FREEDOM UNDER THE LAW†

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At the present time the phrase "freedom under the law" has achieved great popularity. It is not surprising that it should have been welcomed by all lawyers because it marks the essential contribution which the law has made to the development of civilization. It is also popular with political scientists because it enables them to draw a distinction between democratic and totalitarian principles of government. Thus it has been claimed, I believe with complete accuracy, that the Western States recognize the authority of the rule of law, while the Totalitarian States do not. Conferences to discuss the rule of law have been held in such disparate places as Athens, Chicago, New Delhi and Warsaw in recent years. It may surprise some people that the rule of law should have been discussed at Warsaw back of the Iron Curtain, but this phrase has achieved such universal acceptance that totalitarian countries are now tending to claim it as their own. They argue that as they have more laws governing the conduct of the people and enforce them more strictly than do the Western countries, therefore theirs is the true rule of law system. This ought to be a warning that the varying connotations which can be applied to these words may lead to confusion and misinterpretation.

Such general phrases have in the past proved to be dangerous on various occasions because their lack of precision disguised the need for essential qualifications. Thus, to take one illustration, President Woodrow Wilson's statement at the time of the Peace Conference in 1919 that "the world must be made safe for democracy" led to unfortunate consequences because he forgot that it was equally important to make democracy safe for the world. He failed to realize that democracy, unless properly controlled by the law, might lead to totalitarianism. The tragedy of the Second World War was, in large part, due to this. In the present address I would therefore like to analyse what we mean by freedom or liberty on the one hand, and by law on the other, and then to discuss the relationship between the two.

In the eighteenth century there was a clearer recognition of the distinction between liberty and law, for they were regarded as being in many ways in conflict with each other. Liberty was the ability to do what one wanted without interference or hindrance on the part of others, especially on the part of officers of the Crown. The essence of law, on the other

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hand, was that it constituted an interference with the liberty of the individual, either in the interest of the State as a whole or of other individuals. Law was a command which had to be obeyed, and to obtain this obedience a sanction or evil had to be attached to it because no one would voluntarily forego his own liberty. It followed, therefore, that the less law there was the greater would be the degree of freedom. Bentham and his disciples recognized, of course, that a certain amount of law was necessary, but they regarded it as a necessary evil. Thus John Austin chose as an analogy to law the use of medicine. He said:

> "For, seeing that every law imposes a restraint, every law is an evil in itself: and, unless it be the work of malignity, or proceed from consummate folly, it also supposes an evil which it is designed to prevent or remedy. Law, like medicine, is a preventive or remedy of evil: and, if the world were free from evil, the notion and the name would be unknown."

In an ideal world there would therefore be no judges or lawyers. This was best expressed by Dick the Butcher in Shakespeare's *King Henry VI* when he said at the time of Jack Cade's rebellion: "The first thing we do, let's kill all the lawyers."

It is hardly surprising that this pessimistic view of law predominated until the nineteenth century. The main function of the legal system was a negative one for it protected the individual from outside aggression. The complicated inter-relations which exist at the present time were unknown in the eighteenth century. The typical law was the criminal law. Its ferocious sentences, and the social injustices which were fostered by many of its provisions, were responsible in large part for the popular distrust of the law, and of the lawyers. It is difficult to find any adulatory references to the legal system as a whole. There was a strong presumption in favour of liberty which may be said to have reached its climax with the utilitarian school of philosophers and economists.

There were three special grounds on which this strong presumption in favour of liberty in contrast to legal control could be founded. In the first place the individual, it is said, is the best judge of what will constitute his own happiness. The attempt by others to lay down rules for his conduct, even when these are intended for his benefit, may conflict with his own wishes. One of the major happinesses of life is the freedom to decide questions for oneself, even though this may occasionally lead to disaster. In the second place the presumption in favour of liberty is based on the moral ground that every man is entitled to respect as an individual, and that this respect can be best expressed in terms of liberty. Even the most benevolent slavery is unworthy because the slave is denied his self-respect as a human being. Therefore, to some degree, every restraint on liberty may be regarded as a limitation on the respect shown to the person who is being restrained. In the third place the presumption in favour of liberty is supported on practical grounds. Experience has shown that the average man will do better work if he is free to follow his own decisions rather than if he is compelled to perform work prescribed for him by

others. There must, of course, be a certain degree of compulsion in directing the activities of all the individuals who constitute the State, but on the whole it ought to be limited as far as possible.

