

THE

HAMLIN

LECTURES

Forty-second series

**The United Kingdom
and
Human Rights**

Claire Palley



The United Kingdom and Human Rights

by

Claire Palley, B.A., LL.B., Ph.D., M.A.,

LL.D. (Hon. Belf.)

of the Middle Temple, Barrister

In this book based on the forty-second series of Hamlyn Lectures, Dr. Palley begins her exploration of the evolution of human rights by explaining the enormous historical contribution by United Kingdom thinkers to what are now regarded as universal concepts of human rights.

In this exciting series of essays the author looks behind the traditional rhetoric-based legal view of civil and political liberties. She stresses the fact that every modern state's legal institutions strive to provide mechanisms for peaceful protection and orderly adjustment of the many and often competing interests of every individual living in that political society.

In the second and third lectures, current United Kingdom law is evaluated and analysed to see how far it ensures civil and political liberties, how this law gives effect to social, economic and cultural rights and how it measures up to the human rights traditions and legal standards in whose growth the United Kingdom has played so significant a role.

The author concludes by re-emphasising that human institutions are composed of people whose education and habits of life will shape decisions. Accordingly, unless public officials and lawyers are imbued with human rights ideas, lip-service to, rather than respect in practice for, human rights will frequently be the outcome.

For anybody concerned about advancing the goal of a good life for all, this book reveals the vital role the law and lawyers can play by promoting the rights of everyone in society.

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THE UNITED KINGDOM AND HUMAN RIGHTS

by

DR. CLAIRE PALLEY

B.A., LL.B. (Cape); Ph.D. (Lond.); M.A. (Oxon);
L.L.D. (Hon.Belf.) of the Middle Temple, Barrister.
Formerly Professor of Public Law in the Queen's
University of Belfast and in the University of Kent,
Canterbury and Principal of St. Anne's College, Oxford.

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THE HAMLYN TRUST

The Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of strong character, intelligent and cultured, well-versed in literature, music and art, and a lover of her country. She inherited an interest in law. She also travelled frequently to the Continent and about the Mediterranean, and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

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

The Trustees are to include the Vice-Chancellor of the University of Exeter, representatives of the Universities of

London, Leeds, Glasgow, Belfast and Wales and persons co-opted.

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From the first the Trustees decided to organise courses of lectures of outstanding interest and quality by persons of eminence, under the auspices of co-operating Universities or other bodies, with a view to the lectures being made available in book form to a wide public.

The forty-second series of Hamlyn Lectures was delivered at the University of Reading in October-November 1990.

The Trustees also have pleasure in publishing in this volume, as the Hamlyn Legacy, a memoir of Miss Hamlyn written by Dr Chantal Stebbings of the Faculty of Law, University of Exeter. The Trustees are extremely grateful to Dr Stebbings for her scholarly work on this Memoir and hope that it will interest all who admire the Hamlyn Lectures.

November 1991

DAVID M. WALKER
Chairman of the Trustees

THE HAMLYN LEGACY

Emma Warburton Hamlyn was born on November 5th, 1860, at 4 Abbey Crescent on the Torbay Road in Torquay. She was the only child of William Bussell Hamlyn and his wife Emma Gorsuch Hamlyn, née Warburton.

The Hamlyns were ancient Devon landed gentry, originally from Widecombe and then from Buckfastleigh. William could trace his lineage for many hundreds of years, Hamlyn lands in Widecombe being mentioned in the Domesday Book. While many of the other branches of the Hamlyn family flourished and are documented, were it not for the Hamlyn Lectures, the Torquay Hamlyns would have been largely forgotten.

William's father, Joseph Hamlyn, a gardener, was born in 1806 and was clearly of the main Widecombe branch of the family, but had a connection with Torquay as his mother, Johanna Henley, came from St Marychurch in Torquay. On Christmas day 1832 Joseph married Martha Stanton Bussell in Torquay. William, born in 1836, was their only surviving child. Torquay was William's childhood home, and he was to remain there all his life. On February 1st, 1859, he married Emma Gorsuch Warburton, a lady from Torquay, and in the following year their only child, Emma, was born.

In the 1860s Torquay was already established as a popular and fashionable market town, seaport and bathing and watering place, with a population of some 20,000, the large majority being women. On his somewhat early marriage William lived with his wife in rented apartments in a rather unfashionable quarter of Torquay. At the time of his daughter's birth he was described as a "Law Clerk," and was articled to the firm of Hooper and Wollen in 2 Lower Terrace,

Torquay. William remained with Hooper and Woollen for some time, being admitted to practise in his late thirties in 1877. He thereupon left to practise on his own account at 36 Courtenay Street in Newton Abbot, though still living at 4 Abbey Crescent.

William continued to work in Newton Abbot until 1882, when he returned to Torquay to set up on his own at 32A Fleet Street. He was to remain there for the rest of his working life and to become well known as a solicitor at an exciting time in Torquay's development. By 1885 he was a Commissioner for Oaths, and, in 1891, a Commissioner for Nova Scotia, being empowered to take affidavits for that province. In 1893 he was appointed a JP under a separate commission for the borough of Torquay. Politically a Liberal, he was an able and very cautious man. One incident in 1890 illustrates his ability and reputation as a lawyer. It seems that a certain Mr Thornton Slade, a man well regarded and respected in Torquay, was accused of sending an anonymous libellous postcard. William was appointed to conduct the defence, which he did so efficiently that the charge was ultimately proved groundless. At a gathering of Torquay's leading businessmen to celebrate this happy outcome, William was publicly congratulated for the manner in which he had defended the accused.

Though well known in Torquay, William did not make as great an impact on the town as did, for example, the members of the Kitson family. He was, however, as a solicitor, much involved with the business life of Torquay. In 1883 he was elected to the Torquay Chamber of Commerce, was, for example, solicitor to and director of the Torquay Sanitary Steam Laundry Co. Ltd. for over 25 years, and seemed generally to mix with small businessmen and traders. His appointment as JP brought him entry to the civic life of Torquay, and he is seen attending functions such as Mayors' Luncheons and civic funerals, and undertaking tasks such as organising expressions of goodwill towards town servants on their retirement or appointment elsewhere.

As if to reflect his growing success, in 1890 William moved his family to a more fashionable quarter of Torquay, to a large late Victorian villa in Barrington Road, Ilsham, known as

Kintyre but renamed Widecombe Cot, presumably in view of his family's ancient home. William, his wife and his daughter, were all to remain there until their deaths.

The Hamlyns were Methodists, and this would undoubtedly have greatly influenced most aspects of their lives. Emma's grandparents were Wesleyans, and William's birth is appropriately registered. Emma knew her paternal grandparents well, for her grandfather died in July 1893 and her grandmother three years later, when Emma was in her early thirties. In her will she expressed the wish that her grandparents' graves in the Torquay Cemetery be maintained. It is possible that she knew her maternal grandparents as well; one bequest in her will was of two glasses bearing the names of John and Martha Stanton, possibly her mother's parents. Joseph and William were both very active Methodists, solicitors generally being well represented in Methodist circles. One of the very few references to Mrs Hamlyn is in the context of a social event of the Wesleyan church.

William's greatest contribution to Torquay stemmed from his Methodism, for he and his wife were much involved with the Torquay British Schools. These were voluntary nonconformist schools, the result of a movement which began in the early nineteenth century. There were three such schools in Torquay during the latter part of the century, and it is very likely that Emma attended one of them. One of these schools was built at the junction of Rock Road and Abbey Road, next to the Hamlyns' Chapel, and this one would seem the most probable. In 1890 William was elected president, and it is clear that he had long been well-known in connection with the schools. The meeting at which the election took place was confident that Mrs Hamlyn would be a good "presidentess." These schools closed in 1894, essentially through lack of funds. The Sunday schools attached to the Chapels survived, and Emma probably attended the one attached to the Rock Road Wesleyan Chapel. Her father was the school librarian for a number of years, and it is possible that her grandfather was Superintendent. The Rock Road Chapel moved to new premises in Union Street in 1879, and the Hamlyns naturally followed.

The extent of Emma's Methodism is unknown, but the indications are that she was not as devout as her father and

grandfather. She was never active in Methodist circles in Torquay.

William, a modest man of a very retiring disposition was, it seems, a cultured man. He became a proprietary member of the Torquay Natural History Society in 1877, a Society formed primarily for the purpose of purchasing books on natural history, but meeting monthly and holding lectures on a wide range of topics which were delivered at the Museum in Torquay. The Museum was in Babbington Road, close to Widecombe Cot. He never, however, became one of its officers. William retired from the Society in 1912 or 1913, and was not sufficiently involved with the Society for it to record his death. In 1893 William was elected a member of the distinguished and influential Devonshire Association, and attended its meetings.

Ultimately ill health caused William to give up his work. He sold his practice to another Torquay firm of solicitors, Kitsons & Co., which firm is still extant in Torquay. He remained at Widecombe Cot, leading a quiet and retired life. He was already in poor health when his wife died in 1913, and he himself died at Widecombe Cot on November 16th, 1919, aged over eighty. By his will he left all his property to his daughter absolutely.

There is no record of Emma's activities from the time of her father's death. It is known that she remained at Widecombe Cot, but nothing more. She is remembered as being a cultured woman, and a fine pianist, but she seems to have played no part in the social, literary, musical or artistic life of Torquay. She herself was not a member of the Torquay Natural History Society, and does not seem to have been active in the Torquay Debating Society or in any of the local political societies.

Though not wealthy, Emma was clearly of comfortable means, and during her father's lifetime it seems that she travelled extensively in Europe and Egypt. It was usual for solicitors such as William to lend money out on mortgage, and certainly when Emma died her estate was largely comprised of such investments. There is no surviving evidence to support her travels, other than it is known that she was frequently absent from her home for a number of months at a time. When she was at home she was generally in the company of one of a

circle of lady visitors, some of whom were clearly foreign. Certainly in the latter years of the nineteenth century, tourism was fast increasing and it was possible to travel from Torquay.

It is reasonable to surmise that in the latter years of her life, Emma had ceased to travel. It is believed that she made full use of her local library, borrowing books on the subjects she mentioned in her will. She spent her last years at Widecombe Cot, taking no part in public affairs, and leading a very retired life. It would seem she lived alone, with intermittent domestic help. She died at Widecombe Cot, the house where she had spent most of her life, on September 1st, 1941, aged eighty.

We learn more of Emma from the provisions of her will than from any surviving record of her activities during her lifetime. She made a number of specific bequests, namely a clock which had belonged to her grandfather, to Joseph Warburton, and some antique pieces to the Torquay Natural History Society, and a number of specific legacies to her executors and certain other individuals. Her estate was valued at £19,521 gross.

Emma appointed three executors. The first was Joseph Roberts Warburton, a retired Principal of the Board of Education, who lived in Walton on Thames in Surrey. He and Emma shared a common grandfather, her mother's father, and it seems he was her closest living relative. The second was Edmund Ball, KBE, Assistant Auditor at the India Office in London from 1934 to 1943. He was some twenty years younger than Miss Hamlyn, and was the son of one of her father's barrister friends. The third was Sidney Keith Coleridge of Loughborough, an Inspector of Taxes who was the grandson of her father's friend, George Adams Goss.

In terms which it seems were her own, and resisting all attempts by her solicitors to amend them, she bequeathed the residue of her estate to her executors as trustees "upon trust to apply the income of the Trust Fund in the furtherance by lectures or otherwise among the Common People of this Country of the knowledge of the Comparative Jurisprudence and the Ethnology of the Chief European countries including our own and the circumstances of the growth of such Jurisprudence to the intent that the Common People of our Country may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and

realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them."

Miss Hamlyn's solicitors had urged her to amend this passage because they felt that the words might necessitate an application to the Court in order to determine their true meaning and the implementation of the trust. This is indeed what happened. The wording was vague, and after the will had been proved, counsel's opinion was sought. The main question to be resolved at that stage was whether the bequest was void for uncertainty on the basis that the objects, "the Common People of this Country," was too wide and uncertain a class. However, the rules of certainty of objects in the case of charitable trusts is not as strict as for private trusts, and if the trust were charitable, the class would not be regarded as too vague.

In 1942 Mr Hubert Rose advised that the bequest was a good charitable gift for the advancement of education, "the Common People" meaning the public generally, but that it would be desirable for the Court to approve a scheme to clarify certain points in the will. Accordingly the trustees applied to the Chancery Division of the High Court, which in 1948 finally approved a scheme for the administration of the trust. The scheme closely followed the wording of Miss Hamlyn's will, with "my country" being taken to mean the United Kingdom.

The capital of the trust was some £15,000, consisting mostly of mortgages secured on freehold and leasehold properties. Indeed it is seen that Miss Hamlyn had been making such investments until just a few years before her death.

The scheme laid down by the court provided that the trustees were to be the principal for the time being of the University College of the South West, now the Vice-Chancellor of the University of Exeter, and he was to be an *ex officio* trustee, the trustees of Miss Hamlyn's will, and representatives of the universities of London, Leeds [replacing the University of Durham, which declined], Glasgow, Belfast and Wales. This would have the effect of representing the trust throughout the United Kingdom.

The trustees' first meeting was in London in 1949, some eight years after Miss Hamlyn's death, and the reason for the success of the trust lies in the policy of the early trustees, and

the drive and energy of Professor Murray, the Principal of the University College of the South West, and the other academic trustees. Even before counsel's opinion had been sought, Miss Hamlyn's solicitors had made contact with Professor Murray, who proposed that the College should be the seat of the endowment. It was Hubert Rose who suggested that that might be too limited, that other Universities in other parts of the country be involved as well.

It was decided when the trust was established that its objects could be best achieved by means of lectures by eminent lawyers and their subsequent publication and distribution, and it is the consistently high quality of the speakers which has ensured the continuing success and high reputation of the Hamlyn Trust. The first lecture, *Freedom under the Law*, was delivered at London University by Lord Denning and in a sense set the standards of the subsequent lectures. Similar issues of fundamental importance to the Common Law were addressed, but the spirit of the Hamlyn Trust was apparent in the lectures assessing the contribution of English law to Indian, South African and Canadian law. Scotland and other European countries have not been forgotten.

Emma Hamlyn remains something of an enigma. The very sparse documentation suggests she led a quiet, relatively uneventful, and very private life, an unmarried Victorian lady with no more than a comfortable background, largely self-taught, and moving in modest social circles. It is thus all the more surprising and admirable that she should have founded the trust which now provides for the highly regarded and prestigious Hamlyn Lectures. It is said that she studied law, but no evidence has been found to support this. It seems more than likely that she founded the trust in memory of her father, though she does not say so, and in that sense it is not inappropriate that more is known of her father's life than her own. It would seem that she was an intelligent and intellectually curious woman of strong personality, who, in view of her father's profession, took an interest in the legal systems of the countries and cultures she visited, and that that interest was sufficiently strong, and she sufficiently determined

and imaginative, to create a trust which would ensure that her interest endured long into the future.

Chantal Stebbings

1. *The United Kingdom and Human Rights Thinking*

The Themes and the Approach

Conventionally, Hamlyn Lectures commence with chauvinist comments in a comparative context. Like Professor Wade, I queried whether I could comply, but, chronicling the United Kingdom's contribution to concepts and practices concerning human rights does permit the conclusion that these off-shore European islands have cause for self-congratulation, even if, on current form, scepticism may be more appropriate than an accolade. The massive United Kingdom contribution, in a real sense also comprehends early developments in her former American colonies, where, following the last successful British revolt against the British, human rights ideals were first given effect in institutional form. That achievement can properly be annexed as British. Of

course—and who in this Europhillic moment¹ can forget it—human rights discourse arose in a Western European context. Human rights thinking is the house that Ioannis, Iacomo, John, Johann, Johannes and Jack built, with the marketing being done by Jacques with his Estates-General agent's board, declaring rights.²

My own discourse begins by explaining how thinking and the growth of legal institutions in Western Europe and in the United Kingdom and her colonies interacted to father the concept of and theories of human rights as well as current conceptions of their content. Yet, anomalously, in the place where human rights were first conceived, so also was their philosophical basis first destroyed. Despite this first philosophical demolition, the British and early American contributions to the theory and practice of human rights continued to provoke new syntheses. Ultimately, with significant participation by Anglophone statesmen, a universal international legal ethic of human rights was developed. Paradoxically, that international legal obligation, together with similar regional European obligations, all of which are accepted as binding by the United Kingdom, now reinforce conceptions originating here, reminding the originators of their own traditions.

In tackling the vast subject of human rights, which touches on all relationships between men and the societies of which they are part, I have tried to apply approaches not only of lawyers, but also those of historians of ideas and of political institutions, of moral and of political philosophers, of economists, of social administrators, of educationalists and of other social scientists. Thus the reader may at times feel a little burdened with theory and history. Nonetheless, all these perspectives and the historical background are necessary if the many complex issues are to be understood and evaluated. Accordingly, after a theoretical and historical

first chapter, emphasising the contributions to human rights thinking made by the United Kingdom, I go on to explain what is meant by speaking of various kinds of rights, differences of interpretation, confusions which arise and the psychological consequences of human rights talk. That leads naturally to the relationships between human rights and values and to the need for choices when recognising and giving effect to various rights. Because the structure within which choices must be made is provided by the Constitution, its impact on human rights' questions is analysed. The continuing backcloth to all discussion is the historical development of civil, political, social, economic and cultural rights in the United Kingdom and an evaluation of their state in 1990.

I end by re-emphasising the Burkean point that human institutions are composed of men whose education and habits of life shape their decisions. Unless public, officials and lawyers are imbued with human rights ideology, lip service to, rather than respect in practice for, human rights will frequently be the outcome. Because human rights' traditions are transmitted in the course of education and through communication by the modern media, I deal with the vital role that educationalists and the press, as well as lawyers and functionaries, play in promoting respect for and observance of the rights of man in society.

The Beginnings of Human Rights Thinking and its Ultimate Spread

Ideas operate like invading viruses and are not capable of being hermetically sealed. They have after-lives in

both the locations of their origin and their spread, constantly mutating. Obviously, theories and concepts cannot be wholly divorced from the context of the forms of social organisation, interests and needs from which they have sprung. Information about social facts operating when a text was composed is necessary for understanding authorial intention and its contemporary meaning, especially as, at different historical times, particular organising presuppositions have placed limits on modes of thought then current. Yet ideas, even misinterpreted ideas, blended, transformed, re-transformed and continuously re-interpreted, shape events and have important unintended outcomes. Little did Thomas Hobbes realise that his defence of absolutism would provide the doctrinal basis for defending individual liberty. John Locke could have not known that his remarks on man having property in his labour in the context of master and servant contracts would lead to theories of wage value and contribute to Marxist analysis. Least of all would Adam Smith, the expounder of moral sentiments based on sympathetic understanding of the attitudes of others and acquisition of the virtues, have believed that he would be portrayed as the advocate of unrestricted *laissez faire* or that his views on political, economic, ethical and juristic relations would be reduced to market principles.

In the world of our legal institutions, which shape human rights, the same process is apparent. What began as the barons putting a bridle on the King, described in Bracton's metaphor from the 1230s³ and used later elsewhere in Europe, became limits on the powers of rulers and the notion that they too were subject to law. The Charters, from that issued on coronation of Henry I to Magna Carta and its reaffirmations, were designed to affirm baronial privileges. Nonetheless, using the words

of Scotland's other Adam, Adam Ferguson (1723–1816), one of Scotland's great Enlightenment historians, whose ideas affected European thought on sociology, anthropology and psychology, including that of Marx, those Charters ultimately secured the foundations of freedom to the people the barons themselves wished to tyrannise. Similarly, the 1688 Bill of Rights, legitimating a revolution in the interests of landowners, the Established Church and parliamentarians, was a turning point for freedom of speech, for ultimate religious freedom and for affirmation of most civil and political rights. Likewise, political power for the male middle class and new interests, given by the 1832 Reform Act, in retrospect appeared as the first step to universal suffrage.

By referring to events which preceded so-called liberal developments, I am not attempting to resurrect the Whig interpretation of history, although I am confirmed in my prejudice that the study of 17th century thought and events provides an unrivalled grounding for lawyers and all concerned about civil and political rights. A year after the Pilgrim Fathers had on November 11, 1620 formed themselves into a "civil body politic" by voluntary compact and covenanted to frame "just and equal laws," English Parliamentarians were demanding their liberties, including freedom of speech in the 1621 Protestation, shaped by Sir Edward Coke and later torn from Parliament's record by the King's own hand. The most significant legal development was the first statute designed to set out liberties, the Petition of Right 1628. Intended to protect the landed gentry and Parliamentarians and to limit royal taxing power and the King's right to imprison his subjects, it inspired Bills of Rights in the British American colonies. From it and Magna Carta would derive, among other colonial laws, the Maryland Act for The Liberties of the People 1639,

framed by Maryland's third popular assembly, and the Massachusetts Body of Liberties 1641, the draftsman of the latter being a common lawyer from Ipswich.

Although attempts to secure a written constitution failed in England, momentous ideas were transmitted, especially by that unsuccessful endeavour of the agents of the Army in 1647, the Agreement of the People. Written constitutions were, however, enacted in the British American colonies.⁴ Confounding the received public view of him, the philosophic apostle of liberty, John Locke (1632–1704), working for Ashley Cooper (later first Earl of Shaftesbury) framed aristocratic constitutions in 1669 for Carolina, connecting political power to hereditary wealth and its feudal proprietaries. Tenants holding land at a fixed rent were to be tied to their landlord's jurisdiction "to all generations," while freemen were to have absolute power over their negro slaves. Locke's constitution-making should be contrasted with the work of another Oxford man, William Penn (1644–1718), who became an effective pamphleteer for human rights, railing against bigotry and intolerance, including "the hellish darkness and debauchery" of his own University, seeking liberty of conscience, freedom of speech and release from prison of Dissenters. When tried for speaking at a Quaker meeting contrary to the Conventicles Act and asked why he associated with such simple people, Penn replied: "I prefer the honestly simple to the ingeniously wicked." Later, Penn's inherited wealth facilitated a grant in 1681 by Charles II of the territory to be known as Pennsylvania, in cancellation of a Crown debt bequeathed by his father. As absolute proprietary, Penn then built on Leveller notions and told the inhabitants that "You shall be governed by laws of your own making, and live a free ... People." He granted a constitution giving direct power to the people in his 1682 Frame of Government.⁵

When British colonists realised, like others were to do later, that the institutions of British liberty were not reflected in the practices of the Imperial Government, they produced State Constitutions, Bills of Rights (of which the most famous is the Virginia Bill of Rights) and the Declaration of Independence in 1776. All of these, including the carefully crafted American Bill of Rights of 1789, which in 1791 was adopted as the first ten Federal Constitutional Amendments, were the logical fulfilment of their English and colonial precursors.

Human rights ideas have fallen on receptive hosts throughout the world, because, although the Western European tradition has systematised the ideas, similar sentiments and some of the concepts have been discernible within most of the world's major cultures, even if their context, extent and implications have differed. For example, earlier concepts of rights in a framework of duties to God from whom rights are derived, teleological development of man, self-realisation within the community and notions of human dignity, which have contributed to human rights thinking, have counterparts in the moral codes of Buddhism, Islam, Hinduism and Animism, although legalism and rationalism are less evident.⁶

A Digression on Moral Relativism

Before proceeding to the history of the United Kingdom contribution to human rights thinking in the broadest sense, I digress onto the topic of moral relativism. I do so because arguments about the relativity of morals may undermine the supposed validity of our thinking about human rights.

It is ironic that early anthropological thinkers undermined the philosophical foundations of human rights

thinking just as human rights conceptions were about to be given pride of place in European constitutions. Scottish and English writers influenced Montesquieu (1689–1755), who pointed to the plurality of cultures and the relativity of morality to each culture. Awareness of the fact that for each alleged universal right there was some society which failed to recognise it had the result of turning most thinkers into cultural relativists. But the most devastating impact on Natural Law and human rights thinking had been made before Montesquieu's writings, by the Scots philosopher, David Hume (1711–1776), who destroyed pretensions of Natural Law to scientific validity. Building on earlier British and French thinkers about human psychology, as well as on Aristotle and Cicero, Hume demonstrated the absence of rational grounds or of necessity for our moral beliefs, which rest on habit and association. Values, Hume argued, depend upon human propensities, and they may or may not be generally approved—except by “the moral majority.” Morality, he urged, was socially constructed and could not be demonstrated to be scientifically true. Nor could any particular society's moral code be logically demonstrated to be better than another. Despite the titanic endeavours of various godless gatherings of philosophers for the next two hundred and fifty years, they have, although providing justificatory arguments, failed to re-establish the dreams that once existed of Natural Law and natural rights.⁷

Hume's logic did not entail that we cannot continue to reason about values. Quite the reverse. What he showed was that the soundness of reasoning has primarily to be adjudged on the basis that it is shared by the majority of the reasoner's particular community, which habitually shares responses. Indeed, he believed it impossible to maintain a society of any kind without justice—a view of which would have been constructed by the community.

In spite of Hume's demonstration that moral beliefs spring from particular societies, efforts are still made to prove universality of human rights values. In 1966 UNESCO set up an empirical survey which reported that men in all societies have the sense that certain things are owed to them as human beings. This result and the UN Universal Declaration of Human Rights, proclaimed by the UN General Assembly in 1948 and today accepted as declaratory of international customary law, were analysed by the former UNESCO Philosophy Director as corroborating the foundation of the Declaration on "the inherent dignity and rights of all members of the human family." Article 1 of the Universal Declaration states that "All human beings are *born* free and *equal* in dignity and *rights*." To avoid accusations of empirical nonsense, she then interpreted Article 1 as merely referring to the potentiality for or aspiration to equality, to the capacity and ambition people have to become free, and to their capability of deciding their own actions and of assuming responsibility for the consequences. Even so, as a philosopher, she had to concede that the Declaration was "an act of *faith* by which all see the full humanity in others."⁸ (It is a pity that UNESCO's human rights study programmes contributed to the departure of the un-philosophical American and British Governments from UNESCO and a particular disappointment that the United Kingdom has not yet again become a member, because that potentially great international educational instrument was established primarily on British initiatives.)

The elevated sentimental tone of the Universal Declaration is, of course, rhetorical—just like the immortal sentence "We hold these Truths to be self-evident." Such language has an important persuasive function and has serious consequences. The non-philosopher does not construe his use of rhetorical sentences like those as

merely expressing a preference acquired in the course of socialisation. He considers himself to be averring the truth and seeks to persuade others to adopt his beliefs.

There are two kinds of relativism which make it unscientific to argue that beliefs in human rights are true. Firstly, descriptive relativists argue that anthropological studies show that the basic ethical beliefs of different societies in fact differ and even conflict. Meta-ethical relativists go further and assert that there is no objectively valid rational way of justifying one basic ethical belief, judgment, value, or right consequent on a value as opposed to another. Thus, two conflicting basic judgments may be equally valid, or at least neither case can be proved to be valid or more valid than the other. In the event, the world's current ecumenical approach to human rights rests only on tentative philosophical argumentation, assertions made in the course of international relations, laws created by international treaties and the discourse of laymen in those societies where the rights of men have become an accepted notion in the culture.

Some Third World political thinkers, whose national movements, during the phase of their anti-colonialist struggles, invoked human rights, particularly the right to self-determination, the people's counterpart of personal autonomy, now dismiss the view that implementation of the international human rights' moral code is an enterprise for the whole human species by virtue of each person's humanness and claims to autonomy. Instead, they rely on relativism as between societies and different cultural traditions to criticise civil and political rights as manifestations of Eurocentricity or of western cultural imperialism. Others, including apologists for fundamentalists and some moral philosophers, do not consider any discourse to be possible between different cultural traditions, because no universal standards are possible.⁹

These opinions are prevalent in a world of haves and have-nots, where Western States, earlier primarily responsible for the slave trade and colonisation, are perceived as usurious exploiters of the international banking system and of commodity markets and as intermittently and hypocritically invoking civil and political rights standards as foreign policy tools. In contrast, the Western man in the street would assert that stoning an adulterous woman to death or whipping her is always wrong, as is cutting off hands for theft and any maiming punishment.

