jeopardy—to name a few of the accepted legal policies of our judge-made law—spring from the basic freedoms upon which our societies are based. The judges recognise them as required by the society of which they are part. A romantic lawyer—and I am proud to be one—would call them part of the *jus gentium* or *jus naturale*, which judges over the centuries have done much to develop. But neither the judges nor the legal profession can claim any exclusive credit. Such ideas are part of the heritage which judges share with the rest of the community in which they live and work.

Legal policy is, in truth, an omnibus expression which lacks any precise limits. It may represent an attitude towards the interpretation of statutes: it may refer to the human rights and fundamental freedoms recognised by our society—it may be invoked to explain the exercise of discretion, where more than one course of action is available to a court. But it does emphasise in the particular case under consideration by the court the association of law and policy. And in answering the legal question the court has to assess, and to have regard to, the relevant aspect of policy.

We can, therefore, dismiss as completely unsound such objections as those which, frequently heard in the United Kingdom, are variations on the theme that judges must not be brought into the political arena. They are there already—as umpires, not gladiators or competitors. They have always been there: and there they will remain. There is nothing inappropriate in requiring judges to decide justiciable issues arising in a political struggle: and no reason for judges not to be trusted to act judicially and according to law, though the case raises political as well as legal questions.

Technically a written Constitution is, I am fully persuaded, the surest and safest means of entrusting a constitutional responsibility to judges to

protect society against the abuse of power. It creates a legal framework within which constitutional questions become justiciable issues. Put in the narrowest legal terms, the judges, using well settled rules for the interpretation of statutes, construe and apply the most fundamental statute of them all—the Constitution. There is nothing unfamiliar or unorthodox in this judicial exercise.

In terms of principle, the case for a written Constitution is also very strong. Abuse of power is the mischief: and this includes abuse of judicial power. With an unwritten Constitution, no one knows, or can effectually define, the limits to be set to the judicial power. For instance, Lord Denning and the Trades Union Council do not agree and no amount of disputation can resolve their difference for each, under our existing law, has a strong case. Lord Denning must be right to search for a judicial formula to restrain abuse of power: Len Murray is right to seek protection for the two fundamental rights of trade unionists—the right to join a union and the right to strike; and he has Lord Denning's authority for the view that English law recognises no right to strike, but only certain immunities from civil liability, if you do. A written Constitution would define and so restrict, judicial power by confining its exercise within constitutional limits declared by Parliament. If the Constitution should include a Bill of Rights, as in my submission it should—human rights being the raison d'etre for a written Constitution in a unitary state—it would, I confidently expect, include a provision declaring the two fundamental trade union rights. Len Murray would be as content as Lord Denning.

The positive advantages for the rule of law, which are to be found in a written Constitution appear to me, for the reasons which I have given, very strong. It enables society to invoke the aid of the judges in maintaining the balance of power without putting society at risk of judicial power exceeding its proper limits. These positive advantages are, however, not the only reason for advocating a written Constitution for the United Kingdom. We need also to eliminate our present constitutional imbalance arising from the weakness of the second chamber, and the embarrassing uncertainties of our municipal law arising from its conflict in the sensitive area of human rights with our obligations under the European Convention. I had barely finished writing this sentence when my eye fell on a letter written by a Conservative peer in *The Times* newspaper. Lamenting the restrictions imposed by 20th century legislation upon the power of the House of Lords, he concluded:

> "Certainly an elected House with more power and enshrined in a written constitution along with the Commons would make it very difficult for an extremist group to seize power and impose dictatorship."[15]

Under our unwritten Constitution, dictatorship is possible at the option of

[15] Lord Massereene and Ferrard, *The Times*, 18th August 1980.

the Commons without revolution, A written Constitution would, at least, save us from dictatorship, unless imposed by revolution.