A different view concerning the relationship between freedom and law began to devlop in the latter part of the nineteenth century. It held that although the negative view concerning liberty had been satisfactory while men were able to carry on substantially separate lives, this was no longer sufficient with the coming of the industrial revolution. Men had now become inter-dependent, and their relationships were in large part based on their group membership. In these circumstances it was necessary for the law to play a more active role. It no longer was regarded as placing a limitation on action; it was to an increasing extent a means by which the useful activities of individuals could be developed. Law became dynamic rather than static. It might be regarded as the capacity to achieve full development. In place of the criminal law, which is almost entirely negative, the emphasis was now directed to the civil law which is in largest part of a positive character. One illustration of this conception of freedom is found in the establishment of schools. Education creates freedom from the ignorance which is the greatest of all fetters on development. The compulsion on all children to attend school is therefore a form of liberty. It is also an essential part of political freedom, because democracy cannot function properly if the electorate is incapable of exercising a reasonable judgment. Perhaps the most striking illustration of the constructive function of the law in the economic field can be found in the development of the business company in the second part of the nineteenth century. This legal invention, if we may call it that, was of greater importance than those concerning the use of steam or of electricity, because without it it would have been impossible for the industrial development to succeed. We tend to forget that today almost all industrial property is held by these artificial persons created during the past century. Thus in every field of life the law has played and is playing an increasing part, not to limit and restrict, but to encourage and to produce. More than two thousand years ago Aristotle said that the State was created to make life possible, but thereafter its purpose was to make life good. In the same way we can say that the primary function of law is to protect the freedom of the individual by maintaining order and peace, but, having accomplished this, its next purpose is to enable him to enjoy the freedom found in a complete life.

So far I have been talking about freedom as if it were a single concept, but this is misleading. It is essential to realize that there are various kinds of freedom, and that one of our most difficult problems may be to balance them against each other. Although they are closely related to each other, nevertheless they must be distinguished if we are to understand our modern problems.

Today I wish to speak about three different types of liberty which are of special importance to us; the first is political liberty, the second is economic liberty, and the third is societal liberty, *i.e.* the liberties which

the members of a society are prepared to grant to each other. The question which we have to consider is: To what extent can the law contribute to each of these freedoms? It is only when we have considered these problems that we can understand what the phrase, *freedom under the law* may connote. It must be remembered, of course, that the law is only one of the many elements that may constitute freedom, so that it is necessary to determine the nature and extent of the role that it can play in different circumstances.

Political liberty was, and I believe still is, the first and most important type of liberty with which the law is concerned. The problem can be set in these words: To what extent can the law control the exercise of power by the officers of the State who are exercising legislative, executive, or judicial functions? If these officers are uncontrolled by the law then their power is arbitrary — if they exercise this power in the interests of the public then theirs is a benevolent tyranny, but it is a tyranny nevertheless.

Today we accept in the western world the idea that governmental power, of whatever nature it may be, need not and must not be absolute, but this is not an easy conclusion to reach. Perhaps as an Oxford man I can best discuss this problem by referring to the conflict in opinion between Oxford's two most famous political philosophers. Thomas Hobbes (1588-1679) published in 1651 his famous *Leviathan or The Matter, Forme and Power of a Commonwealth.* He was a timid man who, during the troubled years of the Civil War, hoped for a strong central government which could establish peace and order. He taught that in every State there must be an absolute sovereign—either an individual or a single group of persons — who could command the law in the name of the State. The power of this sovereign must be legally unlimited because he or it was the final law-giver. The idea that law could control this law-giver and limit his power was, he argued, a contradiction in terms.

Hobbes was followed by another Oxford philosopher, John Locke (1632-1704). In 1690 he published his *Second Treatise of Civil Government* which is probably the most important and practically effective contribution ever made by an English writer to political science. We may fail to recognize its transcendent influence because so many of the views expressed in it tend to be accepted as axiomatic today. They played a major role in the creation of the Constitution of the United States. Briefly, his doctrine was that in every State there must be a supreme government, but that this supreme government need not be unlimited in its powers. It is created by the people who transfer to it certain limited functions which are controlled by the law. This power is in the form of a trust which must be exercised in the interest of the beneficiaries. The rules which limit this governmental power constitute the highest law and are the foundation of the State. They may be described as the constitution of the State because it is on them that the State is constituted.