It cannot be disputed that, by a conjunction of events, a significant one being the rediscovery of Aristotle and Stoic thinkers' texts preserved in Arabic, political theories of the state and then of natural or human rights first emerged in societies constrained to thinking in European thought patterns. Nonetheless, human rights have now been adopted as universally binding standards, admitting, of course, that universal applicability has always been paralleled by universal violation. Today, International Law human rights standards bind states, irrespective of whether their validity can be philosophically underpinned or anthropologically established.

Although the British and American Governments do not believe in the practical worth of philosophy, others believe that were it possible to *prove* the validity of the morality of human rights, the benefits would be profound. Not least, the universal legitimacy of laws giving effect to human rights would be strengthened, our tendency to quibble with duty to observe them might be undermined and educators could promote such a morality without scruples about indoctrination.

Until a day of proof of moral standards arrives, if ever, we must not exaggerate the risk of moral scepticism in daily life. In practice, we do not question the basis of our

beliefs, except in mid-life we mis-read or partially read Hume, ignoring his account of practical reasoning and his account of a moral sense. Hume derived much of this thought from his Scots-Irish teacher Francis Hutcheson (1694–1746), whose account was also developed by Adam Smith (1723–1790) in *The Theory of Moral Sentiments*, first published in 1759 and added to in 1790 after publication of *The Wealth of Nations*. Although in adolescence and early adulthood we may spend time denying the truth of the values we have learned in the family, at work and in the wider community, we take practical moral decisions all day long, using standards we assume to be correct, that is, true. The precise relationship between such practical reasoning and philosophers' theorising about morality and reasoning is itself a matter of philosophical dispute in which no practical unself-questioning layman should dare to become embroiled. Nonetheless, this laywoman cannot but observe that frequently those who are most sceptical in philosophical discussion are the most vociferous in their condemnation when they cease to philosophise and begin to speak as practical moral agents, making evaluative moral judgments which purport to be something other than their subjective preferences. Thus in every day life we behave as if there were a degree of stability and objectivity in our moral reasoning, whatever philosophers may say.

Indeed, in practice we all share, to a greater or lesser extent, a common ideology, by which I mean the set of beliefs, concepts and rules, which are the prevailing moral convictions forming an essential part of the culture of the society in which we live. Because ideology itself influences our attitudes and behaviour and can programmatically be exploited to mobilise us for action, whether to support or to attack particular practices, we should remain conscious as individuals of why and how we are

being motivated. Whatever happens to Marxism, it has at least made us aware that aspects of the ideology of those exercising power tend to be reflected in most laws—subject, of course, to compromises with the ideologies of others who have an input into the legislative process. The same applies to administrative and judicial decisions.

I contend that in the modern world, that is since the 17th century, those who live in modern societies have basically accepted an ideology of which the major premises are that the human personality should be satisfied and realised; that this occurs in the wider society of the nation-state; that the end of collective constitutional and democratic governmental institutions is promotion of a good quality of life (in Benthamite thought the term is “utility”) for citizens of that state; and that all humans in such societies have some rights against the state and against one another.

The United Kingdom’s Contributions to Human Rights Thinking

A common ideology brings me full circle to the United Kingdom’s traditions and how these developed. Crucial contributions were made by the lawyers, Canon, Common, Civil and Parliamentary. Their concepts of rights, contract and property were transmogrified into ideologies, including the view that governments exist to recognise and protect the rights of man. We are all aware of the revolutionary impact of the political language and ideology of natural or human rights, over the period from the 17th century up to recent events in Eastern Europe, in China and in Africa. Although he did not use jargon, Blackstone, well before the French

Revolution, commented on the appeal of such an ideology: "There is nothing which so generally strikes the imagination and engages the affections of mankind" as do rights.¹⁰

I turn now to the five main intertwining strands of the United Kingdom's contribution to human rights thought and institutions.

Evolution of the Concepts of Rights and Natural Rights and of Political Theories of the State

Firstly, thinkers from these islands injected major elements into the medieval and 17th century debates, which led to development in Europe of the concept of rights and natural rights and to theories of the state.¹¹ As I have already indicated, here and in Europe there were repeated connections between political facts, legal ideas and philosophical ideas. The concepts of rights and development of political theory came out of controversies arising from the 11th century onwards and re-discovery of the legal and political ideas of the ancient world. Popes and rulers disputed the limits of sacred and secular authority and the power of secular rulers to invest bishops with authority. Differences with Archbishops of Canterbury are by no means new, but such disputes at that time led to re-examination of the foundations of authority. Arguments within the Church as to the relative authority of Popes and their Councils, as representing the body of the Church, likewise provoked ideas about the limits of authority and of rights of the community to representation. Disagreement between the Papacy and the Franciscan monastic order as to the nature of property and the implications of vows of apostolic poverty led to theories of rights being vested

in the subject (subjective rights).¹² Such theories led to the notion that men as individuals have control over their lives, which control could be described as property. Upon that basic notion, social and political relationships were posited.

Ultimately, theories of political individualism were developed and were built upon in the 17th century, in conjunction with political theories about the state and powers of rulers. Such theorising and consequential debates and disputes occurred in the midst of historic events, at a time when nation-states were evolving, and culminated in 17th century political and natural rights theory. By then there were theories of natural rights, theories of the nature of the state, competing theories about the power of rulers over their subjects and theories of the rights of states *inter se* (International Law).

The earlier medieval disputes had taken place in a context of political arrangements in Western European principalities and kingdoms which were broadly similar. Furthermore, ideas about law, justice, the community and rulers had by the 13th century become so generalised that they amounted to an informal proto-theory and background against which political conduct occurred. There were several crucial features. Firstly, the law expressed the custom and consent of the whole community, of folk as well as the will of the ruler. Secondly, the ruler was chosen by the people, either by election or ratification, the agreement of the people being manifested in the ruler's coronation oaths to uphold the law and to give justice to all men. Thirdly, ruler and ruled were alike subordinate to the law of the folk, which was supreme (the notion of the rule of law) and embodied the principles of justice. Fourthly, if major changes were to be made to custom, the ruler acted with the counsel and consent of the great men, lay and

ecclesiastical, behind whom was the community, whose custom was the ultimate source of law.

Against that political background, the rights of subjects evolved. Disputes between their baronial vassals and Kings led to the deposition of Edward II (1327) and Richard II (1329). The seeds of rights to representation, the need for consent to taxation, the right to petition for grievances and the right to fair trial were planted by Magna Carta and its reaffirmations and similar European Charters, and also by the summoning of representatives of counties in 1213, 1254, 1264 and thereafter. Such a representative assembly first met in 1188 in Spain, with the Council of Leon and the Cortes of Castille being the earliest representative institutions. Elsewhere in Europe others followed—in Siena in 1231, in the mid 13th century in the Hapsburg Empire and in 1302 in France, with the first meeting of the States-General.

Attempts to secure responsibility of the ruler to the community by involvement in appointment of his chief officers began in England, with the 1258 Provisions of Oxford. Such historical events were subjected to analysis in all Europe and significant inferences for political theory were drawn.

These developments were reflected in legal commentaries, particularly that compilation published by Bracton in the 1250s, which was later relied on in the struggles between the Stuarts and the Courts and Parliament. I have already referred to the bridle to be put on the King. Bracton also wrote: "the King is under God and the law" and "there is no King where will rules and not the law," repeating commonplaces of his age. Indeed, as early as 1185 Manegold of Lautenbach was pointing to the agreement according to which kings were chosen and to their duty to conform to justice. But the first systematic treatment of the social state, one made even before rediscovery of Aristotle, was John of Salisbury's 1159

Policraticus. Drawing on Cicero, John (1110?–1180) saw the state as a commonwealth, united by a common agreement about the ends of law and rights. The state was ruled by a public authority acting for the public good. Law was supreme, binding rulers and ruled alike, and the ruler derived his authority from law. Any vassal must be judged in the King's Court, by his peers. Should the King become a tyrant and break his oaths he was subject to deposition and even tyrannicide. John was writing over 56 years before Magna Carta. Later, the great Italian writer, Marsilius of Padua, emphasised in his *Defensor pacis* (1324) that authority was drawn from the people, the body of citizens. In short, to speak of pacts and contracts was not a metaphysical speculation, but a legitimate conclusion about the recognition of rulers by the community.

It is inappropriate in this popular account to outline the detailed development of a natural right or *property* in life, liberty and the means of preservation, which emerged from the Franciscan debate with the Papacy.¹³ That debate started with Duns Scotus (1265?–1308), who argued that none could be excluded from what was common in nature and from the necessities of life. It was carried forward by William of Occam (c1285–1349), the great English Franciscan dialectician, who, in answering Pope John XXII's Bull of 1329 designed to settle the issues with the Franciscans on ecclesiastical poverty and mendicancy, argued about the nature of property. He invoked concepts of rights which had been extensively developed from study of Justinian's rediscovered Digest by the Glossators of the Bologna School of Law. The result was a theory of subjective rights, that is, rights are vested in the subject and are exercisable at his will. Occam contended that men have power or property over their own lives, the capacity to operate institutions and the will, capacity and freedom to invoke their rights

against their rulers. His work provided the foundations for later individualist political theory. An Irish contribution came from Richard Fitzralph of Armagh (d.1360), who sought to answer the Franciscans. His reply, that men were by nature just and held land in common, provided arguments exploited by John Wycliffe to argue that, when grace was forfeited by injustice, any holding of land was subject to forfeiture and that Church reform was necessary. Wycliffe, through direct transference of ideas in the 14th century, encouraged popular democracy, egalitarianism, notions of communism and even revolt. An even more important consequence of Occam's thought and Fitzralph's answer was the development of a fully-fledged theory of natural rights by two French thinkers, Peter of Ailly and Jean de Gerson, just before 1400.¹⁴ These ideas were taken further by an earlier, but Scottish, John Major (1467–1550) who moved to France. Major contended that the community was the source of political authority, that there were stringent limits to the power of the King, that revolution could be proper and that private property was natural. Among others he taught were George Buchanan, John Calvin and John Knox, a pupil who wrote (of Queen Mary of Scots) that:

“Nothing can be more unjust. It is contrary to God's will that a woman should be exalted to reign above men.”

By the early 16th century it was generally accepted that men had free will, property over their liberty and things, and that this property could be “traded.” In short, society was made up of individual rational beings who each decided for themselves. Just as had been the case in the 14th century, political events were justified by doctrines about the right to resist and to depose monarchs, similar to those of John of Salisbury. In 1558 in England, Christopher Goodman, and in the same year

in Scotland, John Knox, after collaboration, put forward such arguments. George Buchanan, (writing in 1578 for the instruction of his pupil, James VI, later James I of England) relied on the will of the people to defend the deposition of Mary Queen of Scots. His *De jure regni apud Scots* (1579) was paralleled by the *Vindiciae contra tyrannos* (1579), which systemised arguments against the tyranny of rulers which were current in Holland, France and Switzerland. Such ideas provided justifications for revolts in Europe and were later to be invoked in the 17th century struggle against Charles I.

Meanwhile, development of notions of derivation of authority from agreement or contract, of natural rights, of laws deriving authority from the whole community and of the rights of rulers continued. Thomas Hooker's *Laws of Ecclesiastical Polity* (written from 1594 to 1597) was highly influential. Hooker spoke of rulers' rights arising out of "the original conveyance" by the community. In Europe, his German Calvinist contemporary, Johannes Althusius (1557–1638), wrote on similar lines in his *Politica methodice digesta* (1603). Althusius developed a theory reducing the whole range of political and social relationships to the single principle of consent or contract. All the preceding thinkers and some lesser authors, influenced subsequent later judges. Two English writers require specific mention: Sir John Fortescue (1394?–1476?), tutor to the exiled Lancastrian Prince Edward, for whom he composed the dialogue *De Laudibus Legum Angliae* before later becoming reconciled with the Yorkists and Chief Justice to Henry VI; and Sir Thomas Smith, author of *De republica Anglorum* (1583, written 1562), who became Secretary of State to Elizabeth in 1589. Fortescue emphasised that the King himself could not change the law and customs of the realm and Smith asserted that the most high authority was vested in Parliament (the monarch and two houses) whose

consent was taken to be every man's consent. Edward Coke (1552–1643) thus had to hand much material to construct an answer to James I's argument about the divine right of Kings, their infallibility, their claimed power to decide cases themselves and to interpret and to change the law and limitations on the royal prerogative. But the Scottish Court of Session in 1599 had the distinction of being the first court in the world to stand up to a ruler. The Lords of Session rejected a personal plea by James VI to dismiss a claim by Robert Bruce, in favour of Lord Hamilton, ruling that they did not do justice according to the King's command but in the matter of law must do as their consciences led them. All but one of the judges voted for Mr. Bruce against the King's demand and in his presence.¹⁵ In 1605 Coke, relying on Bracton, responded to James I's claim that he had the right himself to decide any cause and to remove it from the judges, holding that cases must be determined in a Court of Justice according to the law and custom of the realm.¹⁶ Again, Coke's knowledge of the long medieval debates and of Bracton was the basis from which he derived his reasoning in *Bonham's Case*. According to Coke:

“the common law will controul acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right and reason, or repugnant ... the common law will controul it, and adjudge such act to be void.”¹⁷

Even though Coke's assertion of power to overrule Parliament was, according to most legal historians, not borne out by the precedents he cited and not even believed in by him, his formulation was the precursor of judicial review as developed in the British American colonies. It is also the equivalent of doctrine that will come through the EEC back door via the European

Court; and it is a ruling which many who currently seek a United Kingdom Bill of Rights would wish to see adopted by our judiciary.

By the beginning of the 17th century the stage was set for the development of modern political theory, the doctrine of sovereignty, International Law and natural or human rights theory. These developments were primarily the achievements of two thinkers, the great Dutch international lawyer, Hugo Grotius (1583–1645), and Thomas Hobbes (1588–1679), also legally trained. Both took some inspiration from Francis Bacon's arguments concerning the utility of knowledge and the effect of scientific regulation in the sphere of law and politics as increasing power and affecting the nature of happiness. Grotius set out a regular system of general principles, which ought to be the foundation of the law of all nations and is regarded as founder of International Law, a term coined by Bentham in 1780. (That credit needs sharing with Albericus Gentilis, an Italian refugee and Professor of Civil Law at Oxford from 1587 to 1608, Gentilis subjected rulers to Natural Law and the Law of Nations, but remained absolutist).

Grotius explained that men in their natural state were free and capable of renouncing freedom to create the state, submitting their liberty to a ruler. They might choose whatever form of government they pleased, with government resting on the will of the men who conferred it on the ruler. Grotius did not consider that natural rights were inalienable, but, by the principle of interpretive charity, he considered that no reasonable man would renounce his life and make himself subject to tyranny. On such an assumption, man retained an ultimate right of resistance.

The Janus-faced Thomas Hobbes, defender of absolutism, can be seen as perhaps the most important political thinker since the ancient world. From him

sprang theories of sovereign power, of authorisation of the sovereign by the agreement of individual men, of legitimacy of government, and of the state as collective regulator of liberty. Conversely, he emphasised that the private individual is the owner of his liberty. Hobbes was both an individualist and a communitarian thinker, with his complex description of a public sphere grounded on individual relations. Hobbes was also the forefather of utilitarianism, and, with his clear distinctions between natural rights and civil or legal rights, the founder of legal positivism. In short, Hobbes' thought formed the basis of most modern political thinking.

John Locke, the next British contender in what Pocock would describe as a World Cup for human rights thinkers, inherited the medieval tradition through Hooker. He drew on that tradition, on individualist views of man as a reasoning political animal and proprietor of his liberties, on William Petty's views of man as producer of labour and his labour theory of value,¹⁸ on contractual theories advanced in the late medieval period and by Grotius and Hobbes,¹⁹ and on the debates about religious freedom and freedom of expression from Peter Wentworth in Parliament on February 8, 1575–1576 to John Milton's *Areopagitica* (1644).²⁰ Locke added "inalienability" of individual rights to resist, this right having hitherto been thought to be vested in the magistrates (officers of the state), rather than in individuals. Written in 1681, with revolutionary, even plotting expectations, but published only after 1688 as post-hoc justification, Locke's *Second Treatise* had no influence upon the 1688 to 1689 revolution in England.²¹ His thought had its major impact in France through Voltaire and the French Enlightenment, and later in the British American colonies.

The British colonists of the American Enlightenment, as educated men, also drew on Greek and Roman

thought, especially that of the Stoics, who regarded man as in theory a rational and equal being—except for the wise and the fool. Their reading of Polybius' study of Roman political institutions,²² which expressed approval of mixed government (according to which constitutional elements are accurately adjusted and in exact equilibrium) gave to them, as such authors had earlier given Montesquieu, the notion of a system of checks and balances. They continued to believe in natural rights, gaining sustenance from the moral and political sentiments of Hutcheson and support for natural rights from the writings of Dr. Joseph Priestley and Dr. Richard Price, the latter two of whom were rejected in their own country and vilified, along with Tom Paine, by Edmund Burke.²³ In contrast, in the land of its birth, the United Kingdom, natural rights theory was to die, as mentioned above, at the hands of Hume, with the *coup de grace* being administered by Jeremy Bentham (1748–1832) in his *Fragment on Government* (1776) attacking the fiction of natural law and Blackstone's *Commentaries*.²⁴

The After-Life of Natural Rights Ideas and Political Theory

The second strand of the British contribution comes from the after-life of ideas of natural rights and of post-medieval political theory. In the United Kingdom and in the British Colonies, such ideas formed the basis for modern political theories of the state and for urging limits on the power of rulers. These were effected by appropriate forms of state organisation, such as the written constitution, Bills of Rights, an independent judiciary granting remedies like *habeas corpus* and judicial review for failure to observe natural justice and, in the

United States of America, review on grounds of constitutionality. Again, in the British colonies of settlement (where Europeans in large measure displaced the indigenous population) the right of the people collectively to govern themselves and to choose their system of government and their rulers was first put into practice. It then became a prevailing idea.

Still remaining within the world of theory, it is also important to note that, initially in England and then to a far greater extent in Scotland, with such ideas being further elaborated by the mid-18th century French Physiocrats, there developed the science of Political Economy. This originally dealt with the household management of the state, its political arithmetic and how economic matters were best organised in the private and the public interest to ensure the material well-being of men in society. Those ideas and their consequences affect us all daily. As Keynes has said:

“The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.”²⁵

The Contribution of English Law and Administrative Practice

The third strand of the contribution to human rights arose from English judicial decisions,²⁶ British laws and British 16th and 17th century developments. Some continental advocates of reform (for examples, Montesquieu and Voltaire) perceived British constitutional

arrangements and civil and political liberties, especially freedom of speech and of the press as ideals and advocated broadly similar institutions in their countries. Others, immediately before the French Revolution, used American precedent to attack English institutions and to discredit these as precedents for France. Indeed, an American pamphlet translated into French and annotated by *philosophes*, *Examen du gouvernement de l'Angleterre* was much referred to in the constitutional debates of the Assembly in 1789. Because such British institutions have been described by other Hamlyn Lecturers, they will only be touched on—and then in the third Lecture—if appropriate.

One point requiring emphasis is that the concept of social and economic rights sprang in large measure from legislation and criticism of social policy in this country from the 18th century onwards. The concept was not the mere product of French revolutionary ideals or of later Prussian and then Imperial German legislation. Indeed, contrary to prevalent opinions that such rights arose out of the Marxist critique and Third World socialism, it would be more appropriate to say that Engels' and Marx' analysis derived from perusal of statutory reports under the United Kingdom Factory Act of 1833 and the Mines Regulation Act 1842, as well as from Select Committee and Royal Commission Reports to be found in Manchester and the British Museum.²⁷

In one major area of rights, cultural and educational rights, it is unfortunately necessary to note that, just as the United Kingdom does today, England lagged far behind other countries in fleshing out the concept of educational rights. At the forefront of countries implementing such rights in practice were Prussia and later France, with her 19th century development of secondary school education. Scotland was even more prominent, making universal educational provision through Kirk

schools from 1696, with its Act for Settling of Schools, before Frederick William I of Prussia in 1717 provided for compulsory schooling, an enlightened enthusiasm not matched by the measures for its implementation. British American colonies with Quaker or Dissenter traditions had earlier provided universal schooling, beginning with schools in New England towns in the 1630s and Massachusetts's 1642 requirement that children be taught to read and be trained to work. The background against which education became seen as a state duty and ultimately as an individual's right was in fact set by Luther's 1524 letter to the German municipalities, followed by the establishment of town and village schools in Saxony in 1528 and later in Württemberg and other principalities. In Scotland John Knox's 1560 *First Book of Discipline* established ideas about virtuous education and godly upbringing still prevalent in Scotland, while Comenius (1592–c.1670), a Moravian exile and disciple of Bacon, was responsible for publicising ideas about education throughout Europe. At the same time the English thinker, James Harrington, was advocating compulsory education in his *Oceana* (1656), although his thought had more impact in America than in England. The first advocate of co-education was Mary Wollstonecraft in 1792, although many who have followed her pioneering feminist path would denounce that particular idea as denying women opportunities of full development in a supportive environment prior to going into a mixed world.

The Development of International Human Rights Standards

The fourth contribution resulted from the United Kingdom's role in the spread of human rights ideas and

institutions at the international level. By the end of the 19th century, ideas and institutions similar to those in the United Kingdom and her erstwhile colonies, had become prevalent in industrial societies. They spread throughout independent states in the post-World War II era. International human rights sensibilities were also heightened by 19th century abolition of the slave trade in Africa. This, and humanitarian intervention in the Balkans, was action largely the outcome of British foreign policy. Subsequently, joint American and British policy toward the World War I peace settlement led to treaties to protect Eastern European minorities and to the human rights work of the International Labour Organisation. The ILO, set up on principles proposed by and on an initiative of the United Kingdom, evolved international standards for working conditions, including equal treatment at work and rights of collective bargaining, as well as freedom from forced labour in prisons. It has been responsible for numerous Conventions promoting human rights, not all of which have been ratified by the United Kingdom.²⁸

The turning point ensuring development of international human rights was the Atlantic Charter of August 14, 1941, a declaration of British and American World War II aims. Drafted by Churchill, the Atlantic Charter referred to rights of people to choose their form of government (self-government), freedom of speech and thought, and access by all peoples on equal terms to the trade and raw materials of the world. On Ernest Bevin's suggestion, made through Attlee, references to improved labour standards, economic advancement and social security were added.²⁹ Bevin's influence also ensured continued existence of the ILO, something at that time in doubt.

Ultimately, the new United Nations was founded with a specific Purpose of its Charter being promotion and

encouragement of respect for human rights. Development since then has been continuous, beginning with the UN Universal Declaration of 1948—although by this time Mr. Attlee's Government was less than enthusiastic about setting out human rights in such a document. Since then, the impetus for further international human rights Declarations and Conventions has become unstoppable. They include the two International Covenants of 1966, the Convention on Elimination of Discrimination against Women, the Convention on Torture and the recent Convention on the Rights of the Child. Such Conventions are in the process of creating a growing body of international human rights law, binding states who have ratified and in some cases also indicating the scope of international customary law.

Contemporaneously with UN developments, regional implementation machinery was being developed in Europe with active participation by the Attlee Government. The Council of Europe's Statute decreed that respect for human rights was a condition of membership. The European Convention on Human Rights of 1953, which followed a lengthy drafting process, was a joint Western European achievement. The Convention's vitality in operation owes most to the smaller countries of northern Europe and to Germany and Austria. Although the quasi-judicial Commission created by the Convention was capable of hearing individual petitions from 1955, the United Kingdom and France only recognised the Commission's competence to hear petitions from individuals in 1966 and 1974 respectively. Once that individual right of petition was accorded, the United Kingdom made a major unintended contribution to the growing European jurisprudence of human rights: of 108 cases in which the European Court of Human Rights had by 1989 found violations, 23 came from the United Kingdom. The United Kingdom was, until 1987,

also disproportionately predominant in relation to applications brought to and declared admissible by the European Commission of Human Rights. Although many applications were lodged in 1988 and 1989, the making of a large number was a manifestation of the level of consciousness of human rights by United Kingdom lawyers, rather than a reflection of a proportion of violations higher than those by other European States when regard was had to the size of the United Kingdom's population. Indeed, in 1989, Italy and France were prominent among States receiving attention from the Commission.

Paradoxically, because of the United Kingdom's participation in European institutions, human rights traditions have been reincarnated in the land of their birth, which only too often seemed to treat them as being embalmed. Such traditions are flooding back as a result of decisions by the European Convention machinery, which indirectly applies pressure for conformity with human rights standards as these are developed by the Council of Europe's Commission and Court of Human Rights. Human rights law also comes in through the EEC's European Court, whose judgments have directly accorded greater rights to workers and more equality of the sexes than that given by the United Kingdom's own law including United Kingdom courts' interpretations. European Court judgments must be applied by United Kingdom courts and contrary statutes cannot stand against them. In contrast, decisions by European Convention organs are not directly applicable, although the United Kingdom is internationally obliged to enact amending laws and to change its administrative practices.

A most important consequence of judgments or opinions by the Convention organs has been comprehensive reconsideration of the need for inserting safeguards

in the special emergency laws applicable in Northern Ireland. Procedures under the European Convention have also occasioned alterations in the Prison Rules, which imposed restrictions on visits, correspondence and access to the courts. Laws have had to be changed following judgments on corporal punishment in Scottish schools, on the criminality of homosexuality in Northern Ireland, on unfair discrimination in applying the immigration rules, on inadequate safeguards regarding detention of persons of unsound mind, on indeterminate prison sentences, on inadequate safeguards to protect parental rights when children are placed in care, on limits on the rights of the press to report pending proceedings because of the law of contempt of court, on clandestine telephone tapping and on continuing covert surveillance by MI5 of civil liberties campaigners. Embarrassment because United Kingdom laws and administrative practices are repeatedly being found by an international body to be in contravention of the United Kingdom's human rights obligations has become one of the strongest arguments for incorporating the Convention directly into the municipal law of the United Kingdom.

The Enterprise of Theorising

The fifth contribution is the current Anglophonic enterprise of theorising. There is a virtual industry of thinkers busy defining and formulating concepts for discourse about human rights and related topics. Using the products of these philosophical workshops, thinkers from different traditions are able to debate, reflect on

their values and cultural practices and attempt to resolve differences. Some conflicts of value now seem irreconcilable, for example, the unalterability and unquestionability of religious beliefs in systems condemning heresy and apostasy, the place of women in various societies and states and the necessity for preserving female chastity by infibulation in certain traditional societies. Yet, in the long run, philosophical and historiographical discourse may assist by encouraging scholars from those traditions to re-examine them, just as the views of the Church Fathers were questioned and reinterpreted. For example, if the views of the Doctors of Law in the three centuries succeeding the Hegira were treated by modern Muslim scholars as being only historical exegesis (a few already do this), the human rights of women in Africa and Asia would be much enhanced in practice.

The nature and extent of values, the relationships between the society as a whole and individuals, also interacting with each other, and consequential moral claims and legal rights have varied greatly in different places and at different times. Their analysis and the construction of moral theories has in recent years become a major activity amongst the chattering classes at Oxford and across the water in former British colonies. Philosophers, legal, moral and otherwise, have sought to rationalise either a rights-based ideology or one in which human rights are a major component. Utilitarians, the successors of Bentham, who famously described natural rights as simple nonsense, have engaged in this task too, but, despite sophisticated reformulations of principle, their criterion of utility must, in the last resort, override rights should there be a conflict. Modern followers of Kant (1724–1804) have also attempted to construct moral theories, implicitly relying on Kant's presuppositions that man has freedom and capacity to reason; that the nature of human reasoning is such that there are

principles to which any reasonable being must of necessity assent; and that in a world of rational beings the principle would be recognised that persons must necessarily be treated as ends and not as means. In this Hamlyn context, I must add that the great German philosopher, in building his metaphysics, relied heavily on ideas propounded in the United Kingdom, especially by Hutcheson and Hume.