BRITISH JUDGES IN THE NEW SYSTEM

The final question must, now be faced and answered. Are British judges fitted by training and experience to assume a constitutional role? Professor Griffiths in his recent book on the judiciary suggests that they are not.[16] *The Times* newspaper, it would appear, agrees with him: for on the 31st July it chose to greet the House of Lords decision in *Granada Television Ltd* v. *British Steel Corporation*[17] with a leader entitled "A Charter for Wrongdoing". Apparently, we judges lack the experience of the world to break out of the ivory towers of the Inns of the Court where we live a closed, cloistered, but not austere, life. We would seem to be permanently in the situation in which A. E. Housman's Shropshire Lad only found himself when he could afford a pot of beer. We are believed, it would appear to look into the pewter pot to see the world as the world is not. It is a sad reflection that our most influential newspaper gives currency to the idea that a good education, a professional discipline, and success in the most competitive of all professions afford no basis for judicial effectiveness. But, more important, it is nonsense. English judges have done wonders in the field of administrative law. In a series of famous cases the Court of Appeal and the House of Lords have not only established the requirement of natural justice in the administrative process, but have also set as a condition of the valid exercise of statutory power that it be exercised only for the purpose for which it was conferred. In *Ridge* v. *Baldwin*,[18] the House of Lords asserted the necessity for procedural due process. In *Padfield's*[19] case a Minister's refusal to exercise a statutory discretion in circumstances which required its exercise was held to be void. In *Congreve* v. *Home Office*[20] a Minister was held to have acted illegally in using his discretion to withhold a television licence so as to impose, indirectly, a financial burden which statute had not authorised. In *Anisminic* v. *Foreign Compensation Commission*[21] the House of Lords would not allow Parliament to exclude judicial review of a statutory tribunal's purported exercise of jurisdiction by its enactment that the tribunal's decision was to be final. In the *Laker Skytrain* case[22] and in the *Tameside Education* case[23] the Courts investigated the grounds on which

16 J. A. G. Griffiths, *The Politics of the Judiciary*, (London, Fontana, 1977).
17 *The Times*, 31st July 1980.
18 [1964] A.C. 40.
19 *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.
20 [1976] Q.B. 629.
21 [1969] 2 A.C. 147.
22 *Laker Airways Ltd* v. *Department of Trade* [1977] Q.B. 643.
23 *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014.

a Minister had exercised his discretion and themselves determined whether it was a use or abuse of his powers. In each case they found it was an abuse and invalidated the decision. Finally, this year, apprised of the European Court's decision on contempt of court in the *Sunday Times* case, the House of Lords (*BBC* v. *Attorney-General*)[24] have put a limit on the extension of the doctrine of contempt of Court. The House refused to extend it to a local valuation court, (which considers appeals against the decisions of a rating officer as to the valuation of property for rating purposes).

Judges, who have shown themselves so perceptive of the needs of their time and able, within the limitations of their constitutional position, to develop judicial review and effective remedies against the abuse of power, should not find an extension of judicial review to include the protection of constitutional rights against abuse of legislative power beyond them. Granted the framework of a written Constitution, they should be able to tackle the job. Given the guidelines of a Bill of Rights entrenched as part of the Constitution, they should be able to provide an effective safeguard amongst the several needed to ensure liberty and justice in a modern society.

CONCLUSION

I will end, as I began, with a reference to the written Constitution of the U.S.A. and Australia. I would suggest that the absence of a Bill of Rights is a serious defect in the Australian Constitution. Delivering the first Denning lecture at Sydney University Mr Justice Kirby criticised the High Court of Australia for refusing to play a formative role in modernising the law.[25] But, if the Constitution had by a Bill of Rights established the right of individuals to invoke its protection, it may be that the approach of the Court would have been very different. Judges, as I have already argued, must keep within their constitutional limits. If the fear exists that Australian courts might be led by a Bill of Rights into adopting the wide-ranging techniques of statutory interpretation currently practised by American courts, I would suggest the fear does less than justice to the judiciary. A purposive construction of statute law is possible without gazing into a crystal ball in search of political, social, or economic consequences, which are, after all, anybody's guess. It may be that Australia, like the United Kingdom, needs a Bill of Rights.

My conclusion is that, to avoid irretrievable breakdown in modern conditions, the common law must come to grips with the statute law and the constitution. A written Constitution incorporating a Bill of Rights provides the opportunity. But the judges must seek out and support the

[24] 1980: as yet unreported.
[25] Sydney: July 1980.

policy of statute law, rejecting a literal construction, if a statute's policy is better served by such rejection. They must approach the Constitution in the same way, drawing support from the principles of the common law in favour of life and liberty. If they do so, the common law, which is the judges' contribution to law-making, will survive. But, if the opportunity is not given them, or if they fail, the common law will join the collection of interesting antiquities chronicled by Sir William Holdsworth in his *History of English Law*. The British Museum, not the living world, will be its appropriate resting-place.