In all federal States such as Australia, Canada and the United States the doctrine of Locke has been accepted as self-evident, because, for one thing, the division of power between the federal and state governments can only be enforced if there is a constitutional law dividing governmental

functions into separate parts. On the other hand, the doctrine of Hobbes, that there must be in every state a sovereign power which establishes the law and is therefore above the law, has been accepted by many English political and legal philosophers, because it seems to accord with the unitary British political structure. It has been stated in its most authoritative way by Dicey when he said: "Parliament is, under the British constitution, an absolute sovereign legislature." Accordng to this view the British constitution can be stated in six words: "The Queen in Parliament is supreme." It would seem, therefore, that there is no distinction in theory between the absolutism of Parliament and that of the most despotic rulers. It has enabled the jurists of the totalitarian countries to argue that the orders issued by a dictator and the statutes enacted by Parliament are inherently of the same nature. The fallacy lies, however, in the statement that Parliament is "absolutely sovereign." It is true, of course, that Parliament is unlimited in regard to the subject-matter with which it can deal. Thus, to take one example, it could repeal tomorrow, if it wished the famous Statute of Westminster II. No British court can refuse to recognize a duly enacted statute on the ground that it lies outside the scope of Parliament. But it does not follow from this that the Queen in Parliament is uncontrolled by the law, because that body, or rather group of bodies, can only act according to certain established rules. It is these rules of procedure that constitute the constitution, and which control the individuals who exercise governmental power. In a recent address by Viscount Kilmuir on *Individual Freedom Under an Unwritten Constitution* at the University of Virginia, the Lord Chancellor dealt in detail with the provisions governing the enactment of legislation. He showed that they constituted a powerful protection against arbitrary rule. For one thing, he pointed out that "the existence of a second chamber of some sort is essential where there is an unwritten constitution." Moreover, there are four effective stages for every Bill in the House of Commons, and five in the House of Lords. Apparently it takes the Lords an additional stage before they can make up their minds. It is true, of course, that it would be possible for the Queen in Parliament to transfer all power to an absolute dictator, but until that is done the legislative function under the British constitution can only be performed in accordance with established rules. These rules are of such a nature as to give a minority an adequate opportunity to play a part in the legislative process, and are therefore a guardian of freedom under the law.

A second question concerning the relationship between the rule of law and the power of the legislature concerns certain fundamental rights of the individual, such as freedom of speech, freedom from arbitrary arrest, and freedom of religion. At the present time there is a heated debate in Canada whether or not these common law rights should be given special constitutional protection. They are recognized in the United States Constitution, but not in that of Australia.

I am doubtful whether this debate is of much practical importance, because if we once recognize that there is no such thing as absolute legislative sovereignty then these basic rights must be part of the system. No

constitutional government can function unless there is freedom of speech and freedom from arbitrary arrest. It is here that we find the basic difference between democratic and totalitarian systems of government. The power of arbitrary arrest is an essential part of every dictatorship; it is the negation of every democracy. It is the recognition of this truth which guarantees freedom under the law as much in Great Britain with its unwritten provisions as it does in the United States with its specific constitutional Amendments.

It is interesting to note that these basic freedoms under the law may still give rise to difficult problems. It is true, of course, that our liberties are no modern thing, for most of them were stated more than seven hundred years ago in Magna Carta, but they have varied in scope from time to time. Within the past few months the United States Supreme Court in *Frank v. State of Maryland* has had to consider the nature of the Fourth Amendment dealing with unreasonable searches and seizures. In popular language, to what extent is a man's home regarded as his castle? The Supreme Court, by a majority of five to four, held that a city ordinance which entitled a health inspector, who had reasonable cause to suspect that a dangerous nuisance existed, to demand entrance to a home without a judicial warrant, was constitutional. This is an interesting illustration of the conflict which may arise between competing freedoms, for here we have the freedom from the threat of disease balanced against freedom from a search which might be used for improper motives.

From political liberty I want to turn to the problems of economic freedom. By economic liberty I mean the freedom of choice which a man can exercise in earning his living, and in the use and disposal of his private property. The traditional Marxists placed so much emphasis on this problem that they held that only if economic liberty were abolished could the other liberties be established. The wage-earning class, in their view, were the slaves of the capitalists because it was the latter who could determine how the wage-earners should live. It followed according to this doctrine that true liberty could only be established if all productive capital was held in communal ownership. The democratic states have never accepted this doctrine. It may be said that for them the exact opposite more nearly represents the truth, because they recognize that political liberty depends in large part on economic freedom. Professor Charles McIlwain, in his famous book *The High Court of Parliament and Its Supremacy*, has pointed out that it was through the control of the purse that modern democracy was established. Under the feudal system the King could not tax the property of his tenants, so that in times of need he could not obtain financial help without their consent. It was through this bargaining power that Parliament was able to force the King to agree to the legislation which it desired. There are still traces of this historic origin in some parts of Parliamentary procedure today.