This modern analytical revival of debate about moral, natural or human rights stems from Herbert Hart, who in 1949 alerted philosophers to W. N. Hohfeld's analysis of rights and duties. They had ignored the preoccupations of their jurisprudential country cousins, who, in a line running through Bentham, John Austin, Sir John Salmond and John Chipman Gray to Hohfeld, had analysed and developed Hobbesian concepts of right and duty.³⁰ Hart also re-synthesised the concept of law, driving home the necessity for evaluating law in terms of morals. He set the terms of the debate continued by Ronald Dworkin³¹ and more systematically developed by Joseph Raz. In *The Morality of Freedom* Raz has produced a tripartite political theory, linking freedom and its role in politics to a theory of justice and a theory of institutions.³² Hart also influenced John Finnis, who, building on Aquinas and Thomist thinkers, attempted to construct a modern theory of Natural Law and human rights.³³

As the delectations of analytical jurisprudence are either before or behind most lawyers, I will say no more than that rights-analysis assists rational discourse by ensuring clarity of concepts when talking about obligations and the relationships of parties involved, including who has what entitlement against whom, upon what conditions, for what purposes and how this is exercisable. Clarity comes from differentiating and relating various kinds of rights (rights *stricto sensu*, privileges or

liberties, powers and immunities) and their correlatives (duties, no-claim rights, liabilities and disabilities).

Hart's intervention was a major factor in the Anglo-phone renaissance of moral philosophy among linguistic, liberal and conservative philosophers and historians of thought. Their discussion has fed into popular debate, the newspapers, lawyers' talk, and even that of the general public, albeit incoherently in bits, like wreckage from a ship. But the grand philosophic enterprise has over the last 40 years swept away much confusion by clarifying the concepts of values, goods, reasons, objectivity, subjectivity, relativism, pluralism, scepticism, ideology, altruism, personal identity, individualism, autonomy, agency, responsibility, freedom, liberty (positive and negative), preferences, priorities, equality, justice and act-, rule- and preference-, utilitarianism. Many such theorists have sought to devise coherent accounts of the relationship between authority, liberty, equality, justice and fairness. Other non-lawyer academics, including economists, have attempted to construct theories about moral rights and their place in moral systems. The asserted logic is that moral rights are firmly founded in the necessary conditions of human action and life. That is in effect a utilitarian assessment that if men are to live in a stable society, certain moral rules are necessary.³⁴

Another development has been the production by historiographers and philosophers of histories of concepts and ideologies, including that of human rights. Their analysis of the conceptual framework and languages in which ideas were produced has revolutionised discourse about traditions by providing paradigms showing how traditions are embedded in the social structures of the real world. The paradigms also illuminate the limits of thinking within a tradition and the modes of transformation of thought.³⁵ One major

consequence of this approach has been debate about various conceptual languages for talking about the history of ideas, namely civic humanism and republican or conservative citizenship. Such discourse has focused in a secular fashion on the institutional, moral and material conditions of free citizenship in a political community. Discussion of socialist humanism has, because of Eastern European political events, been rendered *passè*. Yet, its earlier theoretical debates, even if not its practices, showed that there is no logical necessity for rights to be based on theories of moral individualism. The current talk is of contrasts between liberal individualism, possessive individualism, civic humanism and communitarianism, which has become the flavour of the moment.³⁶

Live philosophers, political scientists, sociologists, social policy scientists and administrators have, it seems, now enslaved our political leaders, with debates on these concepts and their practical implications entering the public political domain. The outcome has been that, other than in recently-liberated Eastern Europe, old-fashioned liberal individualism has become regarded as unvirtuous and description of the beliefs of politicians in such terms is regarded as a condemnation. Even so, it is a misconception to think that any major modern Western leader contends that society is made up of independent rational beings who are free to choose what is the best for them and do so on the basis of selfish individualism, let alone on the basis of unbridled acquisitiveness. "Best for them" in the view of all leading Western politicians implies that persons, as social animals, will not be satisfied unless they can also contribute to improving collective life. It seems that we are all communitarians now—except when it comes to diminishing the powers of local government and there too qualifications must be made.

Conclusions on the Significance of the United Kingdom's Contribution

I do not apologise for coarsening the ideas of philosophers and historians in seeking to popularise the intellectual basis of the United Kingdom's human rights' traditions. Nor am I embarrassed that a hint of patriotism or of conforming to the civic virtues may provoke charges of jingoism and Victorian values. I believe that the people of the United Kingdom should celebrate their significant role in developing and implementing human rights thinking. This we should do, not to give any comeuppance to those who have sought to monopolise intellectual traditions and to condescend to a nation of shopkeepers' daughters and sons, but to remind ourselves both of what our traditions mean and what their continuance requires. I am not bringing any news when reaffirming that thinking about history and theory is a social activity and that our speech-acts, and to coin some jargon, writing-acts, reading-acts, listening-acts and refraining-acts, create new thoughts which affect our dealings and relationships. Study of human rights thinking affects the whole world of thoughts, necessitating consideration of human political, economic and social institutions, how our lives should be regulated and how men in society should live. Again, when we talk and think of society or groups, whether from the smallest club to the State, we are, in the words of Ernest Barker, talking of

“organisations of persons, or schemes of personal relations . . . made by the mind of man . . . constructed by the thought of persons, consisting in the thought of

persons, sustained by the thought of persons and revised (or even destroyed) by the thought of persons."³⁷

Prime Minister Thatcher's Court philosopher may well have told her that Barker also emphasised that organisations and societies were "never persons themselves, in the sense in which individuals are persons." Speaking philosophically, society is not a material "thing" and is certainly not something tangible. Anyone who says "there is no such thing as society" is not thereby advocating unsympathetic social policies towards the dwellers of run-down industrial centres or the groups of homeless people sleeping on inner city streets. Their support or otherwise for such policies must be a separate matter for empirical assessment. Equally, insistence on individual personal responsibility does not imply failure to recognise that group behaviour, family experience and living conditions affect attitudes and behaviour of offenders, including football fans, vandals, petty thieves, drop-outs and muggers. Perhaps the conclusion politicians should draw is that it is dangerous to use philosophical language to the lay public, because critics are often less than clever by half. Press commentators are not cognisant of theories of corporate and juristic personality, which, while positing fictional personality, also take the philosophical view that only individuals can be responsible moral agents and that it is essential to prevent individuals avoiding their personal responsibility for advising, supporting or opposing action by notionally offloading this onto a transcendent being. The result of use of philosophical turns of phrase is likely to be misinterpretation and the creation of new myths, in turn affecting the conduct of their audiences.

I hope that my own use of philosophical language and concepts has not obscured the crucial contribution

United Kingdom ideas, institutions and interventions in international affairs have made to the growth of human rights standards. The outcome is of permanent significance, even if certain latter-day postures by some United Kingdom Governments have been less than heroic.³⁸ The international community has created a *universal* international *legal ethic* of human rights in the form of international human rights standards and is well on the way to creating international human legal rights. States now have duties to each other and to their subjects to observe human rights. To this extent the world has been turned upside down.

Those who have entered international treaties do not always have the same values as their successors will have and may not even reflect those of their communities at the time of the treaty. Furthermore, there is a lack of universally-shared ideals between societies and cultures. It will take a very long time before a universal moral tradition arises. Nonetheless, irrespective of the arrival of that time and even if the positive law of particular states fails to accord or observe particular human rights, the world community has acquired standards by which the conduct of states can be judged. The growing body of international Conventions and Declarations are giving a more concrete meaning to the various conceptions, with detailed criteria, exceptions and limitations being inserted. Because the instruments have been drawn up by lawyers and statesmen, rather than by metaphysicians, the framers have attempted to reconcile the antithesis between state or collectivity and individual, which has for so long plagued political thought. The two U.N. International Covenants of 1966 provide specifically that the individual has duties to other individuals and to the country to which he belongs. Obviously, the criteria enunciated need interpretation, choice between them and application. No

criterion ever gave certainty, but at least these provide starting points. It should go without saying, that neither instruments nor enforcement institutions, international or national, will ensure compliance with human rights, unless those who operate such institutions, and the great majority of any society in which they are located, are imbued with the *values* which informed the instruments.

Notes

¹ This is a reference to current modes of thought about Europe and an acknowledgement of my indebtedness to J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 1975). Professor Pocock, together with Professor Quentin Skinner and Dr. John Dunn, has revolutionised approaches to studying the history of political thought as the history of ideologies. Pocock explains that there have been certain enduring patterns and themes in the temporal consciousness of medieval and early modern Europeans which gave rise to problems of historical self-understanding and to confrontation with such problems at particular moments, especially when contemplating instability, change and the temporal finitude of societies organised in particular modes. In Pocock's words: "We have both been associated with the programme of remodelling the history of political thought as the history of political language and discourse; it seems to us that history in this field can better be written if we focus our attention on the acts of articulation and conceptualisation performed by thinkers as agents in the world of speech and on the matrices of language and rhetoric within which they are constrained to speak." See J. G. A. Pocock, "The Machiavellian Moment Revisited: A Study in History and Ideology," in *Journal of Modern History*, No. 53 (1981), p. 50. This methodology reveals development of political traditions of thought, with constant evolution and modification of concepts (for example, of balanced Government and of constitutionalism) of values (for example, public virtue and justice) with changing emphasis on particular public virtues (for example, cooperativeness as a citizen) and confrontations at various times between particular concepts (for example, the role of arms and property or of public virtue and corruption in shaping the civic personality). Modes of speaking about such concepts constitute idioms, institutional languages or rhetorics and are a constraining

background, which itself is modified with shifts of meaning in the course of usage. Texts by thinkers (writers) have consequences for the institutional language in which their acts of writing are performed, injecting new words, facts, perceptions and rules of the game. Texts (that is the writings of thinkers) are acts by their authors and thus historical events, translated and re-interpreted by subsequent readers, and particular actions in long processes.

See also J. G. A Pocock, *Virtue, Commerce and History: Essays on Political Thought and History, Chiefly in the 18th Century* (Cambridge University Press, 1985), Chaps. 1 and 2. For a simpler account see J. G. A. Pocock, "Texts as Events: Reflections on the History of Political Thought" in *Politics of Discourse*, Kevin Sharpe and S. N. Zwicker ed., (University of California Press, London, 1987), pp. 21-34. In his *Politics, Language and Time: Essays in Political Thought and History*, (Methuen, London, 1972), Pocock gives examples which will strike a note with non-theory oriented lawyers. He shows that Edmund Burke was first to point out the historical significance of the fact that the English talked about their liberties in the common law language of real property and that John Locke was talking in the language of natural jurisprudence.

² The Estates-General's Declaration of the Rights of Man and the Citizen of August 1789 (henceforth the Rights of Man) was preceded by Bills of Rights in Virginia and other British American colonies. From the mid-17th century, American colonial assemblies passed such Bills. For example, in October 1683, the people of New York met in assembly with their first action being a claim to the rights of Englishmen in a "Charter of Franchises and Privileges." The Estates-General's drafting Committee for the Rights of Man had studied the earlier American models and members like the Abbé Sièyes had for over a decade discussed the American constitutions. Lafayette's own draft Declaration had been vetted by Thomas Jefferson. During the 1989 bi-centenary celebrations one could easily have been forgiven for believing that the rights of man were invented in France.

³ *De Legibus et Consuetudinibus Angliae*, a compilation by many, came into Bracton's hands in the 1230's and was published about 1250. Bracton's views on the limits of kingship influenced Hobbes, Filmer, Algernon Sidney, Locke and generations of lawyers and judges. Claude de Seyssel (1450?-1520), theorist of French constitutionalism, used Bracton's bridle metaphor in his theory of the three bridles. His French *La Grand Monarchie de France* (1519) described *la religion*, *la justice* (the Higher Courts or Parlements) and *la police* (the body of the people well-ordered in three estates and under certain conditions) as complex legal and institutional constraints resulting in a flexible and a durable constitution.

- ⁴ See Bernard Schwartz, *The Great Rights of Mankind*, (O.U.P., New York, 1977), for an illuminating account of the development of written constitutions and protections for liberties in the British American colonies.
- ⁵ Comparative comments on Locke and Penn are made by George Bancroft, *History of the United States of America*, (Appleton, New York, 1882 ed.), Vol. 1, pp. 408 *et seq.* and 552 *et seq.* Some historians believe that Algernon Sidney assisted Penn draft his Constitution.
- ⁶ See Jeanne Hersch (ed.), *Birthright of Man*, UNESCO, (New York, 1969), a collection of texts illustrating the universality of concepts of human rights; *Philosophical Foundations of Human Rights*, UNESCO, (1985), especially Fouad Zakaria, "Human Rights in the Arab World: The Islamic Context," pp. 228–241; and R. J. Vincent, *Human Rights and International Relations*, (Cambridge University Press, 1986), pp. 39–52.
- ⁷ The great German Pandectist, Bernard Windscheid (1817–1892) said in 1854:
- "For us there is no absolute law. The dream of Natural Law is over, and the titanic endeavours of recent philosophy have not stormed the heavens," quoted in Carl Schmitt, "The Plight of European Jurisprudence," in *Telos*, No. 83, (Spring 1990), p. 45. An excellent account of the rise and fall of Natural Law thinking is given in George H. Sabine and Thomas Thorson, *A History of Political Theory*, (Holt, Rinehart and Winston, 4th ed., 1973). This text is mandatory reading for all interested in the history of ideas.
- ⁸ Jeanne Hersch, "Report," Theme II, *Universality of Human Rights in a Pluralistic World—proceedings of the Colloquy organised by the Council of Europe, Strasbourg, 17–19 April 1989*, Council of Europe (Pub. N. P. Engel, 1990), p. 102.
- ⁹ Alasdair Macintyre, *Whose Justice? Which Rationality?*, (Duckworth, 1988), and *Three Rival Versions of Moral Enquiry*, (Duckworth, 1990), explain the concepts of incommensurability and untranslatability where two large-scale systems of thought and practice are in radical disagreement. Macintyre sought to show that rational debate between adherents of those two systems or traditions was not impossible and might reveal that one of the contending standpoints fell in its own terms and by its own standards. That may even lead to a re-interpretation within one of the particular traditions. In *Human Rights and International Relations*, Chap. 3, the late John Vincent set out arguments which might bridge the gap between cultural pluralism and universal human rights.
- ¹⁰ Sir William Blackstone (1723–1780), Vinerian Professor at Oxford, translated *Magna Carta* (1759). His *Commentaries on the Law of*

England, (1765–1769) shaped legal education in England and America and long perpetuated his Whiggish account of English constitutional development. His work exemplifies cross-fertilisation of ideas in Europe. His section on Natural Law in his *Commentaries* imports almost verbatim ideas from Jean Burlamaqui, an 18th century Swiss publicist, who popularised Locke and Pufendorf. Again, his view of the separation of powers was shaped by Montesquieu, whose own view had been shaped by Locke. For more cross-fertilisation see Alexis de Tocqueville's comments in *Memoir on Pauperism* which virtually repeats Blackstone's words: "There is nothing which, generally speaking, elevates and sustains the human spirit more than the idea of rights": cited by K. R. Minogue in "Natural rights ideology and the game of life" in *Human Rights*, E. Kamenka and A. E-S. Tay (ed.), (Edward Arnold, 1978), p. 34. Tocqueville added that rights remove the suppliant character of requests from the poor.

¹¹ The concept of rights was present in ancient Athenian constitutions: Blair Campbell, "Constitution, Rights and Religion: The Athenian Example," *History of Political Thought*, Vol. VII. 2, (Summer 1986), 239. Natural rights concepts and theories of the state began their evolution following rediscovery of Roman law texts with comments by the Glossators and the Decretalists after Gratian's *Decretum* of 1140: B. Tierney, "Origins of Natural Rights Language: Texts and Context, 1150–1250," *History of Political Thought*, Vol. X, No. 4, (Winter 1989), 615. For extended accounts on which I have relied see *The Cambridge History of Later Medieval Philosophy*, N. Kretzmann, A. Kenny and J. Pinborg (ed.), (Cambridge University Press, 1982); Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols., (Cambridge University Press, 1978); A. J. and R. W. Carlyle, *A History of Medieval Political Theory in the West*, 6 vols., (London, 1903–1936); Sabine & Thorson, *op. cit.*; O. von Gierke, *Natural Law and the Theory of Society, 1550–1800*, English translation by Ernest Barker, 2 vols., (Cambridge University Press, 1934); A. P. d'Entrèves, *Natural Law*, Hutchinson, (London 2nd ed., 1970); C.B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, (Oxford, Clarendon Press, 1962); Richard Tuck, *Natural Rights Theories: Their Origin and Development*, (Cambridge University Press, 1979); John Finnis, *Natural Law and Natural Rights*, (Clarendon, Oxford, 1980); and I. Shapiro, *The Evolution of Rights in Liberal Theory*, (Cambridge University Press, 1986).

¹² This older usage of "subjective" as "belonging to a political subject" must not be confused with modern usages of that word. Today "subjective" is used correlatively to "objective" by philosophers, psychologists and lawyers. It may mean "having its source in the mind of the subject" or as "peculiar to an individual subject's mental

operations, personality or idiosyncrasy" and is also used in specialist senses. Contract lawyers put forward objective and subjective theories of contract, with objective theories treating agreement as if it were a real thing, externally observable from conduct of the parties, whereas subjective theories consider agreement to be dependent on the intentions present on the mind of each contracting party and, unless these are identical, do not hold there to be a contract.

¹³ The most detailed account is in Tuck, *supra*, n. 11.

¹⁴ They were two of the most significant of many thinkers at the University of Paris, then the major centre of learning. Their writings, together with those of other conciliarists, provided the arguments for reforming Church government by abolishing the supremacy of the Pope, drawing up a plan of constitutional government and establishing a General Council. The conciliar movement led to the first great debates on constitutionalism against absolutism and spread ideas used in later struggles. See Sabine & Thorson, *op. cit.*, Chap. 17.

¹⁵ Lord Normand, in an address delivered in Edinburgh in 1951, describes James VI's subjection to the supremacy of the law, relying on an eye-witness account sent to Sir Robert Cecil. It is quoted in T. B. Smith's Hamlyn Lecture, *The Scottish Contribution*, (Stevens, 1961), p. 58.

¹⁶ *Prohibitions Del Roy* (1607) 12 Co. Rep. 63.

¹⁷ (1610) 8 Co. Rep. 114a.

¹⁸ Sir William Petty (1623–1687) was the father of Economics, his writings even earning praise and being repeatedly quoted by that stern critic, Karl Marx, in Volume 1 of *Capital*.

¹⁹ Legally-trained political theorists made contract the basis of the state, because, according to the great German philosopher Kant, heir to such traditions of thought, the idea of contract was the only possible means of setting the natural rights of the individual within the framework of the state (quoted in d'Entrèves, *op. cit.*, p. 59). I take this endnote as an opportunity to reiterate the seamless web of Western European thought. Strands were contributed by many thinkers I have not mentioned, such as Descartes and Rousseau. A full history of human rights ideas would need to cover much of the history of philosophical and political thought.

²⁰ Wentworth was asserting the privileges of parliamentarians and for his speech was confined to the Tower. In 1587, after a similar speech, he put a series of written questions for ruling upon by the Speaker, enquiring "whether the Prince and state can be mainteyned without this Court of Parliament . . . item, whether there be any counsell that can make or abrogate laws? but only this Court of Parliament." Wentworth was again sent to the Tower, but rather for

conducting conferences in his Inn about the succession to the throne. See J. E. Neale, "Peter Wentworth" in *Historical Studies of the English Parliament 1399-1603*, vol. 2, E. B. Fryde and E. Miller, ed., (Cambridge University Press, 1970), at 253 *et seq.* So far as concerns Milton, the *Areopagitica* later became widely read in Europe after Milton had acquired fame as defender of regicide. It is convenient here to note that British literary figures spread conceptions of liberty in Europe. The diffusion of ideas of liberty and of rights through plays, poetry, essays, tracts and novels is itself a major topic for study. I merely drop the names of More, Shakespeare, Wordsworth, Coleridge, Southey, Dickens, Carlyle and Ruskin, not even mentioning the great figures of the Scottish Enlightenment better known in Europe than south of the border.

²¹ Locke was prudent in not publishing, although he did associate with revolutionary circles. Algernon Sidney (1622-executed 1683), an active republican in the Commonwealth and later Earl of Leicester, was sentenced by Jeffreys for complicity in the Rye House plot. The only overt evidence of Sidney's alleged treasonable libel was his documents, which he claimed were not for publication and which asserted that the King was subject to law and might be deposed. As Dicey pointed out: "In times of passion . . . trial by jury cannot secure respect for justice. The worst iniquities committed by Jeffreys at the Bloody Assize would have been impossible, had he not found willing accomplices in the jurors . . .": *An Introduction to the Study of the Law of the Constitution* (1885), (Macmillan, 10th ed., 1967), p. 395.

²² Polybius (c.200 B.C.—c. 118 B.C.) Greek historian of the rise of Rome, left the earliest existing history of Rome. His *Histories* (c.150 B.C.) explain the constitution's part in Rome's success (Book 6). Polybius much influenced thinkers from Cicero to Montesquieu.

²³ Burke's splendid rhetorical prose in *Reflections on the French Revolution* (1791) was provoked by a sermon given on November 4, 1789, "Discourse on the love of our country" to the London Revolution Society, a Gentlemen's club founded in 1788 upon the centenary of the 1688 English Revolution. (Did the founders of Charter 88 also have this in mind?) Price had supported the ideas of the revolutionaries and the Declaration of the Rights of Man and the Society had thereupon sent a congratulatory address to the National Assembly for storming the Bastille. Price (1723-1791) was a unitarian divine and thinker. Priestley (1733-1804) was a scientist and theologian, virtual inventor of Unitarianism, discover of oxygen, carbon monoxide and soda water and a political thinker. Burke accused them both of viewing with a steady eye the greatest calamities that could befall their country. Part of Burke's aim in writing *Reflections* was to expose what he saw as the evil designs of

Lord Shelburne, First Marquis of Lansdowne (1737–1805) and his creatures, Price and Priestley. Burke dreaded revolutionary activity in England and sought to demolish any claim that the 1688 revolution might be read in such a way as to justify that of 1789. See Pocock, *Virtue, Commerce and History*, Chaps. 9 and 10. See also my second Lecture.

²⁴ Bentham attacked American natural rights theory in a pamphlet in 1776 and in his *An Introduction to the Principles of Morals and Legislation* (1789). His *Anarchical Fallacies*, although written in about 1795, was only published in 1816 and in English in 1843. Apart from direct communication by Bentham to his circle, that text did not influence thinking at the time. Bentham's critique of Blackstone as confused conservative was far more effective and echoed throughout the 19th century. But legal historians and lawyers have appreciated Blackstone's elegant style, his mastery of exposition in systematically describing the constitution and law of England (for the first time since Bracton had done so 500 years earlier), his influence on legal education in England and America and his subtle criticisms of the legal system. There are balanced assessments in A. V. Dicey's *Inaugural Lecture* of 1909, reprinted as "Blackstone's Commentaries," *Cambridge Law Journal* (1932), Vol. IV, 286–307, and in W. S. Holdsworth, *A History of English Law*, (Methuen, 1938), Vol. XII, pp. 702–737. Blackstone observed that the constitution was not in fact so perfect as he had "endeavoured to describe it; for if any alteration might be wished or suggested in the present frame of parliaments, it should be in favour of a more complete representation of the people": *Commentaries*, Vol. 1, p. 171. He explained that he had not descended "to the invidious task of pointing out such deviations and corruptions, as length of time, and a loose state of national morals, have too great a tendency to produce. The incurvations of practice are then the most notorious, when compared with the rectitude of the rule; and to elucidate the cleanness of the spring conveys the strongest satire on those who have polluted or disturbed it."

²⁵ *The General Theory in The Collected Writings of J. M. Keynes*, (Macmillan, 1972), Vol. vii, p. 383. Keynes emphasised that long-dead controversies and long-exploded sophistries still permeate our atmosphere of thought and "dogma forged in the 17th and 18th centuries to throw down Kings and prelates" had literally entered the nursery: *Essays in Persuasion* (on *laissez-faire*) Vol. ix, p. 280.

²⁶ Because they were less well-known abroad, I have not talked about Scottish judicial decisions, which were always more enlightened than those in England. Professor Smith's Hamlyn Lecture demolished the popular superstition that Lord Mansfield in *Somerset's Case* (1772) 20

St. Tr. 1 vindicated personal liberty and condemned slavery generally. Mansfield upheld the legal validity of slavery contracts, merely holding that a slave in England could not be sent back to a colony for punishment. In contrast, in 1757 the Court of Session had queried whether the law would countenance the institution of slavery and in 1778 held that it could not be recognised: Smith, *op. cit.*, pp. 196–197, making appropriate qualifications because of the remnants of the laws in Scotland on indentured labour, abolished in 1799.

²⁷ F. Engels, *The Condition of the Working Class in England*, published in 1845 in Leipzig, was based on these reports. Engels in turn influenced Marx. A reading of *Capital*, Vol. 1, shows the great extent to which Marx relied of the same reports for his facts and certain analyses.

²⁸ Significant Conventions not ratified are No. 33 (in force since 1935) on the minimum age for non-industrial workers, No. 105 (in force since 1959) on the abolition of forced labour and No. 131 (in force since 1972) on the fixing of minimum wages. Continuance of non-ratification has been decided by Governments drawn from both major political parties. The 1973 Convention on the minimum age (No. 138) has also not been ratified. 78 out of 169 Conventions had not been ratified by the United Kingdom by December 1, 1989: *List of Ratifications of Conventions*, International Labour Office, (Geneva, 1990).

²⁹ Winston Churchill, *The Second World War*, (Cassell, London, 1950), Vol. III, pp. 385–400. The British War Cabinet put social and economic rights firmly in the international sphere. Henceforth such rights were claimed as well as traditional human rights.

³⁰ See Hobbes, *Leviathan* (1651), Chapter xiv, some of Bentham's views on rights are conveniently printed in "Nonsense upon Stilts," Jeremy Waldron, ed., (Methuen, 1987); for a comparison of Bentham and Hohfeld, see Ross Harrison, *Bentham*, (Routledge & Kegan Paul, 1983), Chap. 7; one upon whose work Hohfeld built was John Salmond, *Jurisprudence*, (London, 1902); another was John Chipman Gray, *Nature and Sources of Law*, (New York, 1909); other predecessors' work is discussed in Roscoe Pound, "Fifty Years of Jurisprudence," (1937) 50 H.L.R. 557 at 571–572; and Hohfeld's two essays, originally printed in 1913 and 1917 in the Yale Law Journal, posthumously published as W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, W. W. Cooke, ed., (Newhaven, 1919).

Hart's revival of discussion was preceded two years earlier by Margaret MacDonald, "Natural Rights," *Proceedings of the Aristotelian*

Society, Vol. 47 (1947–47). Hart's own work began with publication of "The Ascription of Responsibility and Rights" (1948–9) Vol. 49, *Proceedings of the Aristotelian Society*, 171–194. His inaugural Lecture "Definition and Theory in Jurisprudence" in (1953) 70 L.Q.R. 37 was followed by "Are there any Natural Rights?" (1955) 64 *Philosophical Review*, 175–191.

³¹ H. L. A. Hart, *The Concept of Law*, (Clarendon, Oxford, 1961). Ronald M. Dworkin took him up in "Is Law a System of Rules?," published in 35 U.Chi.L.Rev. 14 (1967) and reprinted in *Essays in Legal Philosophy*, R. S. Summers ed., (Blackwell, Oxford, 1970), pp. 25–60. The debate continued in Dworkin's *Taking Rights Seriously*, (Duckworth, London, 1977 revsd. ed. 1978). It was taken further in *A Matter of Principle*, (Harvard University Press, Cam., Mass., 1985), and in *Law's Empire*, (Fontana, London, 1986). Dworkin argues that a basic tenet of both justice and democracy is that every person must be treated with "equal concern and respect." A striking impact has been made by his view that rights are trumps, first expressed in *Taking Rights Seriously*. Subliminal influences from great earlier writers come through in all thinkers: Dworkin's famous "trumps" metaphor comes from Hobbes, *Dialogue between a Philosopher and a Student of the Common Law of England*, "Of Punishment" (1681). Hobbes pointed out: "In a matter of Government when nothing else is turned up, Clubs are Trump." Cp. Dworkin: "Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole" in "Rights as Trump" in *Theories of Rights*, J. Waldron ed., (O.U.P., 1984), p. 153. Similarly, *Law's Empire* is a phrase from James Harrington: "Government . . . is an Art whereby a civil society is instituted and preserved upon the Foundations of common Right and Interest; or (to follow Aristotle and Livy) It is the Empire of Laws, and not of Men," *Oceana* (1656), *Works*, p. 37, a text surely read by any American liberal or civic republican philosopher. It may be that the genre of philosophic discourse, however, discourages an unnecessary apparatus of footnotes.

³² For Raz's first major development building on Hart's work see J. Raz, *The Concept of a Legal System*, (Clarendon, Oxford, 1970). Rights were taken up as an issue by Raz in "Right-based Moralities" in *Utility and Rights*, R. G. Frey ed., (Blackwell, Oxford, 1985), pp. 42–60 and in *The Morality of Freedom*, (Clarendon, Oxford, 1986). A stimulus to philosophical debate was J. L. Mackie, "Can there be a Rights-based Moral Theory?" in *Mid-West Journal of Philosophy*, (1978), Vol. III, now reprinted as Chapter VIII in J. L. Mackie, *Persons and Values: Selected Papers*, J. Mackie and P. Mackie ed., (Clarendon, 1985), Vol. II.

Some philosophers associate the revival of modern concern for rights with the publication of John Rawls, *A Theory of Justice*, (Clarendon, Oxford, 1971). If not originally a rights-based theory, Rawls' revision in his Tanner Lectures makes his work rights-centred if not rights-based, and he did this in response to Hart's critique. See "The Basic Liberties and their Priority" in *Liberty, Equality and Law*, S. M. McMurrin ed., (Cambridge University Press, 1987), pp. 3-87. Rawls explains how the basic liberties are specified and adjusted to one another in the application of his two principles of justice. A right-wing rights-based theory was put forward by Robert Nozick in *Anarchy, State and Utopia*, (Blackwell, Oxford, 1974). Various perspectives are dealt with in useful collections of essays such as *Human Rights*, E. Kamenka and A. E-S. Tay ed., (Edward Arnold, London, 1978); *Theories of Rights*, Jeremy Waldron ed., (O.U.P., Oxford, 1984); *Human Rights*, E. F. Paul, J. Paul and F. D. Miller ed. (Blackwell, Oxford, 1984); *Utility and Rights*, R. G. Frey, ed. (Blackwell, Oxford, 1985), and UNESCO, *Philosophical Foundations of Human Rights*, (H.M.S.O., 1986). There is a good bibliographical essay in J. Waldron, "Nonsense upon Stilts," *supra*. Comprehensive bibliographies on the nature and foundations of rights are given by R. Martin and J. W. Nickell, (1978) *Political Theory*, Vol. 6, 395-413 and (1980) 17 *American Philosophical Quarterly* 165.

³³ J. Finnis, *Natural Law and Natural Rights*, (Clarendon, Oxford, 1980).

³⁴ See the writings of Amartya K. Sen, especially *Choice, Welfare and Measurement*, (Blackwell, Oxford, 1982); *Freedom of Choice: Concept and Content*, Alfred Marshall Lecture, August 22, 1987, World Institute for Development Economics Research of the United Nations University; and *On Ethics and Economics*, (Blackwell, Oxford, 1987). The latter book gives a good Sen bibliography. The start of ideas like those of Professor Sen seems to have been the work of K. J. Arrow, *Social Choice and Individual Values*, (John Wiley & Sons, New York, 2nd ed., 1963). For other writers with utilitarian ideas see *Justice and Economic Distribution*, J. Arthur and W. H. Shaw ed., (Prentice-Hall, Eaglewood, Cliffs, 1978). See also essays in the collection *Utility and Rights*, R. G. Frey ed., *supra*; *Essays in Human Rights*, Paul ed. etc.; J. L. Mackie, *Persons and Values*, *op. cit.*; R. M. Hare, *Moral Thinking*, (Oxford, 1982); and A. K. Sen and B. Williams ed., *Utilitariansim and Beyond*, (Cambridge University Press, Cambridge, 1980).

³⁵ See note 1, *supra*. I should here acknowledge a particular debt to Alasdair Macintyre, *Whose Justice, Which Rationality?*, *op. cit.*, Chaps. XVII-XX. See also his *After Virtue: a Study in Moral Theory*. Those who are willing to navigate deep philosophical waters in order to understand the role and influence of the rhetorical rationality in human lives and to acquire ability to demystify personal theoretical

positions, should attempt to read S. L. Hurley, *Natural Reasons: Personality and Polity*, (O.U.P., Oxford 1989). As the author warns, it is not easy to do so, but this important work analyses most of the concepts raised in philosophical debate and draws connections between philosophy, political theory, law, economics and decision theory.

³⁶ "Liberal Individualism" as developed by the end of the 17th century had several elements. It assumed that individual will was the cause of all actions; that each individual had equal worth as a human being and impliedly had the same capacity for reasoning and the same interests; that a political constitution could only be justified when it was consented to by and functioned in the rational interests of each individual; that individuals had a private sphere of freedom that could not be entered without their consent; and that they were endowed with civil rights to preserve their autonomy. This is sometimes, with unconscious pejorative overtones, described as a negative libertarian view. For a comprehensive analysis, see Shapiro, *op. cit.*, n. 11 *supra*.

Talk of "Possessive Individualism" became fashionable after publication of the *Political Theory of Possessive Individualism*, n. 11 *supra*. Macpherson pointed to the possessive quality of liberal individualism which was to be found in its "conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them": p. 3. Later Macpherson foresaw the possibility of changes in the concept of property as no longer being solely private and exclusionary: *Democratic Theory: Essays in Retrieval*, (Clarendon, Oxford, 1973).

"Civic Humanism" or "Civic Republicanism" is a concept (transmitted from Aristotle via Machiavelli and English 17th century thought to the British American colonies and modern day thinkers) according to which man is by nature a citizen, fulfilling his nature (political virtue) by active participation in a self-governing republic in which each equal citizen enjoys moral and material autonomy. The history of the concept is explored in Pocock, *The Machiavellian Moment*, and further analysed in *Politics, Language and Time*, *supra*, n. 1. Civic humanists believe human beings can be trained and disciplined into being good citizens, will acquire civility and manners, will avoid corruption and will be motivated to seek the good of the commonwealth instead of mere personal advantages. They would become active citizens engaged in the service of the community (commonwealth).

"Communitarism" refers to theories of community, put forward since the late 1970's by philosophers and lawyers critical of recent moral and liberal thought for its failure to provide adequate accounts

of what is good for man, how he should quest after the good life and of the concept of political community. These things go in circles: if Gierke and Barker were fashionable reading there would be less need for such a critique. The communitarian thinkers build on Aristotelian concepts and traditions of civic humanism. Alasdair MacIntyre, *After Virtue, A Study in Moral Theory*, (Duckworth, 2nd ed., 1985), is essential reading. The modern communitarian theory is perhaps best set out in M. J. Sandel, *Liberalism and the Limits of Justice*, (Cambridge University Press, 1982), where he argues for community on the basis that members of society do not merely profess and pursue aims individually and to common effect, but have a shared vocabulary of discourse, a background of implicit practice and understandings, and, as members of the community, conceive their identity as to some extent defined by the community of which they are part. Thus their affections are enlarged, and community is a constituent of their identity. See also Finnis, *op. cit.*, Chap. 6. A bibliography is given in Waldron, "Nonsense upon Stilts," pp. 229–230. If communitarian doctrine is interpreted as overriding the interests of minorities and dissenters, it risks being totalitarian. However, all thinking in terms of models or conceptual theories risks exaggeration. Waldron, at pp. 207–209 effects a reconciliation between communitarianism, liberalism and rights theories, urging that it is values which must be prioritised in any given situation and that it is not a simple matter of whether community or individual interests (and, I add, particular rights or interpretations of these) ought to prevail.

³⁷ Ernest Barker, in his introduction to Gierke, *Natural Law and the Theory of Society*, *supra*, at p. xvii.

³⁸ e.g. the United Kingdom did not ratify the United Nations Covenants on Civil and Political Rights until it became necessary in 1976 to ratify or otherwise forfeit the opportunity of being elected to the Treaty-supervising body, the Human Rights Committee. The United Kingdom's record on ratification of ILO Conventions is also deficient as indicated in n. 28, *supra*.

2. Human Rights, Values, Choice and Social and Economic Rights in Practice

The Themes in Outline

In this second lecture I define moral or human rights, legal rights and international human rights and set out the context in which these terms are used, as well as their significance. Having already outlined the evolution of civil and political rights, I now give the parallel history of social and economic rights. I then indicate why today rights cannot be sensibly compartmentalised. Having engaged in human rights talk, I go on to its psychological consequences and the inevitable linkage between human rights and values. I then explain what is meant by "values" and how behind each human right there stands at least one value. Because values are differently interpreted and frequently in competition, the claims which particular values justify impose dilemmas

of choice. I then seek to demonstrate that since values, human legal rights and governmental economic policies are interlocked, public policy choices in allocating resources as between competing claims are value-determined. The particular choices made dictate the extent in practice of social and economic legal rights. I conclude by arguing that, unless there is an attempt to reconcile human rights values with Treasury principles, Governments may fail to conform to international human rights standards and to the United Kingdom's human rights' traditions.

What is meant by Human Rights?

I use the words "human rights" to refer to the concept that every member of the human race has a set of basic claims in virtue of his or her humanness. Historically, these claims covered "natural rights" to life, liberty, property and freedom of religion. They later came to cover all traditional civil liberties (the rights of man) and rights of political participation (the rights of the citizen). Subsequently they were extended to cover "social, economic and cultural rights," a phrase which refers to the duty of the state to provide, without discrimination, for those material conditions, including education, working conditions and welfare benefits, which will result in a minimally decent standard of living, that is, freedom from want or "welfare rights." The preamble in the Universal Declaration of Human Rights sums up:

"The peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person

and in the equal rights of men and women and have determined to promote social progress and *better standards of life in larger freedom.*"

Several points need noting. Firstly, the Declaration is a reaffirmation of the "faith" of peoples on these matters. Secondly, the basis is membership of the human race. Thirdly, such rights are universal and can therefore be ascribed to human beings irrespective of the laws of particular states. Fourthly, they cover significant aspects of human freedom and conditions of life, not all claims. Fifthly, duties are imposed on governments to promote these claims. As I mentioned earlier, the Declaration was expanded by the two UN International Covenants, which emphasise that the individual has "duties to other individuals and the community to which he belongs." The Covenants permit restriction on rights in order to protect rights and freedoms of others and to protect the common good as indicated by certain specified criteria.

An account of human rights involves setting out the major rights and duties of man in society, in relation to other individuals, the institutions within which all live and the organs of government. In short, it constitutes a political or moral theory. That theory can be summed up in two propositions: rights are means to secure the good life for the individual in a society; and, governmental organs have the task of adjusting conflict between the equal rights of individuals in order to secure the good life for all participating in that society. When talking about human rights we are, therefore, talking about moral rights, rights in terms of a postulated moral and political system, according to which relevant rights ought to be respected, with governments being obliged to enforce those rights, including those held against the state.

There are of course many other moral rights arising from special social relationships such as schoolteacher and pupil, doctor and patient and relationships at work. Many moral rights arise out of life's daily dealings, which place one person under a moral obligation to another. I am not here concerned with such moral rights, confining this discussion to the basic rights alleged to inhere in all persons by virtue of their personhood.

Hereinafter, I will use the phrase "human rights" only in the context of talking about *rights as part of a moral and political theory*. The importance of distinguishing between that basic category of *moral rights* (human rights) and *legal rights* was pointed to implicitly by Hart when making the distinction between morality and law. Human rights provide criteria for making value judgments. Human rights reflect normative judgments as to what is permissible to be done by free and responsible persons, acting either individually or collectively through their governments. Human rights can be used to evaluate the law of states by deciding whether the standards inherent in such rights are reflected in positive law. They also provide justifications for conduct and arguments for changes to existing law to give effect to them.

The international political system, as I indicated earlier, has recognised moral rights, which are in process of being converted into international customary law and are constantly being added to by UN Declarations or multilateral treaties for progressive ratification by all states. When referring to moral rights incorporated in this fashion as international standards, I shall hereinafter speak of "international human rights standards," that is, moral rights set out in international Declarations or Conventions, such as the UN Universal Declaration on

Human Rights 1948. Finally, there are "international human rights," rights which have already become part of International Law, either because recognised generally by states as such or by judgments of the Permanent Court of Justice, or as specific rights set out in the United Nations' constitution, the UN Charter. International human rights standards and international human rights are, if created by treaty, automatically and directly incorporated into the internal municipal law of many states, where they are "self-executing." This is a very different position from that obtaining in the United Kingdom, where an Act of Parliament is required for incorporation of International Law and of international treaties, even those to which the United Kingdom is a party, in order to make their contents part of the law of this country. This explains the need to enact the European Convention of Human Rights.

I shall use "legal rights" to refer to rights recognised in the law of states. I use "law" here to refer to the body of binding rules, institutions and procedures regulating relationships and orderly change, and protecting interests of men living together in a political society, controlling a particular territory. Such a society I shall refer to as the "state." Legal rights entitle the right-holder to insist on their observance, and various remedies, judicial and otherwise, are available. Law and legal rights are pervasive at all levels of social life: there are legal rights governing family relationships, education, working conditions, property—including any form of wealth and resources—and governmental relationships with individuals. Many legal rights are the positive law counterpart of human rights as moral rights and therefore reflect values as well as protecting particular interests. For example, the rights of an accused person to fair pre-trial procedures and trial involve notions of fairness and justice and protect that person's liberty.

To sum up, there are moral rights or human rights, which we invoke in order to evaluate or to argue for change; there are legal rights, accorded by the positive law of states, that is, in their municipal law, where such rights develop because of the particular state's cultural traditions and general consensus; there are international human rights standards set out in formal international declarations or treaties which, because as yet they only bind some states, are still not universal in their operation; and there are international human rights which have arisen out of international customary law and treaties binding all states.

The four categories may or may not be congruent. Over time, conceptions concerning and the extent of recognition of rights and standards have altered depending upon changing circumstances and public views of political and social ills. For example, although social and economic legal rights had to a limited extent existed in the positive law of states since the 15th century, such rights were first mentioned as natural or human rights in the 18th century, and only generally recognised as human or moral rights after 1890. When, from 1919 onwards, the International Labour Conference began drafting ILO Conventions, international human rights standards resulted, a process carried much further by the Universal Declaration of 1948 and the International Covenant on Economic, Social and Cultural Rights of 1966. Few international legal rights now exist, the best known being the right of peoples to self-determination and the right not to be subject to genocide, to which one might retort since Halabja: "tell that to the Kurds." Perhaps, ultimately, in a perfect democratically and economically developed society, rather than law withering away, there will ultimately be the equal legal *right* of all citizens to be free and to live well!

The Evolution of Welfare Rights in States

In my first Lecture I mentioned United Kingdom, German and French contributions to development of the concept of economic and social rights. The story is, of course, more complex.¹ In medieval Europe lords', vassals', villeins' and serfs' reciprocal relationships gave basic protection for the poor, sick, old and needy. Later, similar duties covered tenants and were implied in master and servant relationships. Guilds, associations of journeymen, of miners and of traders cared for their members. Boroughs began to care for the needy. Charitable foundations helped their members and the poor generally and provided schools. Until the Reformation, the Church was the major alms-giver and carer, a role it retained in Roman Catholic countries. For example, from the mid-17th century in France the church administered *hôtels généraux* in towns and *bureaux de charité* in villages, which in the 18th century were given some state funds to assist their work.²

In those kingdoms where monastic property had been seized, state intervention necessarily came earlier. Prussia and England led the field. In Prussia towns and communities were from 1530 required to provide for their poor, some towns already having passed their own Poor Laws in 1520. Henry VIII in 1536 ordered the head officer of cities, towns and parishes to receive poor creatures and sturdy vagabonds, to sustain them by charitable alms and to cause the sturdy vagabonds to be set to earn their living with their own hands. With Elizabeth's 1563 Act contributions began to be levied on those who did not give alms, and by the end of her reign, the 1601 Law for the Relief of the Poor was in

place.³ The Scots kingdom enacted similar provision, but Ireland was regarded as too unsettled and barbarous to have a Poor Law until 1838, when it was opposed by O'Connell as an imperial measure.⁴ From 1845 the Scottish Poor Law even accorded a legal right of destitute poor persons to obtain relief. Unlike the English paupers, a Scottish applicant could appeal to the local Sheriff if refused relief by the Inspector of the Poor and there was even appeal possible against the amount in the Court of Session.⁵

The particular arrangements in Western European states depended on the nature of their social institutions, the place of the Church, the role of local government, the extent of voluntary action by self-help through co-operatives, friendly societies, trade unions, employers' action, the development of insurance schemes, philanthropy and the provision of public works by the state in exchange for daily payment, common in 17th century Europe. It also depended on political attitudes. There were reformers, like Michael Sadler (1780–1835) and the 7th Earl of Shaftesbury (1801–1885), pragmatists (like Bismarck who wanted stability in the new German Federation) and enlightened employers throughout Europe who thought a cared-for workforce would be more productive.

In the United Kingdom support for change came from both major 19th and early 20th century parties. Disraeli was simultaneously sympathetic and pragmatic. His 1874 to 1879 administrations introduced significant social legislation on public health, trade union collective bargaining, slum clearance (the first), education reform and factories' and workshops' legislation.⁶ Joseph Chamberlain, as Liberal President of the Board of Trade from 1886, pressed for social insurance measures for workers like those in Germany,⁷ but Gladstonian

Treasury principles rejected this as too expensive. Eventually a Conservative-appointed Royal Commission of 1905 led to Lloyd George's and Winston Churchill's Acts introducing national labour exchanges, minimum wages in sweated industry, compulsory national and sickness insurance for workers and non-contributory old age pensions in 1911. It is generally asserted that inter-party consensus was only reached post-World War II and that this was the cause of real advances. That ignores the long tradition of agreement after 1911 by all major parties on expanding social welfare rights: advances were made in the 1920s and 1930s with pensions, expansion of the scope of national insurance, non-contributory national assistance, slum clearance and planning for housing. Harold MacMillan's influential 1933 plea for a national policy on reconstruction and his *The Middle Way* (1938), arguing the necessity for abolition of poverty, need remembering. The Atlantic Charter reference to social security, the joint work of Churchill, Attlee and Bevin, was relied on by Beveridge in his Report, the main thrust of which was accepted by both parties and which would have been implemented in broadly similar fashion by Churchill, had he won the 1944 election, instead of a Labour administration coming into office under Attlee and Bevin. I remind readers of these contributions, because improvement of social welfare standards has been a non-party tradition, even though the Parliamentary system is such that criticism of Government performance is the duty of any opposition, something that obscures broad underlying agreement, with differences being on detail and method. Churchill's 1906 remark that "we want to draw a line below which we will not allow persons to live and labour" reflects the policy of all United Kingdom parties.⁸

Germany, Austria and England led the world with development of private insurance arrangements, but

Bismarck was first to take up generalised compulsory insurance for *workers*. As early as 1810 Prussia had imposed employers' liability for accidents and duties upon masters to give servants sick pay. In 1854 there was compulsory insurance for miners. Between 1883 and 1889 Bismarck secured the passage of workers' compulsory sickness, accident, disability and pension insurance. Bismarck admitted to being much influenced by British co-operatives' insurance schemes and by Napoleon III's introduction of state workers' pensions. Austria adopted some similar measures and by 1906 had a Law on Pensions Insurance of Employees in Private Concerns and in Some Public Services that was far ahead of its German equivalent.

Denmark in 1891 was the first state to have non-contributory old-age pensions, followed by New Zealand in 1898 and the United Kingdom in 1908.

The United Kingdom's 1911 compulsory unemployment scheme, adopting in part the voluntary municipal small-scale schemes in some German cities and a Swiss canton, was the first national scheme in the world and was later to be followed in Germany.

The United Kingdom's 1911 health insurance scheme and non-contributory pensions schemes, being introduced later, were developed far beyond the Bismarckian model, which Lloyd George and his officials had examined on a German visit prior to legislating.

The United Kingdom, having been first to suffer from industrialisation, was the first to take action to alleviate its horrors in factories and its legislation concentrated on improving conditions at work. From 1802 there began a series of Factory Acts. The 1802 Health and Morals Act was the work of Sir Robert Peel the elder (father of the Home Secretary who created the Metropolitan Police Force in 1829 and, as Prime Minister, pushed through repeal of the protectionist Corn Laws in 1846). Reports

made by factory inspectors under the 1833 Act altered public opinion in England and elsewhere and fuelled the thoughts of Engels and Marx. Working hours were first limited in 1812 to the twelve hour day and in 1847 to ten hours, resulting in "English hours" being spoken of throughout Europe. Laws governing safety of machinery were another English concern. Although Joseph II of Austria had in 1786 been first to limit child labour, the Factories Inspectors' Reports led in England in the mid-1849s to action to protect children and women, something the rest of Europe followed at a distance.

Public health was a field in which this country once led the world. From the sixteenth century commissioners of sewers were appointed. From early Victorian times Edwin Chadwick (1800–1890) persuaded Governments to legislate for and spend on public health, a process which culminated in Disraeli's 1875 Public Health Act.⁹ It is ironic today to read the Webbs' *Poor Law History*:

"main drainage, the water carriage system, and a publicly managed supply of filtered drinking-water were contributed to the world mainly by Great Britain."¹⁰

The Webbs went on to emphasise the significance of British experiments in medical inspection and treatment of children at school as well as work in Child Care Committees. These ideas went to the rest of the world, as also did ideas about preventive medicine from Germany and France.

In health for the individual the United Kingdom was first to have a National Health *Service*, rather than wide provision of *insurance*, as in Europe. A national health service might first have been created in Australia had it not been for the thirties' depression. The British Dominions of Australia and New Zealand had both been leaders in social legislation for workers. Indeed, in 1907

the Australian High Court had insisted on a legal minimum and reasonable wage for workers. New Zealand followed shortly.

It must be emphasised that measures of this kind were being accepted internationally. They were accepted not merely because they provided models, but because public opinion in industrialising countries was ready for them. Indeed, if "National Insurance—A Cheap, Practical and Popular Way of Protection from Poverty" proposed by Canon Blackley (1830–1902) had been accepted, Bismarck's legislation might not have been the first. Canon Blackley had in 1878 proposed old age and sickness benefits, with contributions to be made by workers between the ages of 18 and 21 to fund them. His suggestion got as far as being investigated in 1885–87 by a Commission.

Before leaving social and economic rights, I should mention two largely indirect roles of central government in late Victorian times. These related to improving the environment and general living conditions. By enacting permissive legislation, Parliament authorised private undertakers and local government bodies voluntarily to provide public services. Local government assumed many tasks, one of the most significant at a much later stage being provision of council housing. Beginning in 1875, and later from 1890, state loans became available for housing of the working class. They were exploited by builders and local authorities. Local social services were also significant, especially in the sphere of health provision, labour exchanges, education and police. Local government in that period enjoyed an inter-party tradition, but this unfortunately disappeared in post-World War II years, with problems about the availability of resources and the amount of central funding increasingly leading to central Governments' intervention. There are no easy answers as to who should pay for

expensive services, more housing and a better environment and what degree of central government control is appropriate. Whatever the answers, in recent years central government financial controls have throttled the supply of new houses and together with the sale of council housing stock, have much diminished the ability of councils to provide housing.

The History of the Concept of Social and Economic Rights

I must briefly refer to development of the concept of economic and social rights. German thinkers believe that ideas about the right to work came from Grotius, Hobbes, their exponent, Pufendorf (1632–1694) who expanded Natural Law doctrine and a broad concept of the right to property, Locke and the French economist and administrator, Turgot (1727–1781). These ideas were taken up by the French Physiocrats, Quesnay (1694–1774) and the Abbé Morellet (1729–1819). Tocqueville, in his diatribe against the *philosophes* and economic theorists, quotes Morellet's 1755 *Code of Nature*, advocating the right to be provided with work, community of property, absolute equality and communal uniform state education from the age of five.¹¹ Turgot has been credited with inventing the concept of the right to work because of an Edict he drew up in 1776 as Comptroller-General for Louis XVI. The Edict would have substituted a money tax on land owners in lieu of compulsory labour by peasants on roads (the *corvée royal*), stating that labourers had the right to work for themselves rather than for the benefit of landowners. Rhetoric is not the preserve of liberals and those opposed to universal poll tax: in

response, the Parlement of Paris made a Declaration that their rights had their source in "immutable wisdom of the plan of the Universe [making] an unequal dispensation of powers and genius"; that it was "a fundamental rule of natural right" to uphold "rights of property" and "rights attached to the person and born of prerogatives of birth and estate"; and that Turgot was advocating an "inadmissible system of equality whose first effect would be to confound all orders in the state by imposing on them the uniform burden of a land tax."¹²

The rights to work and to state assistance were first formally proclaimed in the Twenty First Article of the Jacobin Declaration of Rights made in the fourth year of the French Revolution on 24 June 1793. The Jacobins declared:

"Public relief is a sacred obligation. Society owes subsistence to unfortunate citizens either by procuring work for them or by providing the means of existence for those unable to work."

By the end of the Revolution, the right to work had disappeared in France, although it was temporarily resurrected by a thinker condescended to by Marx as "a petty-bourgeois socialist," Louis Blanc (1811-1882), who attempted to set up national workshops at the time of the 1848 Revolution. Blanc's attempt much affected German thought. Ferdinand Lassalle (1825-1864), the socialist leader, was influenced by Blanc's view of the right to work, and in turn influenced Bismarck, who negotiated with Lassalle and wanted to outflank the socialists by providing welfare rights for workers.

It is misguided for some French writers to claim that social and economic rights were a French invention, as they do with references to Turgot, to the 1793 Jacobin or Montagnard Declaration of Rights and Constitution and to Baboef. Baboef (1760-1797) and his co-conspirators

had in 1796 demanded expropriation of all land to be held in common, and were guillotined for plotting to overthrow the administration. In fact, there were arguments about communal ownership of land in 14th century Europe and similar debates in the mid-17th century between the army, the Levellers, the Diggers and other Utopian English thinkers. Such ideas were later to be found among Utopians throughout Europe. Indeed, Morellet had, as mentioned earlier, advocated common holding of property with abolition of private property in 1755. Well before the French Revolution, agrarian reform and communal land ownership were preached in 1775 by Thomas Spence and in 1782 by the Scottish advocate of land reform, William Ogilvie.¹³

Land reform brings me to perhaps the most influential advocate of human rights across the world, Tom Paine (1737–1809). Paine, using a different approach to land, went far further, although Spence reproached him for his conservatism. Paine put a fully reasoned case for redistribution of taxes to compensate the landless for dispossession. This he did in the second part of *The Rights of Man* published in 1792 and reiterated his scheme in *Agrarian Justice*, written in 1795–1796 while he was in France, but only published in 1797. Paine argued for most benefits similar to those now found in the modern welfare state. Foreshadowing Henry George's single tax theory, he even proposed a detailed negative income tax system in 1792 and again in 1797. Paine thought that charity would never suffice and that "it is only by organising civilisation upon such principles as to act like a system of pulleys, that the whole weight of misery can be removed."¹⁴ He was emphatic that such payments were a *right*, and not charity.