With the transfer of supreme power from the King to Parliament in the eighteenth century this economic freedom of the individual tended to decline, but it is only within the past fifty years that a fundamental change has been introduced. In the past the two basic elements of private

property were considered to be the right to enjoy the fruits of that property, and the right to have that property descend to one's heirs. Modern taxation in Great Britain, and to a lesser extent in other countries, has altered these two rights to such an extent that the most complete social revolution in nearly a thousand years has taken place with only limited recognition of what it entails. It has been said with truth that taxation is a far more effective revolutionary weapon than are the machine-gun or the bomb.

The law has affected economic liberty in many other ways. Perhaps the most obvious instance of such legal control can be found in the Anti-Trust Laws in the United States, and in the Restrictive Trade Practices Act, 1956, in Great Britain, both of which are directed to limiting the power of industrial combines.

Another illustration of legal control of economic liberty can be found in the various Statutes of Labourers which existed in England until the middle of the nineteenth century. Then a complete change took place with the recognition of trade unions. Thus a new problem, which we have not as yet solved in a satisfactory manner, developed in this field. On the one hand the unions claimed that they must have complete liberty to enforce the closed shop, *i.e.*, the right of the trade unions to insist that no non-trade unionist be employed, while, on the other hand, it was argued for the latter that such a combination constituted an unreasonable interference with the economic liberty of the individual.

In other fields there has been increasing legal limitation on economic liberty. The absolute right to use one's property as one wishes, provided that it does not constitute a nuisance to one's neighbours, which was a favourite dogma of the nineteenth century, is given less and less recognition. Private property, it has been said, must be recognized to have a public function. This does not mean, however, that private property has ceased to remain an essential part of our democratic type of civilization, because we realize that excessive power of control would be vested in State officials if private property in the means of production were abolished. If this were to happen then our lives would be as regimented in peace as they were in war.

The third type of liberty to which I have referred is perhaps the most important of all, although it is the one which is least often recognized. This I have called societal liberty—the freedom which men grant to each other as members of a society. In a sense most of the criminal law is directed to the protection of this societal liberty because my freedom as an individual depends on the protection which the law gives me against the aggression of others. We frequently do not realize that the failure to enforce the law against A may constitute a loss of liberty on the part of B.

The importance of societal freedom has developed in recent years because new means have been developed to encroach on it. The right to privacy, which is only another name for freedom from outside interference, has been affected by the development of new instruments of publicity. A man may suddenly find himself rendered an object of ridicule for millions of viewers on a television screen, without realizing his

position. It is the new tyranny of the majority, which is a societal tyranny, that has replaced the political or economic tyranny of the individual as it existed in the past. There is also the tyranny of the organized minority in many fields, such as the newspapers, the cinema, and the wireless, because a minority which threatens a boycott if anything is said of which it does not approve, can wield immense power. To what extent the law can protect the liberty of the individual against prejudice and other forms of social discrimination it is difficult to foretell. The danger of McCarthyism in the United States lay not so much in any harm that a Congressional committee could itself do to an individual, as in the harm that resulted from the general public's reaction to these appeals to intolerance. Intolerance is, after all, merely another word for the denial of freedom.

It must be remembered that the liberty which the general public, or a part of the public, is prepared to give to the individual depends in major part not on the law itself, but on the social standards of the people. But even here the law is not powerless, especially in the role of a teacher, because the standards it establishes for itself tend gradually to be accepted by the people in their non-legal relations. The effect which the common jury has had on the history of England is an illustration of this. The jury system has not only proved to be a shield against political tyranny, but it has also taught to a great number of people the essential need for fair judgment. It is here that we find in its most dramatic form the closest relationship between freedom and the rule of law.

It has been said that the people of every country achieve the degree of liberty that they desire. That statement was truer in the past than it is today, because we have seen how easy it is for tanks and machine-guns to impose tyrannical government on those who wish to be free. But it is still true to say that our freedom finds its strongest foundation in the will of the people. That will has been expressed in legal terms in all our English-speaking countries. We as lawyers can claim with pride that for us freedom and law are one and inseparable.