Celebrating bi-centenaries is currently more than just a cultural fad. I hope that in 1991 the United Kingdom,

and not only America, will celebrate the life work of this unsuccessful exciseman once stationed at Grantham. Paine's influence in America and Europe was incalculable. Earlier, after emigrating to America in his late 30s, Paine had published a pamphlet urging a Declaration of Independence. Within six months that pamphlet had prepared colonial public opinion for the 1776 events. Paine later returned to England and promptly responded to Burke's attack on the French Revolution, by himself seeking to popularise human rights' ideas. His 1791 publication of *The Rights of Man* frightened the Government, as the book was broadly circulated amongst the populace. Within a couple of months of its publication in 1791, for example, Wolfe Tone was describing Paine's book as "the bible of Belfast." By 1802 over half a million copies were in circulation. But Paine played yet another role. There can be no other Englishman who was elected by three French constituencies simultaneously to be a member of the French Assembly, as Paine was in 1791. To avoid a criminal prosecution for his views in *The Rights of Man*, Paine fled to France and then helped the Marquis d'Condorcet (1743-1794), the leading French theorist and believer in state education and human progress to perfection, with the Girondist draft for the 1793 Constitution and Declaration. However, libertarian as ever, Paine ended up in prison for speaking in defence of Louis XVI, and was only saved from the guillotine by a mistaken identification and ultimate American intervention on his behalf. There are few writers whose books have provided a name for whole historical period, as did *The Age of Reason*, the second part of Paine's *The Rights of Man*. Two hundred years later his social ideas are still relevant and Governments need to consider something akin to his 1792 and 1797 proposals for a negative income tax system. Of course, in his own time Paine influenced not only the general

public, but even thinkers of stature. Among those influenced by Paine was Fichte (1762–1814), the last major German natural law thinker. In 1800 Fichte published a theory of the duty of the state to protect two fundamental rights: the state must produce the necessities of life in sufficient quantities for its citizenry; and it must ensure that everyone could satisfy his needs through work.

Several other United Kingdom thinkers require mention. Jeremy Bentham (1748–1832) taught the world that the social reformer could legislate to achieve change.¹⁵ Robert Owen (1771–1858), the early socialist and advocate of co-operatives, affected the co-operative movement throughout the world and as early as 1818 advocated an international labour organisation. Owen and a contemporary from Cork, William Thompson (1775–1833), provided foundations for Proudhon's and Marx's views about the need for decent living conditions among the working class.¹⁶

Another very significant economic rights question, at the time considered one of political rights and later one of equal legal rights, rather than of an issue requiring the restructuring of society, was that of the rights of women. The feminist cause was first put forward by Marie Gouze, who was ultimately guillotined. In 1791, under her pen-name, Olympe de Gouges, she had drafted a Declaration of the Rights of Women, modelled on the Rights of Man. In 1792 there appeared a systematic exposition of feminism, taking on the need drastically to change the manners (morals) of society in the second significant book by Mary Wollstonecraft (1759–1797), *A Vindication of the Rights of Women*.¹⁷ (Earlier, in 1790, she had answered Burke in her *A Vindication of the Rights of Man*.) The most effective arguments for feminism came much later in J. S. Mill's essay, *The Subjection of Women*. Mill (1806–1873), who had in 1867 introduced a Female

Suffrage Bill, published his essay in 1869, influenced by William Thompson's writings. It was translated in the same year and circulated widely in Europe and abroad, becoming the bible of feminism. Mill was also significant as inspirer of the Fabians, who in turn affected politicians and administrators. His writings were an important factor in the transition from earlier *laissez faire* economic policy to a policy of more active intervention, although it is the grossest of exaggerations to think that the Victorian state was not interventionist from the outset.¹⁸

In talking about thinkers I shall end with one whose photograph I pass each morning as I walk into my College room. T. H. Green (1836–1882) affected a whole generation of Oxford men, including Herbert Asquith (1852–1928), whose administration was responsible for the Liberal legislation of 1906 to 1911. Green, in his Lectures (published posthumously as *Lectures on the Principles of Political Obligation*) emphasised that the personality was realised by playing a part in society; that politics was about creating social conditions for moral development; and that it was the duty of the state to safeguard all social interests relating to the general welfare. Green was an advocate of compulsory education, of extension of sanitary regulations, of higher standards of living and of the right of individuals to share in the goods produced by society. He was co-founder and first secretary of The Association for Promoting the Education of Women at Oxford, which led to the admission of women to study at the University of Oxford.

The ideas of all these thinkers affected their own societies, including political leaders, and ultimately the relationships of statesmen world-wide. I hope I have adduced sufficient evidence to show that it is *thought* and its influence, which leads to changes in attitudes and

ultimately to social reform of institutions and legislative enactment of social and economic rights.¹⁹

Categorisation of rights

Rights cannot sensibly be compartmentalised into the two categories of civil and political rights on the one hand and of economic, social and cultural rights on the other, even though these categories evolved separately. Distinguishing between these categories at the present day leads to fruitless argument about the appropriateness of the categorisation, the degree to which the categories or rights in them overlap and their relative priority. Poorer undeveloped states argue that economic and social rights have priority over civil and political rights, and capitalist states tend to argue that civil and political rights have priority over economic and social rights. In fact, the categories are interdependent: without the political rights, economic and social rights are likely to be limited, while without the economic and social rights the value of civil and political rights is diminished. If the extent of economic and social rights is constricted (and the degree to which that is necessary is open to argument about availability of resources and their allocation by the state) the autonomy of the individual is infringed, so that realistic exercise of civil rights is hindered. Let me give as example, a figure now prominent in debate, the single woman parent, scraping by on income support, which is often reduced to repay loans for basic furniture. She is tied to her council flat or bed and breakfast accommodation with small children. She is in no sense a free person or an equal citizen in the current United Kingdom legal system. There are many rights to which she is entitled, but which she is not

capable of exercising. Effectively she is unable to take any important decisions about her mode of life. She is a caged carer for children, dependent upon the discretion of bureaucrats for any improvement in her living conditions. She has insubstantial personal liberty, being in practice subject to scrutiny by central and local government officials, especially about any permanent relationship with a man who might have to pay maintenance. She has no freedom to choose her residence. Her private and family life and home are in a sense not respected. She has no exercisable right to education. Because of the absence of state provision of creches and kindergartens, she cannot take employment, unless she risks losing her children into care. The worst feature is that the vicious circle of deprivation is likely to be perpetuated with her children themselves ultimately being denied autonomy, because they are likely to be denied the educational start in life necessary for the development of autonomy and the capacity to exercise freedom when adults.

It has been said that economic, and social rights cannot be legal rights, but are only aspirational. This is nonsense legally speaking. All human rights are aspirations and some get recognised as legal rights too. The scope and content of legal rights will expand or contract according to the current rules and judgments in a particular legal system. In modern welfare states the scope of any entitlement will also be affected by discretion. For example, doctors have a discretion when rationing their life-saving medical techniques. Officers of the Department of Social Security have a discretion to make grants and loans from the Social Fund. Our expensive police force has as much discretion about the protection they will afford security of person and property in their decisions about where they will be present and how they will deploy their investigatory

resources as have doctors and Social Security officials. But all are also duty bound in law to consider fairly and reasonably any claim made to them for their services. In many cases there is far more than a legal right to have a claim considered: there is an actual substantive legal right to a specific benefit, provided specified conditions are met, for example, unemployment benefit. In short, I assert that the dichotomy between civil rights and welfare rights—often put forward as the difference between claims to freedom and to bread—is fallacious. In advanced democracies welfare rights are as much an entitlement as civil liberties, while civil rights cannot be exercised without a basic level of welfare.

Human Rights Talk—Rhetoric and Enforcement Devices

If the reader thinks back to my earlier account of the woman single parent's situation, she²⁰ will realise that it was designed to exemplify how rights, freedom and liberties function as "hoorah" words, necessarily implying wrongfulness by government for failing to create conditions necessary for their exercise. Such language becomes even more emotive when conjoined with adjectives such as immutable, inalienable, imprescriptible, fundamental and absolute, or with phrases such as "simple and uncontestable principles." At the end of the 17th century Lord Halifax pointed out that professions of principles and talk of "fundamentals" are:

"a nail everybody would use to fix that which is good for them; for all men would have that principle to be immovable that serves their use at the time . . . Magna Charta would fain be made to pass for a fundamental; and Sir Edward Coke would have it that the Grand

Charter was for the most part declaratory of the principal grounds of the fundamental laws of England . . . Fundamental is a word used by the laity, as the word sacred is by the clergy, to fix everything to themselves they have a mind to keep, that nobody else may touch it."²¹

Although such adjectives (and indeed nouns in seventeenth century usage) make for sloganising, they reflect significant characteristics of human rights and of legal and international rights, as well as aspects of political theory. "Immutable" was used by Hobbes and Selden in discussing natural rights, the 17th century precursors of human rights, to express the non-transient, eternal, character of the rights to which man as a human being was entitled. For Hobbes the Right of Nature was:

"the Liberty each man hath, to use his own power, for the preservation of his own Nature; that is to say, of his own Life."²²

Hobbes asserted that some Rights cannot be abandoned or transferred, for example, the Right cannot be transferred to others to take away a man's life, with the same being "sayd of Wounds and Chayns and Imprisonment" and their infliction, a foreshadowing of what the late 20th century regards as "absolute rights."

"Inalienable" was added by Locke and used both in respect of the right to life, liberty and property, and in relation to the means of subsistence. The United States' Declaration of Independence 1776 and the French Declaration of the Rights of Man and the Citizen 1789 also used the word "inalienable" to express the idea that such rights could not be alienated, whether by agreement or otherwise. "Imprescriptible," was used by Locke and in the French Declaration to indicate that neither

agreement, passage of time nor tyranny (*pace* Eastern Europe) can invade or alter such rights.

"Fundamental," rather than being merely rhetorical, indicated that certain rights were so important and basic that they were essential conditions for continuance of political life. The word "fundamental" as meaning foundation or basis had a long history and was first used by James I who used it in a Scots sense with reference to his right to the succession. Subsequently the concept of "fundamental law" was regularly invoked from 1635 onwards in Charles I's struggle with Parliament. William Prynne (1600-1669) wrote that the great charters were "FUNDAMENTAL, PERPETUAL AND UNALTERABLE." His view that *Magna Charta* was "the ancient fundamentall Law of the Realm, confirmed in at least sixty Parliaments" appeared in his *Sovereigne Power of Parliaments and Kingdoms*, a work arguing against Charles I's refusal to assent to a Bill and printed by the order of the Commons in 1643. Prynne was expressing the constitutional views of those who dominated the earlier sessions of the Long Parliament and setting out the theoretical basis of the 17th century English revolution in its earlier stages.²³ Fundamental law, taken in conjunction with the ideas of immutability and inalienability, was later translated in the British American colonies into new constitutional arrangements which were scarcely alterable because of the rigid procedures required for constitutional amendment. That is to say, the Constitution and fundamental rights were entrenched, so that their provisions constituted higher or fundamental law, putting them beyond the reach of passing legislatures, temporary expressions of popular sentiment and majority tyranny. Later, the American courts recognised in *Marbury v. Madison*²⁴ that they were guardians of the Constitution, adopting Hamilton's opinion in *Federalist* No. 78 that judicial

review was logically entailed by the Constitution drafted in 1787, a view foreshadowed by Coke in *Bonham's Case*.

The most recent development has been use of the term "absolute." It refers to the notion that fundamental rights are always binding in all circumstances whatsoever. Modern international human rights Conventions have adopted this notion (subject to certain loopholes to which I shall refer in connection with the European Convention on Human Rights). Such Conventions can in consequence cause problems for Governments. Again, some state constitutions have contained absolute fundamental rights in respect of property. In India, these provisions blocked land reform schemes, resulting in a state of emergency after disputes between Mrs. Ghandi's Government and the judiciary, which had upheld the constitutional property protections. Restrictions of that kind can have other adverse consequences, for example, effective town planning legislation will be blocked if full compensation is required should development rights be denied. United Kingdom opponents of incorporating the European Convention on Human Rights into domestic law have asserted that this entails similar risks. However, Article 1 of the First Protocol does not impair "the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest," and persons can be deprived of their possessions in the public interest, subject to conditions provided by law and by the general principles of International Law.

Another type of rhetorical reference to human rights places no legal barriers to legislative and governmental action—although it psychologically constrains those in office. It consists of the assertion of rights in a formal declaration, either by a Constituent Assembly of people's delegates or by a legislature. The first such assertions were in the constitutions of the rebelling British

American colonies and in the 1776 Declaration of Independence. They were followed in 1789 by the French Estates-General's Declaration of the Rights of Man and the Citizen, founded on "simple and incontestable principles," in order that the demands of the Citizens may always be directed towards the maintenance of the Constitution and the welfare of all.²⁵ The French Declaration did not create legal rights, although the 1791 later version came to preface all French constitutions as a set of guiding principles. Legal rights, reflecting the human rights of the Declaration were only later enacted over time by Laws, decrees or decisions and it was not until the Gaullist Constitution of the Fifth Republic that a Constitutional Court was invested with power to declare legislation to be in conflict with the Declaration. Other states have followed the example of having a declaration with relatively insignificant direct legal effect. For example, a preamble and Directive Principles of State Policy are in the 1937 Irish and the 1950 Indian Constitutions respectively. They have some significance as guides to interpretation when there is doubt as to the meaning of a statute.

A different constitutional hybrid was invented by Canada. Her 1960 Bill of Rights (given a wider scope by the Canadian Charter of Rights and Freedoms of 1982) renders pre-enacted law invalid if it is inconsistent with the enumerated rights, and also subjects future law, absent express wording to the contrary, to an interpretation consistent with the Bill. A Bill of Rights of the Canadian kind is advocated by many who wish to see the United Kingdom enact the European Convention of Human Rights as domestic law. Such a Bill must be contrasted with one that is entrenched, where limitations upon parliamentary sovereignty would result, so that all future laws would have to be consistent with the Bill of Rights and liable to striking down, should they prove

irreconcilable. That is the position under the United States Constitution, a model followed by both the Irish and Indian Constitutions, which contain enumerated fundamental rights provisions in addition to preambular guiding Directive Principles relating to rights.

In summary, the ideas and language surrounding discussion of human rights have been reflected in various mechanisms of protection evolved by state legal systems. The first model, which applies to the United Kingdom, incorporates most major moral rights or human rights into the ordinary law as legal rights. The second model is a declaration of human rights' principles, relevant when interpreting ambiguous provisions in laws. The third model is an Act of constitutional significance, setting out human rights' standards, with such an Act retrospectively repealing inconsistent laws and having future interpretive effect. The fourth model is to enumerate rights as constitutional rights within the body of the constitution, thus subjecting them to its amending process, and often entrenching them, assuming that the constitution is inflexible, that is, it requires more than a simple majority, with there being some special procedure for amendment.

Psychological Consequences of the Use of Human Rights Language

I turn now to psychological consequences of the use of human rights language. The dramatic language of "human rights and fundamental freedoms," combined with talk of inalienability, immutability, imprescriptibility, universalism and absolutism, is emotive. The effect is the greater because human rights represent values in which people believe, for example, the worth

of life, liberty, free speech, free trial, justice according to needs and absence of discrimination. In the 17th and 18th centuries such language was used in revolutionary circumstances and polemicism became prevalent. This encouraged moralism and belief of each participant in the infallibility of his views. Hand in hand with belief in the rights of man went belief that society could scientifically be perfected and that those who stood in the way were evil. Thus it was that the 1790s debate on the rights of man was so bitter. Price, Priestley and Paine were the subject of savage rhetoric by Burke, together with the Baron d'Holbach (1723–1789) and Condorcet, the high priests of progress, and the Abbé Sieyès (1748–1836), who was prominent in drafting the French Declaration and early revolutionary constitutions.

The tradition of bitter debate between those who disagree on moral issues remains. It is prevalent in criticism of laws, judicial decisions and administrative action. Each measure regarded as a step forward is perceived as an invaluable and sacrosanct advance, with every alteration to such arrangements being described as “attacks” on rights. Refusal to take further steps forward is characterised as “heartless”—which is not to say that sympathy may be lacking in those imbued with Treasury principles. Criticism of governmental and legal arrangements arises not only because of the strength of commitment by those holding particular values, but also because of the difficulties of evaluating measures where values conflict, where facts are not susceptible of proof and inferences are problematic and where governments, bureaucracies and libertarians or right wing critics have different views either of what is appropriate or of which is the best method to deal with problems. Exaggerated belief in the perfectibility of society and the capacity of government to bring about happiness and success also continues, although not even the econometricians, let

alone "friends of the family" can predict economic outcomes. When aims are not achieved, various conspiracy theories are proffered as the explanation, rather than mere incapacity to assess complex economic outcomes, or to do much, or to differences of opinion as to the best mode of administration.

Nor is account taken of the difficulties governments face when oppositions exploit their power in local institutions to thwart central policy. Often each insists: "We'll do it my way." Political self-interest then becomes a major factor for the respective political parties in their relative central or local positions, rather than abstract principles of good government. Increasing centralisation and diminution of local government power is more often not so much an attack "on the right to democratic participation" (as it is seen to be by some communitarians) rather than it is a continuing struggle between Whitehall under successive administrations and local government bodies with different democratic mandates. These disputes have been going on since the mid-1970s and involve questions about how expenditure can be controlled, to what degree and on which classes of taxpayers should tax burdens fall unequally, where taxing-powers should be located, and whether particular services are best centrally or locally administered. Somewhat inconsistently, Whitehall asserts the principle of subsidiarity (location preferably in the smaller governmental unit) in an EEC context and forgets it in a municipal one. Similar comment applies to the personalised tone of debate on the EEC, where criticism of ideas is focused not on what is said but on by whom it is said and where, conversely, tension is raised by throwing in another symbolic "hoorah" word, "sovereignty."

Growth of the social sciences, particularly study of social policy and government, universal education, a

watchful Press and involvement of various professions in the development and application of human legal rights, have rendered clichéd calls for vigilance less necessary. Magnification of Press and public awareness of human rights issues owes much to legal academia, professional pressure groups and the constructive comments of non-governmental organisations such as Justice, the Howard League, MIND, Amnesty and the Child Poverty Action Group. Admittedly sweet reason does not always prevail against complacency, but demonisation, attacks on the good faith of those who disagree, and claims to infallibility, will, by strengthening the spirit of faction, delay incremental, let alone institutional, change. Some will sneer at this attitude, but idealist politicians and wholesale reformers should prudently advert to Adam Smith's 1790 comments:

"Some general, and even systematical, idea of the perfection of policy and law, may no doubt be necessary for directing the views of the statesman. But to insist upon establishing, and upon establishing all at once, and in spite of all opposition, everything which that idea may seem to require, must often be the highest degree of arrogance. It is to erect his own judgment into the supreme standard of right and wrong."²⁶

Values and their Meaning

Smith, it must be noted, was speaking about personal "judgment" and standards of what is "right" and "wrong." This brings me directly to what is meant by speaking of "values." In so doing, I hope to avoid the philosophical minefield of debate about the relationships

between belief, preferences and values by defining the term "value" to refer to principles and ideals, which have the capacity to satisfy human wants. To say of a principle or ideal that it is a "value" is to say that it is considered as a good, having worth in itself, and that one cannot go behind it to obtain reasons for preferring or believing in that value.²⁷ On the contrary, the effect of values is that those who believe in a particular value or values, find that application of their values provides reasons for acting in one way rather than another. People also use their values to judge the results of individual or group behaviour, arrangements in society and the outcome of such social arrangements or behaviours. Examples of values are life, enhancement of life, equality, democracy, autonomy, freedom, liberty, self-expression, knowledge, just distribution of goods and evils, pleasures, peace, security and order, as well as two of the virtues (dispositions or traits), namely being just and benevolent.

Attempts have been made to narrow down the values to one single ultimate value. Hedonist utilitarians (of whom Bentham and Mill have been the most prominent) consider the goal or end of all action to be achievement of the greatest happiness (utility or pleasure) of the greatest number. Nonetheless, when doing their sums totalling up happiness (the sum of human welfare), utilitarians count one for the happiness of each single individual who is deemed best judge of his own interests. That procedure non-utilitarians would count as implicit recognition of the further values of "equality" and "democracy." Modern rule-utilitarians, who formulate advance general rules as criteria for evaluating what will in practice produce utility or pleasure for the greatest number, explicitly adopt these values.

"Values" lie behind human rights concepts. They dictate belief in particular human rights, with a value

standing behind each kind of human right or limitation on rights. Thus, the value of life implies the right to life; the value of autonomy implies liberties such as freedom of expression, of religious and political opinion and of association; justice implies the right to fair trial; knowledge the right to education; pleasure implies the right to pursuit of happiness, including material and ethical satisfactions; and security and order imply limitations on rights when their exercise is likely to result in extensive conflict in society.

I have been talking of beliefs in certain human rights held in consequence of holding particular values. Any beliefs held may of course conflict with other beliefs held by a person, let alone with beliefs held by other persons. Conflict also occurs about the meaning of particular values and their inter-relationships, equality and justice being the most complicated.²⁸ In this context, I cannot over-emphasise, firstly, that the meaning which is attached to a value (that is, how it is interpreted) and, secondly, that how one value is reconciled with another will dictate outcomes for human living conditions. Let me explain, by starting from the abstract and then moving to the concrete. The value, equality, is at the heart of human rights theorising. Earlier, I explained that the notion of human rights constituted a moral theory to the effect that rights are means to secure the good life for the individual in a society and that conflicts between the *equal* rights of individuals to pursue their own good are adjusted to secure the good for all. Equality has many meanings. It implies the right to equal opportunity. It may also mean the right to an equal outcome, about which there can be choice as to method and even extent, as for example whether there is to be state-based support, achieved by large scale redistribution of material goods, or whether there is to be primary self-support and a state safety-net. Demands for equality

may even be for proportionate equality, as in the case of wage claims by employees and their unions, who seek to maintain differentials in any settlement.

Equality also relates to power, implying that there should be not merely a formal but also a practically equal say in political decision-making, a value which, combined with the value of democracy, underlies calls for greater participation in government.

Let me give a similar explanation about the consequences of attributing different meanings to the value, justice. Justice can be construed as implying the right to fair treatment according to deserts, or to needs. If need is the criterion, there are questions, just as there are with equality, whether needs are subsistence, minimal or relative needs. Again, there are concepts of distributive and of redistributive justice, raising the question whether current distribution should occur on an egalitarian basis or whether distributive attempts should be made to correct past imbalances, thus linking the values of justice and of equality. Different conceptions involving both justice and equality may well apply to the same complex of facts. As Louis Blanc, the French socialist, said in 1850: "True equality apportions work to ability and recompense to needs." From this was derived the Communist principle: "From each according to his ability and to each according to his work."

Using the concepts of justice and equality as expounded by John Rawls, it appears that if there are to be inequalities, for example of distribution, these should not adversely affect the least advantaged members of society, a notion which Governments, when criticised, have acknowledged by saying that "All members of society are better off." Construing the values of justice and equality in Rawlsian manner, and using statistics winkled out in mid-1990²⁹ shows the United Kingdom's social security system to be less than just on those

criteria. Current welfare rights provide for minimal needs, but result in relative deprivation. Between 1979 and 1987 the income of the bottom 10 per cent. of the population fell in real terms by 5.7 per cent. and for the next decile by 1.1 per cent. In short, the poorest 20 per cent. suffered real cuts in their standard of living. In contrast, the increase in annual income for the total population measured over 23 per cent. Being an average figure, that indicates the enormous increase in incomes of the rich compared with those of the poor. By 1990, following social security changes involving the loss of Single Payment Grants (replaced by loans and grants from the Social Fund if lucky) and the introduction of the Community Charge ("poll tax"), as well as failure in the new arrangements to compensate for rates' contributions and water rates, poor individuals and childless married couples suffered an even greater overall reduction in standards of living in the years from 1981 to 1990.

The falling incomes of the poor are an unintended result of Government economic policies. Trickle down theory is a modern variant of Mandeville's, Montesquieu's and Smith's view that private spending by the rich will result in distribution of wealth to workers—they all gave the sexist example of a woman buying luxurious clothing.³⁰ A decade of experience now shows that trickle down policy, applied in conjunction with a reduction in higher rates of income tax and an increase in differentials between social security payments and the pay of low paid workers in order to encourage the seeking of work, although applied in good faith with the expectancy that the poor would benefit, failed to achieve that effect.

It will now be obvious that views of minimal distributive justice, combined with the values of "the work ethic" and individual responsibility, led to acceptance of trickle down policy and the encouragement of

a dynamic economy by work incentives. In contrast, a maximalist view of distributive justice would lead to greater growth in social security public expenditure. Just as values lie behind human rights, so do they lie behind all economic policies. Economic policies, accordingly, require assessment in terms of the values they give effect to. For example, reducing inflation benefits all, but leaves some more equal than others. Reducing direct taxation in favour of increased indirect taxation leaves more in the pocket on which individual choice can operate—assuming that money is initially in such pocket. A policy of selling council houses facilitates acquisition of property and autonomy of those who can afford to buy, but, when combined with local government fiscal limitations effectively precluding replacement of council housing stock by newly built homes, also means that the opportunities of poorer members of society to rent a decent home are diminished. (The deterrent effects on private landlords of the Rent Acts have had a similar unintended effect.) Again, a switch from rent subsidies to housing benefit reduces the living standards of poorer workers in council houses, unless they are eligible for individual means-tested benefit. In short, the choice of economic policy affects who gains and who loses, so that questions need to be asked whether policies are just, whether they further equality and whose notions of justice and equality should prevail?

I hope I have made it clear that institutions, human legal rights, economic policies and values are inter-locked. It is surprising that lawyers, aware enough in the private professional sector, do not concern themselves greatly with public economic law and policy. All economic relations are underpinned by legal relations and in technologically advanced societies the State has a crucial role in making human material goods available by its economic public policies. Because a modern welfare is

the direct or indirect employer of about half the workforce, it is difficult to exaggerate the impact on people of state economic and labour policies, whether by way of re-distribution through the welfare system, or as an employer, or as a procurer of goods.

The values of any Government, which it achieves through the operation of the party system in Parliament, are a major determinant in making policy choices. Decisions are nonetheless influenced by the values of others if powerfully expressed, for example, by the press and the general public. Another significant source of values is the Civil Service, especially the Treasury.

In late Victorian times Treasury principles (over-cautious state housekeeping is a not unfair paraphrase) appear themselves to have become a value. Certainly the Liberal Party under Gladstone wholeheartedly identified itself with them. Moving to the last 30 years, one can conclude that, apart from the first two years of the Heath administration, Treasury principles of prudence have been treated as if they were a value. Treasury goals do not greatly differ from Government to Government, being reduced inflation, reduction of the Public Sector Borrowing Requirement so far as possible, conformity to cash limits and reduced or at least not expanding public expenditure. When faced by growing demands for public funds through take-up of benefits, Treasury principles dictate changes in the criteria for benefits, such as Single Payments. Since 1980 there have also been shifts to the private sector of responsibility for paying for externalities, including environmental ones which affect the quality of life. Striking examples of expenditure shifts are failure to provide adequate state funding for public transport, including British Rail links to the Channel Tunnel, the transfer of responsibility for improvement of water standards, partial funding of scientific research in universities and abandonment of the task, to use the

1890s phrase, of "housing of the working classes." Treasury principles have been conjoined with the value of freedom of choice. Since 1979 Governments have believed that reduced public expenditure leaves more in the taxpayer's pocket and therefore brings greater freedom of choice—even if after increased indirect taxation on consumption the total tax paid may be higher. Again liberal individualist demands for personal freedom of institutionalised patients have, in conjunction with Treasury principles, led to closure of Victorian mental and geriatric hospitals which are intended to be substituted for by the notion of care in the community. In practice, because of inadequate financial and structural support, the result has been increased hardship for many mentally-ill or handicapped persons. It has also transferred burdens to others, especially to women, who care for them. In short, although every policy requires financial expenditure and there are dilemmas of preference, Treasury principles may operate unduly harshly.

The price of freedom of choice and Treasury principles is, in the absence of greater public revenue resources, paid for by increases in relative deprivation concentrated in certain population groups, because the only method for improving benefits is then by shifts in expenditure, for example by targeting, a policy bringing benefits to some and increased hardship to others. Targeting achieves more marginal egalitarianism and has been used to further the work ethic, for example by introducing tapering benefits to avoid the poverty trap. (The earlier sharp cut-off had discouraged acceptance of employment and independence, because those who accepted low paid work might even be worse off than if they had remained on state benefits.)

All Governments are limited by expectations and core commitments. Even when they desire major policy changes, massive expenditure cuts or shifts are difficult.

All political parties are in the electoral game and are not prepared to alienate large sections of the electorate, something usually observable as any general election approaches. There is fierce competition for existing resources. Large new revenue sources are unlikely, because no-one likes new or higher taxes—least of all working people who have strived for higher living standards.

Demands placed on existing resources are ever-increasing and often unforeseen. For example, an unintended outcome of allowing the run-down of inefficient British industry in the early 1980s was a large increase in the number of unemployed persons on unemployment benefit. By the end of the decade unemployment was much reduced, although lower unemployment statistics in part reflected changes in the statistical methodology and classification of persons as unemployed, as well as a great shift to more part-time work by women. Nonetheless, over 8.2 million people were dependent on Income Support by 1989, whereas in 1980 that figure had been just over 4 million.

Demands for state provision are caused by many other social factors. For example, despite rhetoric about maintaining the family, there has been a vast increase in divorce, with 25 per cent. of marriages ending in divorce. This has increased the number of single parent families with knock-on effects for Income Support and housing needs. There have been other reasons than divorce for an increase in the number of single parent families: sometimes individuals do not desire to enter legal bonds and instead take personal decisions to have a child rather than an abortion and to assume sole responsibility. Housing needs have also been increased by decisions of young persons to set up for themselves, especially when escaping unhappy home backgrounds, or moving to areas of the country where employment is more likely to be found.

Increasing demand affects all public services, with the more extensive the service being offered, the greater being the take-up. This has had the consequence of maintaining public employment, despite governmental attempts to shrink the size of the public sector workforce and to limit its pay and union power. Growth in demand particularly affects technically-advanced services manned by professionals. For example, the National Health Service constantly improves its technology and diminishes mortality in cases earlier thought untreatable. Whatever its organisational reforms and the attempts to make professionals ration and choose between the facilities they will make available, increasing knowledge in health care will make any health service a black hole, sucking in resources and subject to constraints unpopular with sections of the public who do not consider needs are being met. There will always be debates about priorities in reducing particular inequalities. There will also be argument about whether collective policies are having unduly harsh effects on certain groups—such as women, under school-age children, dwellers in less populated regions, immigrants, etc.

Despite bitter debate in recent years, there has been no attempt to introduce the nightwatchman state described by the American philosopher, Robert Nozick. Broadly speaking, the post-World War II Beveridge model remains, even after the 1986 Social Security Act reforms. Some groups are certainly worse off. Students are suffering from partial dismantlement of the world's most advanced and privileged system of financing higher education. Short-term earnings-related benefits under SERPS (not itself part of the Beveridge model) have been abolished—because actuarial evidence showed that younger workers' living standards would be depressed for decades if the working population had to fund the increasing older population. Indeed, when the benefits

were changed in 1986, it was partly because the cost of the 1980 reforms, which converted discretionary payments into rights, combined with massive pressure group "take-up" campaigns, had resulted in large unanticipated public expenditure. Irrespective of which political party is in power, there will, in the absence of a working communal system, never be sufficient state tax-take to achieve complete equality of outcome by way of redistribution. There will always be arguments about what are the best institutional arrangements for distribution, looking across the whole society, public and private, and whether policies across the full range of taxes, reliefs, benefits and sanctioned methods of accumulating wealth maximise resources available for distribution without unduly limiting freedom in consequence of trying to lessen the economic inequality of others.

An Evaluation of the State of Economic and Social Rights in 1990³¹

Any evaluation of the state of economic and social rights, assuming the rationality of the evaluator, depends upon her (in my case) views of justice and equality and how she interprets and prioritises these values in evolving criteria to apply to the facts. Two preliminary assessments are also necessary before evaluating the overall substantive outcome. The first relates to the state's methods of obtaining resources and whether the largest amount has been made available for public purposes compatible with justice and equality. The second involves asking whether the most effective method of delivery to competing recipients has been used without wasting resources, say, by swelling the

bureaucracy or by universal distribution. Effectiveness of distribution is complicated by other values such as the worth in providing work or justice to workers. Finally, the substantive decisions taken as between competing claims need evaluating. Legally-trained readers will note the parallels between giving effect to values and human rights, and the making of governmental policy decisions and judicial decisions. All that judges do is to decide in a narrower sphere with more specific criteria set out formally in existing rules of law and procedure. Lay readers may consider this decision-making procedure unduly abstract, but they should remember that even the most theory-oriented critic realises (or should) that there is a real political world with limited resources for allocation and an infinitely elastic demand by various claimants for multiple needs.

It is perhaps too much to expect all forms of revenue raising, whether by various kinds of direct or indirect taxes on individuals and corporations or by charges, contributions and levies, to be examined as a whole to assess the justice of revenue-raising from individuals. But this aspect should not be forgotten: the state raises far more revenue from each individual than his income tax assessment indicates. Conversely, all benefits, whether by way of tax allowances, services, or state payments need looking at globularly. I find it heartening that Tom Paine lives again, if not in detail and without much acknowledgement, in various radical alternatives to the British tax and social security system. The current proposals do not deal with services and are confined to state payments from and to individuals.³² They are either for a negative income tax or a basic income system, also known as a social dividend scheme. Unfortunately daring thinking is, as Machiavelli pointed out in *The Prince* and as Ministers responsible for the community charge would agree, not an easy course of

conduct: those who gain from reforms are mildly supportive, while those who lose are bitter opponents. Accordingly, only marginal changes to the various tax, benefit and services systems seem likely pending party consensus on radical changes.

The Situation in 1990

What then is my concrete evaluation in November 1990 and what marginal changes would I advocate as politically feasible? Firstly, on the revenue side, I believe that tax-take has not been maximised. Graded rates of tax throughout the scales, running from say 10 per cent. at the bottom up to 50 per cent. at the top, with those above median income paying progressively more tax, would bring in more state revenue without imposing hardship. Even more could be brought in by fading out mortgage tax relief and imposing a Capital Gains Tax on homes, subject to part rollover on sale or deferment until death. A tax on all who use local services is not unjust and a replacement for the community charge, known by another name and subject to total exemptions on a means-tested basis, could raise more if felt to be just by those liable, who would then pay rather than defaulting.

Secondly, I believe that after examining methodology, effectiveness and speed in conferring benefits, targeting is a better policy than is the granting of universal benefits, although even these result in a degree of diffuse redistribution of wealth. Given that resources are and always will be limited, the condition of the worst-off can be relatively improved by targeting: universal benefits, if continued, should be clawed back 100 per cent. by the income tax system above a certain income level. Targeting in the Health Service is also appropriate. For example, there should be more direction of resources

to regional hospitals, giving people, say in North-East England, better treatment, rather than making resources available for more cutting-edge research in London medical schools despite any more rapid advancement of knowledge thereby being forfeited. Means testing is also a form of targeting. If it has its stigma removed, and the bureaucracy are trained invariably to respect the dignity of applicants, means-tested benefits can more quickly reduce inequality.

The political problem is that no-one wishes to pay and everyone wants benefits: I hope that my readers will not be provoked into stopping reading because I believe that a graduate tax, operating above certain income levels and applicable both to past students and, after their graduation to all now taking higher education degrees or diplomas in universities, polytechnics and colleges would be a fairer way in the context of the needs of the overall education system of ensuring reimbursement of sums laid out for students' fees and maintenance grants. If later clawed back, such amounts, despite inevitable Treasury administrative objections, could be used for other educational purposes having greater priority. That outcome could also be obtained by increasing national insurance contributions for graduates on similar principles. Those who have most benefited from the education system should assist in providing the funding urgently needed at the system's bottom end for kindergartens and creches for all children and at the pre-university level for better training for a wide spectrum of people. Provision concentrated on relatively few persons at the highest levels of the system is in a significant sense inegalitarian.³³

As for current substantive justice, I believe that the 1986 Social Security Act, by abolishing single payments and replacing them with discretionary grants and loans from the Social Fund, created grave injustices.

Recent legislation has done better by the disabled. Yet no Government has introduced a comprehensive no-fault liability system with periodical payments, paid for by compulsory insurance, combined with abolition of liability for negligence whether medical, motor or otherwise. Such a system would do a great deal for the disabled and injured whatever the cause of their suffering, and would redirect legal expertise to more useful purposes. Arguments would tend to become ones about quantum of compensation, and would be conducted by para-legals experienced in that sphere. Disputes would be decided by tribunals, rather than being handled as they now are by the lawyers of insurance companies and plaintiffs at great expense to the Legal Aid system and to the general public of policy holders.

The failure to provide adequate resources for community care is unjust to those not provided proper service by the community and needs prompt remedial action. That brings me to one of the major consequences of successive Governments' policies in the social security field. I wholly support arguments about feminisation of poverty: poverty in women has been and is perpetuated by policies towards care of the aged and disabled, by the absence of pre-school care facilities, by lack of provision for leave from employment for family reasons (an EEC draft directive on this was vetoed by the United Kingdom) by the contributions' requirement for entitlement to unemployment insurance benefits and by close scrutiny of the personal lives of women who seek means-tested benefits. A recent small off-setting factor is alteration of the income tax system, with wives being entitled to tax free allowances. Its side-effect will be a long-term wealth shift, but this will be confined to women in the middle and professional classes and does not tackle the need for rethinking the social security system which is still based on the assumption that a

nuclear family is the claiming unit.³⁴ Only radical and expensive changes both to contributory and means-tested benefits combined with a move to higher taxation and contingency-based benefits (that is, ones conditioned on particular circumstances of need) could cause major change to the economic position of women. Unless women as a group become more politicised and press for such changes, the only source for their development will be EEC pressure.

Arguments about racialisation of poverty similar to those on feminism have been put forward.³⁵ Certainly the ratio of unemployment among young blacks is higher, but social and economic policies are not the cause of concentrated poverty among blacks. Blacks indeed suffer, but this has historically been the lot of the most recent immigrants, white or black, in all host societies. Nonetheless, a combination of the legislation on immigration and on nationality does cause hardship. The 1988 Immigration Act provides that families of long-settled British and Commonwealth male citizens can join them only if such family will be maintained without recourse to public funds. This strikes at family life. There are also effects on human dignity: social security benefits depend on immigrant status and social security officers, who are not always sympathetic, check passports and ask detailed questions, giving black people the idea that they are agents of immigration control.

Immigration matters make one aspect of the EEC relevant. There have been, and will be even more, positive EEC developments bringing about equality between EEC workers, but recent public debate shows insufficient consciousness that the EEC may be less liberal than is even this country on immigration matters. A group of EEC member states have taken attitudes towards immigrant workers and refugees manifested in

the Schengen Treaties (mentioned in my third Lecture) which might here provoke charges of racialism and of cavalier attitudes to civil liberties.

On the other hand, the EEC Social Charter sets out minimal standards in labour matters which the present Government has been unwilling to adopt. The claimed justification for rejecting such standards is that they will increase labour costs and result in increased unemployment. Arguably, the increase in recent years of part-time work by women would fall away, because employers would no longer find women cheaper to employ than full-time men. Such a possibility brings one full circle to the grave dilemmas of choice facing any economic policy-maker and legislator.

Housing policies need major reconsideration. Tom Paine was remarkably prescient—or London has not changed—in suggesting the need for hostels in large cities to provide initial accommodation for young people who move and in which they could initially be provided work.³⁶ Denial of benefit to homeless persons without an address is a grave injustice and not justifiable as a means of deterring young people from coming to live in Southern England. On the other hand, consideration will have to be given, because demand is otherwise inexhaustible, to providing some incentives to study, training or work. Encouraging work is not a Victorian value which should be dismissed. Work gives the earner a feeling of independence and self-respect and may, if fortunate in what he does, give him pleasure in tasks done well. The institution of training schemes is positive, but the United Kingdom needs to look again at German models, just as Lloyd George did when he investigated precedents for social insurance. Were many more German-style industrial training schemes introduced in the United Kingdom, productivity would increase with multiplier effects.

Dilemmas about resources, methodology, policy and outcomes are endemic for politicians and administrators. They can never escape the need for Treasury principles of a kind as giving them some guidance and reinforcing prudence. Such principles are certainly contagious. Any Prime Minister and Chancellor, such as Messrs. Callaghan and Healey, like their predecessors and successors, will, once at the centre of power and responsibility, become infected. Indeed, unless public economic policy is to destabilise society, they must not be immune to some constraining ideas. Nonetheless, they should take regular doses of anti-Exchequer-biotics as a precaution. It tends to become too easy automatically to turn down change on expenditure grounds, instead of placing emphasis on needs and policy effects. I believe that although Governments of all complexions always take account of electoral considerations, they are too constrained by existing allocations of expenditure and methods of raising resources even in early periods of office when they have more latitude. Much of the responsibility for this lies in the nature of the British Civil Service, whose members are by and large trained to be defenders of the *status quo*. Their task is not to rock the boat: it is to provide the Minister with a brief explaining and justifying existing policy and to warn him of difficulties in embarking on changes. The Treasury is even more unadventurous, being charged with protecting the economic life of the nation. It believes in the most cautious medication. Over the years its arteries and its heart have hardened.

Treasury values need to be balanced by other values which have been adopted as legally binding by this country. A reminder of the United Kingdom's obligations under the International Covenant on Economic, Social and Cultural rights is appropriate. By Article 2.1 the United Kingdom has undertaken:

“to take steps . . . to the maximum of its available resources with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adopting of legislative measures.”

The United Kingdom, as a developed country, is not permitted to argue that regard may be had to the national economy in determining the extent to which economic rights must be guaranteed. For example, it cannot argue that because there is an economic downturn benefits ought to be reduced. All economists and Treasury civil servants ought to be continuously alerted to the United Kingdom's obligations. They need to be educated about the UN Covenant on Economic, Social and Cultural Rights, the European Social Charter of the Council of Europe and the EEC's Social Charter. Even more important is the issue of practical involvement and seeing the impact of policy on the ground. Treasury officials need to be part-trained in and seconded from time to time to the major spending departments. They ought regularly to visit some of the inner city areas and run-down parts of the country, and if at all possible, be required to work there for periods. A parallel would be Foreign Office officials' constant contact with international human rights bodies, personnel and issues: in the event Foreign Office personnel are the most flexible and sympathetic British civil servants on human rights issues. Admittedly, at the end of the day such contacts may not persuade Treasury officials to advise Governments more sympathetically. They will have to overcome traditions inherited from Gladstonian days which dominate public fiscal and economic policy decision-making. It would, nonetheless, be wrong to see Treasury policies as being underpinned by a consistent *laissez-faire* philosophy and conception of justice. Piece-meal pragmatism is the Treasury's approach. Even if Treasury fiscal and

economic policy decisions have to continue to determine affordable outcomes, I do not think that the Treasury is the right place to take decisions on cutting up the budgetary cake or to settle competing inter-departmental claims for resources, let alone being the appropriate forum for long- or even medium-term substantive policy thinking. I take this position because, as things now stand, the Treasury neither has an appropriate general philosophy nor on-the-ground experience of hardship, yet upon its decisions depend the whole structure of governmental institutions and the substance of human rights. Only when Treasury personnel have their orientation and philosophy changed, will the United Kingdom better conform to human rights standards and achieve better human legal rights in practice.

Notes

¹ My main sources are Sir George Nicholls, *History of the English Poor Law in connection with the State of the Country and the Condition of the People*, 2 Vols., (P.S. King & Son, London, 1860), new ed. H.G. Willink, (1898). Sir George was "the father of the new system of Poor Law" and one of the first three Poor Law Commissioners appointed in 1834. See also Sidney and Beatrice Webb, *English Poor Law History: Part I: the Old Poor Law*, (Longmans, London, 1927), and *Part II: the Last Hundred Years*, (1929); B. L. Hutchinson and A. Harrison, *A History of Factory Legislation*, (P.S. King and Son, London, 2nd ed., 1911); and Maurice Bruce, *The Coming of the Welfare State*, (B.T. Batsford Ltd., London, 4th ed., 1968), which has a useful bibliography. More analytical accounts are given in Derek Fraser, *The Evolution of the British Welfare State: A History of Social Policy since the Industrial Revolution*, (Macmillan, London, 1973); and in Pat Thane, *The Foundations of the Welfare State*, (Longman, 1982). Trends of thought in particular fields are described in *Law and Opinion in England in the 20th Century*, Morris Ginsberg ed., (Stevens, London, 1959).

There is a comprehensive account of the introduction of social insurance by Professor A. I. Ogus in "Great Britain" in P. A. Köhler, M. Partington, and H. F. Zacher, *The Evolution of Social Insurance*

1881–1881, (Pinter, 1982), pp. 150–264. Other authors in that volume survey the developments in Europe, with those in Germany and Austria being particularly interesting. See also “Sozial Grundrechte,” by Martin Kirchmayr in *Grundrechte im 19. Jahrhundert*, Gerhard Dilcher . . . (Hrsg.), (Frankfurt am Main, 1982); and Manfred Nowak, *Politische Grundrechte*, (Springen Verlag, Wien, 1988). I am indebted to Professor Nowak for making German material available to me, including Harald Steindl’s chapter “Entfesselung der Arbeitskraft” from a recent book on labour history.

² O. H. Hufton, *The Poor of Eighteenth-Century France, 1750–1789*, (Clarendon, Oxford, 1974), pp. 131–216.

³ My references cannot encompass the harshness of the original bloody laws to suppress vagabondage and mendicancy railed against by Marx, Vol. 1, *op. cit.*, pp. 686–689, who pointed to similar laws in France and Holland. In fact by 1601 the English legislature had recognised the necessity for ending extremity of want, which leaves no alternative between starvation and a breach of the law, and so undertook relief of destitution as a public duty to be provided for at the public charge: Nicholls, *op. cit.*, Vol. I, *op. cit.*, pp. 188 *et seq.* Here is not the place to write of the vicissitudes of the Poor Law, particularly the harshness of the law of settlement—the reader would get more understanding from Charles Dickens, *Our Mutual Friend*. Nor do I do more than mention the temporary and first institution of fair wages by generalised application of the ruling made in May 1795 by the Speenhamland Justices who set a scale for the wages of the industrious poor. We should when dealing with early ideas of social justice (preceding *Rerum Novarum* by 95 years) note William Pitt’s 1796 Poor Law Bill, introducing a fair wage on the Speenhamland principle, but which was abandoned following Bentham’s denunciation of it as an equalisation of idleness and industry and his special condemnation of its “extra children clause, because it provided that the pay of the idler should increase with the number of his children”: Joseph Redlich, F. W. Hirst ed., *Local Government in England, Vol. I*, (Macmillan, London, 1903), p. 88.

⁴ See introduction by H. W. Willink in Nicholls, *History of the English Poor Law*, Vol. I, pp. xlvii.

⁵ The Webbs, *op. cit.*, Part II, pp. 1034–1035, ascribed this legal right to the influence of Sir Archibald Alison (1792–1867), historian, lawyer, staunch Tory and maintainer of order as Sheriff of Lanarkshire. Alison had written a paper in 1840, “A Legal Provision for the Poor,” wherein he pointed to the anomaly of leaving grants of relief to the discretion of persons representing the ratepayers who had to pay the charge. He wrote: “the claims of the poor for relief are not in the nature of a petition . . . but a legal right, founded upon

the claim which the destitute and impotent poor in a complicated state of civilised state of society everywhere have to a reasonable support from the more opulent and fortunate classes of society who have been enriched or maintained by their labour."

- ⁶ It has been contended that although these measures together constituted the biggest instalment of social reform by any one Government in the nineteenth century, they did not present a substantial shift from *laissez faire* to state intervention and were often cautious or in some cases permissive, for example, the Artisans' Dwelling Act 1875, Disraeli being well aware that compulsion is always unpopular in England. Disraeli was not the originator, but pushed Bills through Cabinet which originated from the Civil Service, a Royal Commission and proposals by his great Home Secretary, Richard Cross (1823-1914): see Robert Blake, *Disraeli*, (Methuen and Eyre & Spottiswoode, 1969 ed.), pp. 553-556.
- ⁷ The Webbs refer to Chamberlain's recognition in 1884 of "the disease of involuntary Unemployment" and his objection to relegating *bona fide* unemployed workmen to the Poor Law and its consequences for civil status: *op. cit.*, pp. 968-970. In a speech at Warrington on September 8, 1885 Chamberlain declared: "Now that we have a Government of the people by the people, we will go on and make it for every man his natural rights—his right to existence and to a fair enjoyment of it," quoted in Alan Bullock and Maurice Shock, *The Liberal Tradition*, (1956), p. 207.
- ⁸ Reprinted in W. S. Churchill, *Liberalism and the Social Problem*, (1909), p. 80.
- ⁹ For public health history see Sir John Simon, *English Sanitary Institutions*, (John Murray, London, 2nd ed. 1897). Sir John was first Medical Officer of Health for the City of London (1848) and was responsible as a civil servant from 1855 for implementing public legislation first bringing "health under the protection of Law," which was the achievement of Sir Edwin Chadwick. Chadwick was an Assistant Commissioner of the inquiry into the working of the Poor Law and was responsible for principles adopted in the 1834 Poor Law Reforms, which he had, as a disciple of Bentham, put forward, arguing that the situation of the man on relief "shall not be really or apparently so eligible as the situation of the independent labourer of the lowest class." This seems to be a Victorian anticipation of the poverty trap. Since elsewhere in these Lectures I am hard on civil servants, I should like to emphasise the crucial originating function they have often played in creating rights, for example, Chadwick, Simon, H. Llewellyn Smith, permanent Secretary to the Board of Trade and responsible for the inauguration of National Insurance and Labour Exchanges by Asquith's Liberal government, and Edward

Phelan and Harold Butler (1883–1951) who drew up the ILO proposals and both became Directors of the International Labour Office.

¹⁰ *English Poor Law History: Part II, op. cit.*, p. 626.

¹¹ Alexis de Tocqueville, *The Ancien Regime and the French Revolution*, Fontana, H. Brogan ed., (1856) pp. 162–185 *passim*. Tocqueville, sounding like Burke on writers: (cp. *Reflections, op. cit.*, pp. 213 *et seq.*) condemned the Economists and the consequences of their writings. Pointing to their fervent zeal for equality and tepid desire for liberty, he saw in them the characteristics of contemporary socialist revolutionaries. Earlier Thomas Carlyle, *The French Revolution: A History* ((1837) K. J. Fielding and D. Sorenson, ed. 1989, (OUP), in Vol. i, p. 326 had enquired “how many Morellets . . . who had sat all their life hatching Philosophe eggs, cackle now, in a state bordering on distraction at the brood they have brought out!” Morellet mixed in an Anglo-French reforming circle, which included Lord Shelburne, Priestley, Price, Bentham, Turgot and Condorcet, and made broadly similar criticisms of the Parlements and other institutions of France and the Parliament of Great Britain. Members of the circle influenced events: R. R. Palmer, *The Age of Democratic Revolution: A Political History of Europe and America 1760–1800: The Challenge*, (Princeton University Press, Princeton, 1959), pp. 267 *et seq.*, shows how influential Price’s *Observations on the Nature of Civil Liberty* (1776), arguing for better representation in Parliament, was in starting the French debate from 1778 onwards on constitutions and recognition of natural rights which went on with British, French and American participants, although, as Palmer points out, “obviously no pamphlet or war of pamphlets determined constitutional decisions made in France in 1789.”

¹² Palmer, *op. cit.*, p. 451.

¹³ Spence’s Lecture was republished in 1793 as *The Real Rights of Man*. In his *An Essay on the Right of Property in Land with respect to its foundation in the Law of Nature*, Ogilvie advocated a land tax in view of the natural right of each individual to possess and cultivate an equal share. See M. Beer, *Pioneers of Land Reform*, (London, 1920). Even Locke had written that God had given the land as common property to man.

¹⁴ Thomas Paine, *Agrarian Justice* (1797) reprinted in Thomas Paine, *Representative Selections*, H. H. Clark, ed. (Hill, New York, 1969), p. 346.

¹⁵ Beatrice Webb described Bentham as Sidney Webb’s “intellectual godfather” in *Our Partnership*, (London, 1948), p. 210. Long before his radicalisation in later life, Bentham was an advocate of bureaucratic reform. His discourse is interesting as a product of cross-fertilisation of thought: he reacted against his University

teacher, Blackstone, and took up concepts developed by British thinkers as reproduced by Swiss and Italian ones. The concept of utilitarianism, the psychological law of association explaining mental processes and the end of human conduct as pleasure and pain, the principle of the happiness of the greatest number and its use as the ultimate principle came from Locke, Burke, Hutcheson ("that Action is best, which procures the greatest Happiness for the greatest Numbers": *An Enquiry into the Origin of ideas of Beauty and Virtue*, (1725)), John Gay's *Dissertation*, (1731), Hume and David Hartley (1749). Dr. Joseph Priestly in 1768 proposed as "the great criterium" to settle all the questions of politics "the good and happiness of the members, that is to say the majority of the members of a state." Claude Helvetius, the Swiss utilitarian, took up these ideas in his *De l'Esprit* in 1758 and his Italian follower, Cesare Beccaria (translated into French by Morellet), based his theory of punishment on it (1764). Bentham credits Helvetius and Beccaria for his awakening and the principles he adopted, but elsewhere credits Priestley: see E. Halévy, *The Growth of Philosophic Radicalism*, (Faber, London, 1928), p. 22.

- ¹⁶ Owen sought social regeneration of the labouring poor in Benthamite psychological fashion. He was indirectly influenced by William Godwin who published *Political Justice* in 1793, expressing faith in human progress, just as Condorcet did in his *Esquisse d'un tableau historique des progrès de l'esprit humain* written in 1794 while in hiding from the Terror and shortly before his suicide. Godwin was a thinker at once communistic, anarchistic and utilitarian. Godwin's thought also affected Thompson, other Ricardian socialists, Proudhon and Marx. For inter-relationships, see George Lichtheim, *A Short History of Socialism*, (Weidenfeld & Nicholson, 1970), pp. 38-42. This is a useful account for the general reader.
- ¹⁷ Harmondsworth, 1975. The growth of feminist and socialist women's movements, economic autonomy for women and the winning of the vote are described in R. J. Evans, *The Feminists: Women's Emancipation Movements in Europe, America and Australia 1840-1920*, (Croom Helm, revsd. ed. 1979).
- ¹⁸ The luminous prose of A. V. Dicey, in his *Lectures on the relation between Law and Public Opinion in England during the 19th Century*, (Macmillan, 2nd ed., 1914), Lecture VI, has firmly identified "the period of Benthamism or individualism" with *laissez faire*, which Dicey described as being a presumption or prejudice in favour of individual liberty (p. 258). Yet in Lecture VII, he also wrote of "the growth of collectivism" increasing from 1848. From 1860 onwards, Dicey argued that the principles of collectivism were accepted, with it by then being denied that *laissez faire* was in many cases a principle

of sound legislation. Instead, belief in the benefit of Governmental interference, even when it greatly limits the sphere of individual choice or liberty, prevailed. The age of Victorian reform in fact contradicts the notion of the age of *laissez faire*, although social and economic historians find the latter concept useful to indicate that there was a period when emphasis was laid on the rights of the individual and his duty to help himself; that there was a presumption against the intervention of the state; and that the view prevailed that economic individualism would better serve society. However, "it would be wrong to infer from the use of such a phrase [*laissez faire*] that there was a period in British history when social policy was determined by such ideas to the exclusion of all others": see Arthur J. Taylor, *Laissez faire and State Intervention in 19th-Century Britain*, (Macmillan, 1972), p. 63.

- ¹⁹ Green's contemporary, Henry Sidgwick (1838–1900) commented that "the development of political ideas is influenced in a different way by their connection with political facts. The ideas are related to the facts of political history, not only as effect to cause, but also as cause to effect": in *Development of European Polity*, p. 346, quoted in Dicey, *op. cit.*, at p. 47, who concluded that laws are amongst the most important political facts influencing and causing legislative opinion.
- ²⁰ The use of "she" is retained in the Statutes and Byelaws of my College, once reserved for women, but now open to men and women alike. Ordinary English usage implies that any human subject is a male. It is useful from time to time to use "she" as a reminder of equality.
- ²¹ *Political Thoughts and Reflections*, printed in H. C. Foxcroft, *The Life and Letters of Sir George Saville, Bart., 1st Marquis of Halifax*, Vol. II, pp. 491 and 497. Halifax's aphorisms were annotated by Foxcroft who instances the use of "Fundamentals" in the 1688–9 Revolution and its use in connection with Fundamental Law. Although not cited by Foxcroft, it is not unlikely that when referring to talk of "fundamentals" Halifax also had in mind use of that word by Oliver Cromwell, who, angered by Parliament's refusal to be restricted by the writs under which members had been returned and to be bound by the Instrument of Government, said on 12th September 1654: "It is true as there as some things in the Establishment which are Fundamental, so there are others which are not, but are Circumstantial ... But some things are Fundamentals! ... These may *not* be parted with; but will, I trust, be delivered over to Posterity, as the fruits of our blood and travail. The Government by a single Person and a Parliament is a Fundamental! It is the *esse*, it is constitutive ... In every government there must be Somewhat Fundamental, Somewhat like a *Magna Charta*, which should be standing, be

unalterable ... That Parliaments should not make themselves perpetual is a Fundamental. Of what assurance is a Law to prevent so great an evil, if it lie in the same legislature to *unlaw* it again?" Lord Scarman's Hamlyn Lecture, *English Law—The New Dimension*, (Stephens, 1974), at p. 17 quotes Cromwell. The Levellers took the same view. "They asserted as Fundamental, that the *Government of England* ought to be by Laws, and not by Men" using half of Harrington's famous phrase "It is the empire of laws, and not of men" a phrase later used in the Massachusetts Constitution of 1780, explaining the doctrine of separation of powers "to the end it may be a government of laws and not men."

Halifax, statesman, essayist and contemporary of Locke, noted how every human institution changes. He was an eighteenth-century legal realist, commenting that the common law was what any court's execution makes of it, with law and government in the last resort depending upon the intelligence and goodwill of the persons who conduct them.

²² Hobbes, *Leviathan* K. R. Minogue ed., (Dent, London, 1973), Part I, Chap. XIV, p. 66.

²³ Quoted in C. H. MacIlwain, *The High Court of Parliament and its Supremacy*, (Yale U.P., 1910), p. 65. MacIlwain gives an account of the development of "fundamental law" at pp. 42-108.

²⁴ (1803) 1 Cranch.

²⁵ Comparative study of the French Declaration with the Virginia Declaration of 12th June 1776 shows that: "The Virginia Declaration differs from the French in its emphasis on freedom and frequency of elections and on jury trial, in its concrete warnings against excessive bail, general warrants, suspending of laws and standing armies, and its more explicit reference to Christian and moral virtues. The French Declaration differs from that of Virginia in its clearer formulation of citizenship, its definition of law as the expression of the general will, its definition of liberty as the right to do what does not harm another, its more explicit provision that the law must be the same for all and public office open to all alike on the basis of abilities, its greater reserve in relating freedom of thought and religion to law and order, its provision that property may be taken for public use only with due compensation, its less explicit reference to moral virtues and its adoption of a deistic rather than a Christian tone. The resemblance remains remarkable. Resemblance in the sequence in which ideas are presented is a stronger indication of filiation than resemblance in context." See Palmer, *op. cit.*, n. 11, *supra*, pp. 520-521.

²⁶ *The Theory of Moral Sentiments*, VI.ii.2. 18 (pub. 1759, 6th ed. 1790) A. L. Macfie and D. D. Raphael ed., (O.U.P., 1976), p. 243. It has

been suggested that this rewritten passage shows either the increasing conservatism of age or Smith's response to the French Revolution.

²⁷ I have adopted the approach in W. K. Frankena, *Ethics*, (Prentice-Hall, Eaglewood Cliffs, 2nd ed. 1973), pp. 81 *et seq.*

²⁸ I have particularly drawn on R. M. Hare, "Justice and Equality" in *Justice and Economic Distribution*, J. Arthur and W. H. Shaw ed., *op. cit.*, p. 116; Albert Weale "Issues of Value and Principle in Social Policy," in *Social Policy and Social Welfare*, M. Loney, D. Boswell and J. Clarke ed., Open University Press, Milton Keynes, 1983), p. 104; Vic George and Paul Wilding, *Ideology and Social Welfare*, (Routledge & Kegan Paul, 1976), pp. 62 *et seq.*; and Rawls, *A Theory of Justice*, *op. cit.*.

²⁹ See the letter by Frank Field M.P., and "Statistics and the Poverty of Integrity" by Melanie Phillips in *The Guardian*, July 27, 1990. See also Raymond Plant, "Trickle Down, Gushing Up," *The Times*, August 7, 1990, p. 10. Measurements of poverty and the effect of social security changes up to September 1988 are comprehensively examined in A. B. Atkinson ed., *Poverty and Social Security*, (Harvester Wheatsheaf, 1989).

³⁰ Bernard de Mandeville (1670?-1733), a Dutchman who settled in England, put forward the cynical theory that the vices of individuals are to the benefit of the public and that if things are left alone, they will work out better than if you meddle. See his *Fable of the Bees* (1723). The image of the capricious woman who wants a new gown is used by Addison, Mandeville and Montesquieu, all quoted in Pocock, *The Machiavellian Moment*, p. 465.

³¹ An excellent account both of the history and of the current position is given in Michael Hill, *Social Security Policy in Britain*, (Edward Elgar, 1990). A punchy, but accurate, picture is given in Ruth Lister, *The Exclusive Society: Citizenship and the Poor*, (Child Poverty Action Group, London, 1990).

³² They are lucidly described in Hill, *supra*, pp. 157-172.

³³ Adam Smith made the point that although society gains from education so do those who receive it: "The expence of the institutions for education and religious instruction, is likewise, no doubt, beneficial to the whole society, and may, therefore, without injustice, be defrayed by the general contribution of the whole society. This expence, however, might perhaps with equal propriety, and even with some advantage, be defrayed altogether by those who receive the immediate benefit of such education and instruction, or by the voluntary contribution of those who think they have occasion for either the one or the other." *Wealth of Nations*, E. Cannan, ed., (University of Chicago Press, 1976), p. 340.

³⁴ See Hill, *supra*, pp. 32–35, 138–139 and 151–157. See also J. Millar and C. Glendinning, *Women and Poverty in Britain*, (Wheatsheaf, 1987), and “Gender and Poverty,” (1989) *Journal of Social Policy* Vol. 18, No. 3, pp. 363–382.

³⁵ The arguments are summed up in Lister, *op. cit.*, pp. 52–56.

³⁶ See *Rights of Man, Part II* (1792), (Dent, London, 1954), pp. 254–255: “Many a youth comes up to London full of expectations and with little or no money, and unless he get immediate employment he is already half-undone; and boys bred up in London without any means of a livelihood, and as it often happens of dissolute parents, are in a still worse condition; and servants long out of place are not much better off. In short, a world of little cases is continually arising, which busy or affluent life knows not of, to open the first door to distress. Hunger is not among the postponeable wants, and a day, even a few hours, in such a condition is often the crisis of a life of ruin.

These circumstances which are the general cause of the little thefts and pilferings that lead to greater, may be prevented . . . The Plan then will be: First,—To erect two or more buildings, or take some already erected, capable of containing at least six thousand persons, and to have in each of these places as many kinds of employment as can be contrived, so that every person who shall come may find something which he or she can do.

Secondly,—To receive all who shall come, without inquiring who or what they are. The only condition to be, that for so much, or so many hours’ work, each person shall receive so many meals of wholesome food and a warm lodging, at least as good as a barrack. That a certain portion of what each person’s work shall be worth shall be reserved, and given to him or her, on their going away; and that each person shall stay as long or as short a time, or come as often as he chuse, on these conditions.

If each person stayed three months, it would assist by rotation twenty-four thousand persons annually, though the real number, at all times, would be but six thousand. By establishing an asylum of this kind, persons to whom temporary distresses occur would have an opportunity to recruit themselves, and be enabled to look out for better employment.”

3. *Constitutions, Values and Civil and Political Liberties*

The Themes

In this third Lecture I begin by explaining that all law is the outcome of value choices and that these choices are given effect by the machinery for making and applying law, that is, the Constitution. The Constitution and the legal system, which is a specialised sub-set of constitutional arrangements, themselves reflect values and create corresponding human legal rights, with varying constitutional arrangements being less or more efficacious in securing continuity for already-accepted values. If some values are not accepted or are considered to be inadequately implemented or protected, demands for constitutional change or for other institutional arrangements will surface. In that context, I touch on the campaign for a new constitutional settlement and a Bill of Rights, ending the Lecture with an account of the

state in 1990 of civil and political liberties, always in so doing emphasising problems of interpretation of and of choice both between different values and between various human legal rights.

The Constitution, Law and Values

In my last Lecture, I explained how behind each human right lay a value. Human *legal* rights form a significant part of our system of law, which is the product of our law-making and law-applying arrangements in conjunction with our policy decision-making arrangements. The rules defining and empowering major law-making, law-applying and policy decision-making institutions, when perceived as an overall authorising framework, themselves make up the Constitution. This constitutional framework is itself the outcome of historic events and traditions and incorporates values. Conversely, one can say that the output over time of the constitutional arrangements, which have themselves gradually changed, is the body of law and the legal system.

The purpose of the whole body of law is to protect persons, their relationships and their property, including development of their autonomy or liberty, very often by facilitating their dealings or exchanges. A law may also be in place to protect institutions of law-making and of enforcement, but it is then serving both to further the value of general order and also, in ascending degrees of remoteness, to protect the persons in office and those in whose interest they are presumed to be holding such office. Exceptionally, a law may be in place for the direct furtherance of a value itself, for example, the older law about blasphemy was in place to protect the Christian religion, although today the justification is public order

and protection of those persons likely to be injured should there be violence. (Nonetheless, the crime is still confined to blasphemous remarks about Christianity.) The lack in the United Kingdom of a formal constitution, setting out major governmental structures in a framework enunciating values, has meant that there has been little principled debate about political issues as these individually arise and that argument has tended to be empirical, rather than purposive, and legalistic, rather than value-oriented.

Here is not the place to debate the merits of an interests, will, consensual, habitual or command theory of law. Jurisprudence is a many-splendoured mansion and there are valid aspects within each theory. But, whichever or whatever admixture of theory is adopted, all depend upon the values of those with interests or upon the values of the willing, consenting, recognising or commanding actors. In summary, whenever and howsoever particular laws are evolved, developed, interpreted or applied, such laws are the outcome of choices made between competing values, which motivate law-makers and law-apppliers, whether legislators, judges or practitioners of administration. The reader will note that this is merely an extension of what was said about economic and social policy-making in the last Lecture.

Once enacted, law and the institutions it creates reinforce particular values behind the legal rules. The law also enables those persons operating institutions to further their own values by influencing interpretation and application in particular circumstances. Even those who have tended to idealise English law in Burkean and Blackstonian fashion as reflecting tradition, accept that law affects attitudes, that is, beliefs and values and vice-versa.¹

Some 17 long years ago, having done the exercise of skimming through *Halsbury's Laws of England* and

Halsbury's Statutes, I realised that the whole body of law could be reclassified in terms of human legal rights.² At present law is primarily classified doctrinally, for example, how it arises out of contract, tort, crime, particular facilitating statutes, or where persons stand in certain equitable or personal relationships, such as within the family. In contrast, the law of property is an older conception, directly related to human rights concepts and their development. The outcome of reclassifying the whole body of law would be human legal rights, some basic and others less significant, together with an account of their limits and inter-relationships. All would reflect particular values—and by overtly doing so would reinforce these. For example, in the case of civil and political legal rights and the right to enjoy and deal with property there would be explicit autonomy by way of various freedoms; justice would be reflected in rights to fair procedures, especially criminal ones, and in distributive mechanisms for socially produced goods; pleasure or happiness would be reflected in rights facilitating its pursuit, including access to material, intellectual and ethical satisfactions; an enhanced life would be reflected by rights contributing to a healthy and developed life; and democracy would be achieved by rights to participation. Values such as peace, order and security would be reflected by limitations on rights if their exercise was likely to result in extensive social conflict or harm to the rights of others.

Human Legal Rights under the United Kingdom Constitution

I must now explain the relationship between our constitutional and legal system and how human legal

rights have been established in the United Kingdom. It is a commonplace that the United Kingdom does not have a comprehensively stated and constitutionally guaranteed set of human legal rights and that human rights are legal rights only to the extent that they can be found to exist in ordinary law. As I indicated above, if the body of United Kingdom law were to be computerised and the file for human legal rights retrieved, nearly all the international human rights standards, civil, political, economic, social and cultural, would, subject to varying degrees of restriction, appear on the printout. Furthermore, if statutes and judicial decisions over the centuries were consolidated into a single constitutional instrument, not only would all those rights appear, but so would the structure and details of the constitution. The computer operator could easily shift around the legal rights, choosing the basic ones as a preface to any document. They would in effect make a Bill of Rights. Any such Bill would, as United Kingdom law now stands, have to set out variations and provisos as to the applicability of the rights in England, Scotland and Northern Ireland, because of their different legal traditions and systems. The Scots system would prove the most libertarian, because of its better criminal justice provisions and safeguards against police misconduct, only recently in part adopted in England.³ That of Northern Ireland, despite the reforms of the 1970s, would, so far as concerns public order laws and criminal procedures, because of the continuing emergency situation, be the least liberal, yet it would best exemplify institutional mechanisms devised to protect human legal rights, such as a Fair Employment Commission,⁴ a Standing Advisory Commission for Human Rights and legal prohibitions against discrimination on the ground of religious belief or political opinion and against occasioning religious hatred. The latter prohibitions sadly but

graphically illustrate the limits of law in restraining passionate beliefs and consequent misconduct.

The explanation for the United Kingdom having neither a written constitution, whether with a preliminary Bill enumerating basic rights or with specific articles in its main body comprehensively delineating basic human legal rights, lies in its history. The Constitution has evolved over centuries through judicial decisions, statutes, subordinate legislation and customary parliamentary and governmental practices. There are numerous major Acts of Parliament, particularly the Petition of Right 1628, the Bill of Rights and the Scottish Claim of Right of 1689, the Habeas Corpus Acts 1679 and 1816, the Representation of the People Act 1949, the Race Relations Acts 1968 and 1976 and the Sex Discrimination Act 1975, all of which set out rights, impose prohibitions on conduct which would effectively infringe these rights and lay down remedial procedures for enforcing claims following their unjustified invasion. (Early Bills of Rights in the British American colonies drew on and built upon the 17th century measures.) The various Acts listed reflect values, for example, personal liberty, freedom of speech, democracy, equality and absence of discrimination, while the Race Relations and the Sex Discrimination Acts go further by prohibiting conduct in conflict with such values and seeking in the long run to alter attitudes, that is beliefs and ultimately notions about values.

Two technical characteristics of United Kingdom human legal rights law, sometimes misunderstood as criticism, must now be mentioned. These characteristics are, firstly, that liberty, that is, freedom to act, is merely residual, and, secondly, that only if the courts or another governmental institution will afford a remedy, is there a right. In fact, these are characteristics of legal rights in *all* legal systems, but are more remarked upon in the

United Kingdom, because of the absence of a written constitution setting out the major legal human rights and the untheoretical, ungeneralised historic pattern of English legal development. Common Law, as judicially developed, is pragmatic, dealing with problems only when they arise. Judges do not normally enunciate broad generalisations or principles in advance of conduct putting them in issue. Seldom, until it recently became more fashionable, did they opine about "liberty of the person," "individual liberties" and "constitutional liberties," let alone "human rights" and "fundamental rights." Those judges who do, do so intermittently, while statutory draftsmen sheer away from such unorthodox imagery. With the odd striking exception, British judges currently perceive their judicial task as being confined to determining whether conduct involves breach of contract or other specific obligation, commission of a tort, or breach of a statutory duty or of the criminal law. If the nature of the conduct is such as to invade a specific right of another person, or if it breaches a criminal law prohibition, then and only then will a remedy be awarded. Such specificity has the result that persons are free to conduct themselves, so long as they do not invade the persons or property of others or transgress any specific restraining provisions. Since freedom to act is restricted by the rights of others and by specific legal provisions, it is obvious that freedom is of necessity "residual." The word "liberty" aptly expresses these connotations.⁵

The residual character of human legal rights also arises from the fact that until recently there was no higher law in the United Kingdom, a point to which I will revert. This was because English 17th century thinkers imported the doctrine of sovereignty, a concept first formulated in the 16th century by the French political theorist, Bodin (1529?-1596) who was concerned

about the conditions under which order could be secured. Sovereignty referred to the absolute, unlimited and illimitable power of rulers. Stuart monarchs claimed to have sovereignty, but it was eventually regarded as being definitively vested in the English Parliament as a whole (Monarch, Lords, and Commons) from the time of the 1688 Revolution. From 1707 that Parliament was merged by the Act of Union with the Scottish Parliament. On an Anglocentric view, which had become prevalent by 1717, the new Parliament has continued to enjoy sovereignty, despite the earlier and later medieval view about limits on the power of rulers and supremacy of the law and arguments about fundamental law with the early Stuarts. English judges and writers have declared that Acts of Parliament can make or unmake any law whatever, with later Acts prevailing over earlier Acts and the common law. For those who accept such a view the law includes the doctrine of sovereignty of Parliament. The result is that parliamentary power is legally unbounded, so that a new Act or authorised subordinate legislative measure can diminish any human legal right, however basic that right may be, by imposing limitations or conditions on its exercise, or by cutting down its scope, and may even extinguish it.

Human Legal Rights and the Impact of European Obligations in Limiting United Kingdom Governmental Power

In earlier lectures I indicated that in Britain's former American colonies English political thought came to fruition: the rhetorical language of human rights talk, with adjectives such as immutable, inalienable, imprescriptible, fundamental, basic and absolute, used as

qualifiers of human rights, was ultimately reflected in practical constitutional arrangements, giving varying degrees of permanence to the values incorporated in the particular arrangements. I also described how British entry to European institutions was reimporting British human rights traditions and referred to the long-term impact which the transfer of power in certain economic and social spheres to European Economic Community institutions will have upon human legal rights in the United Kingdom. Sovereignty in particular spheres has been split between EEC and United Kingdom institutions within a federation still undergoing evolution. The EEC Treaty and the Single European Act are higher or fundamental law, the criterion for validity when EEC law and United Kingdom law are in conflict.⁶ United Kingdom courts must apply the European Court's interpretative rulings, including those on human legal rights. Notable among such human legal rights are freedom of movement of workers, the right of establishment and the freedoms of association and of collective bargaining. Most significant so far has been the Treaty of Rome's Article 119 on equal pay for men and women and Directives implementing it. The European Court interprets the EEC Treaty in accordance with the common traditions, perceptions and ideas of its Member States, using human rights concepts and international human rights and standards (the European Convention on Human Rights and the two UN Covenants) as statements of principle in terms of which EEC and Member States, measures are to be interpreted and adjudged. Furthermore, EEC organs may enact new human legal rights by way of Directives in areas within competence. In April 1989 the European Parliament adopted a Declaration on Fundamental Rights and later in 1989 EEC Heads of States made a solemn declaration of principles, the Community Charter of Fundamental

Social Rights for Workers. Both declarations have the same hortatory effect as the original French Declaration of the Rights of Man. Yet, although the Social Charter has no *binding* force, being merely an assertion of human rights in the social sphere, it has crucial political significance for the future.⁷ Summing up the position in an EEC context—and the United Kingdom *is* part of the EEC—there are now two solemn statements of *principle* on human rights, that is the Social Charter and a Declaration on Fundamental Rights; there is a body of EEC human *legal rights*, constituted by Directives and European Court judgments, themselves in accordance with international human rights standards; and there is the *higher law* of the Treaties.

Yet another factor reawakening the somewhat comatose guardians of human rights traditions was United Kingdom membership of the Council of Europe and subjection to the responsibilities entailed by the United Kingdom's being a signatory to the European Convention on Human Rights.

Because the right of individual petition has been accepted, persons subject to the United Kingdom's jurisdiction may use the Convention's circuitous procedure, subject to prior invocation of United Kingdom domestic courts to show exhaustion of domestic remedies. Paradoxically, United Kingdom courts cannot rely on the Convention to decide any such case when it comes before them, because the Convention has not been incorporated into the United Kingdom's domestic law. However, once a petitioner has been denied a remedy under United Kingdom domestic law, application can then be made to the European Commission of Human Rights, and, should that application be declared admissible, the Commission will investigate and attempt to secure a friendly settlement. Should no solution be reached, the Commission reports to the Council of

Ministers of the Council of Europe (in fact to their Deputies who are the Member States' Ambassadors in Strasbourg). Thereafter, the case may be referred by the Commission or a state party to the European Court of Human Rights, which can afford just satisfaction to the injured applicant. The United Kingdom has implemented agreed friendly settlements following Reports and has complied with Commission Reports and Court judgments, except in November 1989 when, after the European Court of Human Rights judgment in *Brogan and Others*,⁸ it derogated from the Convention. Derogation is a method of temporarily circumventing the stipulations within a treaty. It permits the derogating state to take temporary and limited measures contrary to the treaty, subject to informing the treaty authority and giving reasons. Derogation can only occur if there is a public emergency threatening the life of the nation and the measures are *strictly* required by the exigencies of the situation. In *Brogan* the Court ruled that the Prevention of Terrorism (Temporary Provisions) Act 1984, Schedule 12 contravened Article 5(3) of the Convention by permitting terrorists to be held in custody for 48 hours, subject to a possible extension for a further five days by a Secretary of State, whereas Article 5(3) requires suspects to be brought promptly before a judicial authority and this permits only a limited degree of flexibility. The United Kingdom's given reason for derogating was that circumstances required power to detain those suspected of involvement in acts of terrorism connected with the affairs of Northern Ireland.

Terrorism is one of the most difficult issues with which states have to cope, a point taken by philosophers testing human rights theories. For instance, they seek to demonstrate the ultimate immorality of utilitarianism by questioning whether one person may ever kill someone else to save another's life, or whether torture may be

used to obtain information from the planter of an atomic bomb timed to explode shortly in an unknown location. Torture is a favoured example because (like slavery, servitude, retrospective criminal offences or retrospectively increased penalties) it is never under any circumstances permitted. In contrast, the use of force to occasion death is sometimes lawful both in ordinary circumstances and in time of emergency. In ordinary circumstances deprivation of life is not contrary to Article 2.2 of the Convention

“when it results from the use of force which is no more than *absolutely necessary*:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

Again, in time of war there can lawfully be deaths resulting from lawful acts of war, provided the force used is to an extent “*strictly required*” for example, where combatants are in action.⁹ That wartime test is less rigorous than the “*absolutely necessary*” test applicable in peacetime. If there is no state of war, unless the force used was *both* absolutely necessary *and* either taken to quell insurrection, or to effect arrest, or in defence of any person from violence, it will be unlawful. In either case criteria for the use of deadly force will occasion dilemmas. Because successive British governments have been unwilling to declare that a state of war exists in relation to the IRA, they are bound by the peacetime limits on the use of deadly force. Reluctance to accord captured IRA members combatant status as prisoners of war under the Geneva Convention and the political

embarrassment of treating the IRA as a *de facto* administration capable of conducting war and of giving them such a propaganda victory explain the determination of governments not to declare existence of a state of war. Applying the peacetime criteria to enforcement of order, soldiers, including members of the SAS, may be acting in defence of a person, or in self-defence, or attempting to arrest or to quell a riot and using no more force than is absolutely necessary. A difficult evaluation would have to be made on the specific facts. As things now stand, since there is no state of war, and since the SAS is a military force trained to kill rather than to arrest, there are serious questions about the lawfulness of rendering it operational in times of peace. Certainly any "shoot to kill policy" is unlawful and could only become lawful in time of war. Even then it would have to be confined in scope, covering combatants in action or subject to guerilla attack.

Improving Domestic Institutions Giving Effect to Human Rights

That the United Kingdom judiciary has not been authorised to pronounce on the Convention by making it part of domestic law is a signal vote of no-confidence in judges by successive United Kingdom governments. With such governmental judgments on judicial competence no mere academic's strictures can compare.

The reasons given by the present government for refusing to incorporate the Convention are thin. It has argued that the Convention's broad propositions are unsuited to the British style of interpreting the will of Parliament by using close textual analysis; that there is a risk of conflict between the courts and the Government

supported by Parliament, with the courts being used to challenge unpopular action; that the judiciary must be kept free from political controversy and not required to take policy decisions; and that when Parliament's will is to be altered or reversed, this must be done by elected representatives, rather than by those whose independent tenure makes them not subject to election. All objections are answerable: close textual analysis is only one of several British styles of interpretation, two of which are very broad; conflicts between courts and government occur regularly and inevitably in litigation concerning local government, economic regulation, planning, social welfare legislation and indeed in most spheres of governmental activity; the judiciary continuously face controversy from any disappointed party with access to the public media; and non-election, combined with traditions of judicial independence, mean that short-termism and self-interest are absent from judges' decisions. On the contrary, more publicised disagreement about the legal validity of decisions by Ministers and civil servants (there are in fact many cases decided against Ministers) would give the judiciary greater public legitimacy. It would mean some shift of power, a notion sarcastically rejected in 1987 by the then Attorney-General, Sir Patrick Mayhew Q.C.:

"Our constitutional history rather strongly shows that over the centuries the British people have preferred that these matters should be decided by people whom they can elect and sack rather than people immune from either process—wiser, less opportunist or even less venal though such people might well be considered to be."¹⁰

If judges are considered unfit or inappropriate to interpret the Convention, this makes a mockery of their being entrusted with most of their present jurisdiction. The irony is the more poignant when it appears that

United Kingdom governments are quite happy to entrust the judiciary with the task of interpreting human rights guaranteed by the law of the European Economic Community, but, when the task is that of interpreting the Convention, this is left solely to European professors and jurists on the Commission and European Court of Human Rights and to career diplomats in Strasbourg on the Committee of Ministers' Deputies, who actually decide the final outcome in the vast majority of cases upon receipt of Commission Reports.

At first sight, surprisingly, most of the Law Lords in their non-judicial capacities, other than that great libertarian Lord Scarman, have not supported incorporation of the Convention into United Kingdom law. They well know that all their judicial decisions have significance, great or small, in relation to issues of political, social or economic concern. They are aware that in practice a Bill of Rights would not make a considerable difference to their task, unless they were to take Professor Dworkin seriously and attempted to enter upon his Herculean task of constructing for themselves theories upon which to judge. I suspect that the real reasons for judicial reluctance have not been spelled out. When institutions are altered, general reform is sought. Doubtless judges would not jib at receiving training in constitutional interpretation, something suggested. Their general silence and any expressed opposition is probably underlain by concern about demands for major structural change likely to be sought by some politicians and by academic writers dilating on what they perceived to be a general extension of the judicial role. A bargain demanded as part of any Bill of Rights package could well be a parliamentary equivalent of the United States Senate Judiciary Committee to vet judicial appointments. Moving general power to make judicial appointments from the Lord Chancellor to Westminster is scarcely

likely to be welcomed by the legal profession.¹¹ Nor would most welcome the alternative of a Judicial Service Commission with lay members, even if these were drawn from the good and the great—a compromise in any event unattractive to those critics of the judiciary who seek radical reform of the system of judicial appointments. The basic objection by supporters of current judicial arrangements would be the inevitable answerability of such a Commission to Parliament, which would then, contrary to existing conventions, be free to engage in wide-ranging debates about judges and their conduct.¹²

Civil Service attitudes are also unlikely to be sympathetic to a Bill of Rights. Mandarins, who effectively shape the laws and whose traditional role is defensive, will not wish to give additional purchase to any decision-making body capable of causing ripples on the Thames. Rather than looking at the judiciary with academic eyes or sensationalist journalistic goggles, those who criticise judges for being too executive-minded should imagine how some Ministers, Whitehall officials and some Prison Governors perceive judges as saboteurs, not least in connection with upholding rights of local rather than central decision-making¹³ and disciplinary powers in prisons.¹⁴ Civil servants are likely to assess a Bill of Rights as constituting a major shift of power and, while not quite Panglossian, want no significant changes in the governmental system which they have become accustomed to operate. In practice, such views will influence Ministers when deciding whether to adopt a Bill of Rights.

I believe that the *short-term* effects of a Bill of Rights of the kind likely (if at all) to be adopted in the United Kingdom have been over-emphasised. Should the European Convention on Human Rights be enacted, using the interpretation Bill of Rights model invented in

Canada, it would act as "brakes," using a more appropriate mechanistic metaphor than the absolutist imagery of Dworkin, who, surprisingly for a liberal individualist, has borrowed Hobbes's notion that when all else fails clubs—I mean rights—are trumps. Because Parliament could continue to legislate as it wishes and expressly "notwithstanding" the Bill, no conflict with the legislature as such would arise, although there would be problems for mandarins and any government's political managers in securing passage of amending legislation. There would also be a psychological impact, with judicial intervention becoming even more visible and a greater focus for political comment.

The importance of a Bill of Rights is *long-term*, consisting primarily of its educational function, especially in modifying parliamentary attitudes, with growing reluctance publicly to "notwithstanding," and in influencing bureaucratic and public perspectives. Conventions of the constitution (*pace* Dicey and Ivor Jennings) have had long and effective lives in the United Kingdom, and new conventions about the unconstitutionality, as opposed to illegality, of enacting any conflicting legislation would develop. Other sectors of society, especially powerful interest groups, such as trade unions, and political parties, would ultimately come to terms with the standards of the Bill of Rights and the power of the judiciary to uphold these. Their attitudes too would be shaped.

Those who advocate a new constitutional settlement raise two other significant issues, themselves characterisable as human rights questions. Devolution involves the right to internal self-determination, an area of International Law which is rapidly developing. It has such major implications for the whole governmental system that it is inappropriate here to do more than mention it. The same applies to just methods of giving

effect to the right to take part in the conduct of public affairs and to vote.

I should like to take this opportunity to pay tribute to Lord Scarman, that indefatigable advocate of a United Kingdom Bill of Rights. He has played a seminal role in raising consciousness about challenges facing the English legal system and the need to use

“the rule of law in resolving the conflicts that will arise between the citizen and the state in newly developed fields of administrative-legal activity upon which the quality of life in the society of the twentieth century already depends.”¹⁵

Beginning publicly with his 1974 Hamlyn Lecture, continuing with his campaigning in the House of Lords and wherever he could have an impact, his involvement in the Constitutional Reform Centre and his later role in the founding of Charter 88, Lord Scarman attempted to create a climate of public opinion, informed by human rights values and desirous of reconstituting and modernising United Kingdom institutions. Some credit must also go to Quintin Hogg, whose linguistic skills have from 1969 onwards, and especially in his 1976 Dimbleby Lecture and the 1983 Hamlyn Lecture, ineradicably implanted the ideas of “elective dictatorship” and the necessity for constitutional reform. Nonetheless, Lord Hailsham would concede that, doubtless because of the responsibilities of high political office, there have been too many tergiversations for him to be regarded as the true prophet.

A Constitutional Re-examination?

I shall not in this Lecture traverse at any length Lord Scarman’s arguments or those of supporters of Charter

88, the current main protagonists of a new constitutional settlement. These issues are so large as to require a book themselves—and perhaps the 1977 analysis by Nevil Johnson, *In Search of the Constitution: Reflections on State and Society in Britain* cannot be bettered, only updated.¹⁶ Nonetheless, some comments are here necessary about institutions which further human rights values and are the legitimate concern of every citizen in a modern state. If the constitutional arrangements do not make provision for a significant value, or if certain values are perceived as being inadequately implemented or protected, there are likely to be demands for change. Currently the main barriers in the United Kingdom to change, good or bad, are only the good sense of members of any governing party and the fact that because any status quo is privileged, those who seek change face in practice an onus of proof, even if not too high a one.

In the last 20 years there have intermittently been demands by those at the time excluded from power for a new constitutional settlement. Unfulfilled Scottish and Welsh national aspirations for greater autonomy have been invoked in devolution debates. Those claims can properly be described as ones to the right of internal self-determination, and, in the case of the Scottish Nationalist Party, to external self-determination. Belief by smaller parties that they are proportionally under-represented and that the present electoral system is in this sense undemocratic have stimulated demands for a proportional representation electoral system. The growth of Cabinet power, as a result of the party system operating through the Parliamentary whips, has undermined the House of Commons as a genuine decision-making body—although anyone who thinks that such criticisms should be confined to one party should recollect Harold Wilson's remarks about dogs getting back into their kennels. Then there is dissatisfaction with

the largely hereditary House of Lords, even though that Chamber is much more independent of party control on non-major matters. There has also been widespread concern about the manner in which Parliamentary candidates are selected by activists and imposed upon the electorate as the only effective choice. Because democracy operates through the party system, if the value of democracy is really to operate, it is necessary to see that parties too are democratic. The value of democracy is also considered by some to be at risk in relation to changes in the relationships between central and local government. Concerns are reflected in the continuing debates on whether there is a proper distribution of power as between central and local administration, whether there is adequate democratic control over local financial expenditure and whether local democracy is being diminished in favour of central government control with indirect central democracy.

Public awareness of human rights issues has been aroused. In my second Lecture I indicated the credit that should be given to a watchful Press, various professions involved in the development and application of human legal rights, non-governmental organisations, legal academia, social policy scientists and public administrators. Recently these concerns have been highlighted by the Charter 88 campaign, which has voiced grave anxiety that traditional human rights values, already expressed in constitutional and legal arrangements, are not being furthered and that existing protections for human legal rights are being diminished by new laws and by judicial decisions.

Lay concern has been heightened by some ignorant journalism—I exclude comments by the Press cognoscenti. For example, it has been written even in "heavy" newspapers that the United Kingdom does not have a constitution. The position is that Britain does not have a

written constitution in a single major document. But to make this point is not of great significance. The constitutions of most modern states began with a single written originating document, but these have been added to by numerous judicial decisions and major statutes which collectively form the constitutional arrangements and without which the single document is wholly misleading. The significant points are two: firstly, the United Kingdom's constitution is not *entrenched*; and secondly, nowhere are basic rights set out comprehensively to serve as an inspiration to all, as a strong interpretive guide to law-makers and law-apppliers and as a reminder of the values of the whole society. Burke, writing at the time of the French Revolution, believed that the United Kingdom's "*antient* constitution of government" derived "as an inheritance from our forefathers," evolving out of historic events and traditions and in practice developing human legal rights, duties and procedures "carefully formed upon analogical precedent, authority and example," better protected liberties than did any new-made constitution and declaration of pretended rights by theorists.¹⁷ Dicey, nearly 100 years later, repeated such views, referring to *habeas corpus* "as worth a hundred constitutional articles guaranteeing individual liberty."¹⁸ In the context of the events of the French Revolution and nineteenth century instability in France these views were understandable, but two centuries later, we need to reassess such opinions in the quite different context of our allegedly democratic world, with its public acceptance of civil, political, economic, social and cultural rights as ideal standards. Even Burke did not exclude renovation and reformation of the commonwealth (Magna Carta he thought to be the oldest reformation) and he would have acknowledged that we need from time to time to think systematically about improving governmental and social

institutions, just as did Adam Smith. Burke's concern was at pulling down an edifice without practical experience and without having models and patterns of approved utility to build it up again. The need for constitutional revision cannot be better expressed than by Sir William Blackstone, from whom Burke took his ideas. In his final paragraph Blackstone concluded his 1765 panegyric on the British constitution as follows:

"We have taken occasion to admire at every turn the noble monuments of antient simplicity, and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has, lest we should be tempted to think of it as more than human structure: defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge entrusted principally to the nobility, and such gentlemen of the Kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind."¹⁹

Improvement of the constitution is unlikely to come through the party system, with each party's tactical interests affecting the proposed arrangements in different ways: if the Labour Party legislates for massive devolution in Scotland, similar demands will surface in England, which will see itself as being governed by Scottish and Welsh MPs, who will hold the balance of power in the House of Commons. Similarly, if the Conservative Party were to support legislation enacting proportional representation, it seems unlikely that it would ever again be able to form a majority government

without a coalition partner—the same risk applies to the Labour Party. If there is to be rational discussion, and more rapid promotion of human rights values with extension of human rights, a procedure for assessing needs and demands is required. Nearly 20 years have passed since Lord Kilbrandon's Commission on the Constitution began sitting. Arguably, a new Royal Commission should re-examine demands for constitutional change, so that alternatives can be fully analysed for MPs and for members of the public.

Many other important matters have not caught the Press's imagination. These include the power of media magnates, who control large and influential sections of the Press. Nor have newspapers objected to spending by parties on electoral propaganda and consequential manipulation of opinion. There has been little reaction against the lack of equal access to the electronic media at the time of elections by smaller parties—perhaps this is compensated for by the articulacy of their members on current affairs discussion programmes in between elections. Nor is much fuss made of under-representation of parts of the country due to Boundary Commission recommendations and their implementation, a cutting up of the electoral cake from which neither major party emerges with clean hands. Again, one of the most important potential changes of all has, apart from an editorial in *The Times*, occasioned little excitement: that issue is the fixing of a date for the dissolution of Parliament. If Parliaments operated on a fixed term, there could not be electoral opportunism; there would be continuity of policy over a longer period; and a great deal of harmful speculation, which goes so far as to affect the money markets and economic stability of the country, would be avoided.

What few critics state is that, even as things now are, Members of Parliament of both parties already have

power to do a great deal about promoting human rights values under existing law. They should take Blackstone's advice to heart. Much could be achieved if they modified their deferential attitudes within their parties and were less willing to submit to the Cabinet's views communicated to them by their party whips. If Parliamentarians wish to be effective in extending human legal rights, they would be well-advised to insist on establishing a Human Rights Select Committee. The existence of such a Committee, with competence to investigate and commission studies, would motivate its members to push ahead with recommended changes, using their platform in Parliament. A non-party agreed Bill of Rights for the United Kingdom is more likely to emerge from such a body, than it is from the activities of pressure groups, however able and rational.

Thinking about the British Constitutional-cum-Human Rights System

I have repeatedly emphasised that human legal rights, duties and procedures reflecting human values were secreted by the United Kingdom's constitutional arrangements—themselves evolved from historic events and traditions. In other words, the institutional arrangements both reflect human rights values and are themselves mechanisms for creating, implementing and furthering human legal rights. Whatever files a computer might throw up, it is in practice impossible to separate the protection of human legal rights and the furtherance of human rights values from the seamless web of the whole institutional background, that is, the arrangements for governing the country, the powers exercisable by

institutions, their financial and material base, the inter-relationships of all of these, and methods of controlling institutions, including remedies of all kinds, political, administrative or judicial. That is why constitutional arrangements, simultaneously the apex and the basis of the institutional system and its substantive outcomes, are so crucial. From time to time systematic evaluation, even rethinking, of these is therefore necessary—admitting that, just as all elements of the *status quo* are not necessarily satisfactory, so too all proposed changes are not necessarily good.

Such an evaluation and rethinking is far from easy. As explained earlier, there are differences of interpretation of the meaning of values and conflicts between competing values. *A fortiori* the same problems complicate consideration of the more detailed human legal rights. For example the rights to freedom of expression and to personal liberty may, *inter alia*, compete with the rights of women and children to human dignity and respect when pornography is in issue; rights of people of different races to dignity and respect are put in issue by racist remarks; rights of persons of various religions to respect for their cherished central beliefs are put in issue with remarks or literature attacking these; rights of all not to have their lives disrupted or property damaged are at risk if disorder may be provoked by public meetings or processions; and rights of non-striking workers to work without intimidation are at stake with massive picketing.

A further complication comes from changes in the significance and nature of issues, although some issues remain constant—the poor are always with us. Yet, even in respect of the poor, conceptions are changing, with a growing recognition that poverty is not merely economic, but that it is a state of exclusion, humiliation and degradation. Similarly, recognition that others are being

excluded from the benefits of society lies behind increasing awareness of the economic plight of women. Credit is due to those who, despite much hostile reaction, have repeatedly challenged the *de facto* discrimination faced by women. Fortuitously, EEC standards have significantly assisted in bringing about removal of inequalities. Another new source of pressure will be the CEDAW Committee, established in terms of the Convention on the Elimination of All Forms of Discrimination against Women. The United Kingdom's initial Report to the Committee describes measures adopted and institutions established to give the Convention force and explains means being used to promote and ensure the full development and advancement of women.²⁰ Even more illuminating was the CEDAW Committee's Report on their scrutiny of the United Kingdom in January 1990 and their many questions about the United Kingdom's reservations to the Convention, which the Committee believed could contravene its objectives. Several Committee experts declared that the number and purposes of the reservations seemed to reflect unilateral interpretations of the Convention; that there was doubt whether reservations were really necessary; and that there was concern whether the reservation, based on "essential and overriding conditions of economic policy," implied that if the economy was not buoyant, then equality was to be sacrificed.²¹ Issues affecting women are from 1990 to be co-ordinated by a Minister rather than by a Ministerial Group on Women's Issues chaired by the Home Secretary, so there may be greater progress. It is needed. Yet it is not only Governments who are to blame: the responsibility is that of all political parties and of public attitudes, which, for example, have resulted in only 6.2 per cent. of Members of Parliament being women, although women constitute the majority of the population.

Collective Rights

So-called collective rights have recently been the focus of public attention. The concept is disputed. Some see such rights as in reality consisting of the cumulative rights of individuals and refuse to recognise group rights as such. Others accept that groups, *qua* groups, have rights because certain kinds of rights are in practice only enforceable if there is a group right with group power of enforcement, for example, provision of education by establishment of communal schools or provision of teaching in a language prevalent in a particular linguistic or ethnic community. Most group rights have evolved in an international context, but the concept has taken on a life of its own, with new kinds of groups becoming relevant. For example, it is common to speak of inter-generational groups in connection with protection of the environment and preserving good living conditions for future generations. A sidelight on attitudinal change is that the Victorians, as mentioned earlier, believed that publicly-provided drinking water was essential, because some private companies' standards had increased the incidence of cholera, whereas many today believe that publicly-regulated standards operating on private undertakings will more efficiently achieve enhanced health. Those who so believe will only be justified if the new regulatory authority actively uses its powers and if some collective method of litigating is evolved to ensure enforcement.

A similar group concept underlies the right to development, now claimed primarily by Third World states. This could be paralleled in the United Kingdom: demands for economic development, especially in relation to regional policy, are likely to increase as

federalisation of the EEC progresses. Such demands may serve as a partial substitute for the results of exercising yet another group right, the right to self-determination, to which I will revert.

Minorities, Immigration and Refugees

Another collective right receiving greater public attention is that of minorities. Internally, minority rights have long been a concern, with enactment of the Race Relations Acts, but their importance has been emphasised with growth of ethnic religious communities, making it increasingly necessary to address issues of schooling, language, dress, holidays and religious obligations. Persons from ethnic minorities now number 2.5 million (4.5 per cent. of the population).²² When minority issues have arisen in a European context, Governments have adopted a generally sensitive and humanitarian foreign policy, encouraging the development of safeguarding institutions within the framework of the Conference for Security and Co-operation in Europe. Such concerns are reflected in the Helsinki Final Act (1975) and in subsequent Declarations and in 1990 the United Kingdom made suggestions for creating a supporting institutional framework. Policy within the CSCE was in part designed to reduce inter-ethnic disorders in central and eastern Europe, but has recently been influenced by an incipient problem, that of economic refugees and asylum seekers. In contrast to Foreign Office policy, successive Governments' policies of international trade often assist in the ill-treatment of particular ethnic groups, because

the great majority of dictatorial regimes, to whom arms are sold or to whom financial support in the shape of other aid is given, oppress ethnic minorities in their states. Yet the United Kingdom can take some credit, following Foreign Office pressure, for cancelling helicopter sales in 1989 to Iraq to ensure that such aircraft were not made available for use in delivering chemical weapons' attacks against the Kurdish population.

There is difficulty in practice of separating internal minorities issues, immigration and refugee questions. To Third World eyes the United Kingdom does not appear humane. Instead, it appears hypocritical when United Kingdom emigration of the poor to the underdeveloped world in the nineteenth and early twentieth centuries is contrasted with current attempts of the poor in Asia and Africa to emigrate to the developed world. Recent United Kingdom Governments' treatment of immigrants and those seeking political asylum is particularly criticised. Times and circumstances have changed, but it is worth remembering that in the Victorian era Governments in this country were more tolerant, with immigration of hard-working eastern Europeans being not unwelcome, except by populist politicians and elements of the working class with whom they were perceived to be in competition. Only in 1905 did an Aliens Act, far less restrictive than a Bill proposed in 1904, become law. That Act provided a right of appeal to an independent tribunal against refusal of entry and the subsequent Liberal Home Secretary, Mr. Herbert Gladstone, sent a circular in 1906, stating that immigration officers and appeal boards should give the benefit of the doubt to immigrants who claimed refugee status and had come from designated parts of Europe where pogroms were widespread—although it seems that immigration officials did not fully observe the circular. The period of tolerance ended abruptly with the Aliens Restriction Act 1914

rushed through Parliament to deal with security of the realm upon the outbreak of the First World War. That Act and its successor, the Aliens Restriction (Amendment) Act 1919, were both passed at times of xenophobia, with the 1919 Act ending the right of appeal, which re-emerged only in 1969 to be again diminished in the 1980s.

Today, with modern air travel and undemocratic military or coupist regimes acting against their political opponents, the flow of refugees seeking asylum has become unwelcome to all governments—even that of Sweden, which long philanthropically encouraged liberation movements and dissidents in the Third World. Five European states, including France and Germany, have signed the Schengen Treaties. These set out a common policy for dealing with asylum applications, exchange of computerised information on individuals and trans-border policing. The United Kingdom, not a party, has shifted much of the burden of avoiding having to deal directly with immigrants and refugees on to airlines, imposing duties on them to ensure that prior to embarking on a flight to the United Kingdom passengers have all their required entry documentation. Despite this form of preliminary vetting, the problem is considerable: up to about 150 refugees daily disembark at Heathrow, with there being a fivefold increase in the number of applicants for asylum in the decade 1979–1989. Allegations of abuse of power are always difficult to prove,²³ but non-governmental organisations assisting refugees point to alleged injustices and even unlawful action contrary to the United Kingdom's international obligations under the United Nations Convention Relating to the Status of Refugees 1951. The United Kingdom's 1989 Report to the United Nations Human Rights Committee states that the proportion of successful applicants for asylum decreased from 60 per cent. in 1981 to 25 per

cent. in 1988. The United Kingdom Government admitted that

“The continuing pressure of immigration from certain parts of the world makes it necessary to operate tight controls and apply rigorous investigative procedures which may involve inconvenience or upset for the individuals concerned.”²⁴

The Government takes the view that no full appeal should be exercisable at the point of entry, because to give a right to asylum seekers, which is not enjoyed by the majority of passengers refused leave to enter on other grounds, would both encourage applications for asylum and discriminate against the majority of immigrants (50,000 in 1988) who follow the normal [lengthy] procedures.²⁵ It is harsh to send refugees away, making them appeal from another country—assuming that they are permitted to enter one. In some cases there has not been even a proper initial consideration, let alone an appeal. For example, in June 1989 some Turkish Kurds were not permitted to disembark from aircraft coming from Turkey and to make applications for asylum. They were then refouled (wrongfully returned to the country from which they had fled). Arguably some Sri Lankan asylum seekers have been similarly treated by not having been given a fair opportunity to make a case for asylum. Decisions to refuse asylum necessarily have grave consequences, with the rejected asylum-seeker often being physically ill-treated upon return to his country. It is not surprising that those refused allege that immigration officers have made mistakes and disagree with rulings that they cannot be genuine refugees once two years have passed since they have been assaulted by state officials. Difficulty in deciding whether an asylum seeker is genuine is admittedly complicated by the enormous problem of

economic refugees seeking a better life and the working pressures placed on officers, but sympathetic consideration of the relevant issues could be assisted by better staffing and more training in human rights standards. More important still is the need to reintroduce a right of appeal for asylum seekers at the point of entry, even though their presence pending the appeal gives opportunities for protest embarrassing to any Government, for example, self-mutilation. The case of *R. v. Secretary of State for the Home Department, ex p. Sivakumaran*²⁶ in which the House of Lords on judicial review upheld refusals of leave to enter, was followed by an out-of-country appeal in which the adjudicator found on the merits that four applicants from Sri Lanka were indeed entitled to political asylum. That case graphically shows how appeal on the merits may well reverse a negative decision, while a judicial review on the circumscribed grounds of irrationality, illegality, and impropriety of procedure cannot do so.

The work the immigration service faces has been compounded by immigration problems flowing directly from the end of empire. The absence of citizenship laws for British colonies and protectorates until 1948, with citizenship only being dealt with upon subsequent independence, combined with failure to apply immigration control to British subjects until the Commonwealth Immigrants Acts of 1962 and 1968, left major problems concerning rights of entry and of assuming residence in the United Kingdom. These have often been unsympathetically handled both by governments and officials against a background of continuing tightening of immigration controls, the most recent step being the Immigration Act 1988. That Act ended appeals against the Secretary of State's exercise of discretion in making a deportation order on the ground that he did not take due account of compassionate circumstances or other

criteria in the Immigration Rules. The effect has been more removal (an 87 per cent. increase between 1986 and 1988) of people, who, knowing they cannot appeal, go back not involuntarily to their countries by way of supervised departure.²⁷

Self-determination

Another residual problem of empire is Hong Kong. Hong Kong consists partly of the Crown Colony (Hong Kong Island, ceded in 1842 to the United Kingdom after the Opium War with China, and some of the Kowloon peninsula and Stonecutters Island ceded in 1860) and partly of the New Territories (a strip of mainland adjoining the Kowloon peninsula, together with a group of islands granted in 1898 on a long lease from China following further hostilities). The population of Hong Kong in both the Crown Colony and the New Territories has been so administered over the last 90 years that it can be said to have become "a *people*" entitled both to *internal* and *external* self-determination. Because of China's proximity and political attitudes, *no* United Kingdom government has been willing to allow any genuine self-determination to the people of Hong Kong. Internal self-determination or self-government has been denied and external self-determination ignored, with China and the United Kingdom agreeing over the heads of the people of Hong Kong. A smooth transition to absorption into China has been deemed the best outcome for the people of Hong Kong—and for British foreign trade. This contract between two sovereign states infringes the Hong Kong people's international human right, recognised in both UN Covenants, to self-deter-

mination. This background explains the extraordinary compromises made in 1990 concerning which Hong Kong British subjects will ultimately be permitted, should they so wish, to reside in the United Kingdom—the intention being to restrain emigration of skilled Hong Kong Chinese in the run-up to the handover to China by giving them (and them alone) guarantees for the future. It is a quirk of fortune, due to British imperial citizenship policy and the United Kingdom's subsequent EEC membership, that EEC nationals will be able to seek work in the United Kingdom, whereas large numbers of United Kingdom citizens will not have that right.

In contrast with its unwillingness to accord self-determination to the people of Hong Kong, the British Government has in certain circumstances applied the principle of self-determination to the people of Northern Ireland. The Anglo-Irish Agreement of 1985, a treaty ratified both by the Republic of Ireland and by the United Kingdom and registered with the United Nations, recognised that "the people of Northern Ireland," that is the whole population of Northern Ireland, have the right of self-determination. It is implicit from the Agreement that self-determination is in relation to whether Northern Ireland continues as part of the United Kingdom or whether, following a referendum, the United Kingdom will introduce legislation to unite Northern Ireland with the Republic of Ireland. The Agreement will prove to be a historic turning point for Anglo-Irish and inter-community relations in Northern Ireland, but its thrust is all-Ireland directed, not towards unlimited self-determination. For example, full internal self-determination is not accorded, the people of Northern Ireland being represented in the Westminster Parliament and governed as part of the United Kingdom, but on a special basis, with Northern Ireland affairs being subject to intensive supervision by a Secretary of State for Northern Ireland

with limited local government arrangements. Greater powers of internal self-government have been denied since 1974 because of continuing political differences between the communities and insistence by successive British governments that power-sharing, and not majority rule, is the only appropriate form of administration in a plural society with deep conflicts about national loyalties.

Even the degree of external self-determination accorded the people of Northern Ireland has not been accorded "the people of Scotland," who do not have a right to intermittent referenda on whether Scotland should continue to be part of the United Kingdom. A referendum was held in 1979 on devolution of power to a Scottish Assembly in which about 1.2 million Scots voted for devolution and about 1.1 million against. However, this did not result in change, because the Act empowering the referendum required an affirmative vote to consist of at least 40 per cent. of the electorate, a criterion not met (those against and those abstaining totalled over 60 per cent. of the electorate). In 1990 the United Kingdom government then in office had no policy of ultimately according the Scots internal self-determination by way of a local legislature with large-scale devolution of power from Westminster.

Northern Ireland—an Emergency Case

Northern Ireland has also been significant in another unhappy way. It has been a laboratory for testing limitations on civil rights, particularly in relation to fair trial and the powers of the police and armed forces in time of emergency. Since 1972 there has been trial

without jury for serious offences of political violence as well as for armed robbery and aggravated burglary using weapons. Special courts have been preferred by successive governments to their major alternative, administrative internment, despite reasoned criticism of such courts and suggestion of intermediate alternatives. Indeed, in practice, whatever may be said by parliamentarians, Governments of all hues put security and confidentiality at the top of their agenda. Their response to critical books about civil liberties tends to be that these contain good knock-about stuff, but that the writers do not have the responsibility of ensuring the safety of society. In fairness to successive Governments, it needs emphasising that ever since the Wilson administration actively involved itself in Northern Ireland in late 1968, there have been not only measures to remove discrimination and to accord fair shares of political power, but progressive improvements in security laws. Although many criticisms can properly be made, there has been, when Governments have thought it safe to do so, relaxation of harsh provisions. Criticism is occasioned by differences of evaluation of the facts and different assessment of the appropriate measures.²⁸ Furthermore, *bona fide* attempts lawfully to maintain order are inevitably complicated by intermittent individual instances of misbehaviour or misjudgment, even at a relatively high level.

A particularly intractable problem, already mentioned in the context of the European Convention and emergency situations, is the right to life and the infliction of death in extreme circumstances. In all such cases there are not only disputes of fact, but also competing interests. The issues are best put as questions. Is the risk to the life of a soldier, in an area in which armed terrorists are operating and treating all military personnel as targets, to be measured against the life of the

terrorist? Is it feasible for a soldier in practice to use only that degree of force which is no more than is "absolutely necessary" if there has been no derogation, and force which is "strictly required" if there is a derogation? Has a soldier the capacity to shoot at terrorist targets in a self-defensive way so as to disable any terrorist without killing him and so as to arrest him, while at the same time being reasonably sure that the terrorist, as he lies wounded, is no longer able to shoot at and kill the soldier? Once it is clear that a terrorist is armed, is it necessary that there be a prior clear warning and call upon the suspect to halt? Having due regard to all the relevant circumstances, when judging whether the use of force is strictly proportionate, is always an extremely difficult exercise in assessment. The kind of criminal activity and the dangers to life and limb inherent in the situation, with risk being balanced against risk, harm against harm, have to be considered in the brief seconds during which a soldier or policeman has to decide whether to shoot or not. Those assessments must be made at a time when, despite all his training, the soldier is subject to great stress. Unsurprisingly, therefore, judges like Lord Diplock have warned juries trying soldiers for murder or manslaughter that, when they consider the circumstances, they must remember that such action does not occur

"in the calm analytical atmosphere of the court-room after counsel with the benefit of hindsight have expounded at length the reasons for and against the kind and degree of force that was used by the accused; but in the brief second or two which the accused had to decide. . . ." ²⁹

Lord Diplock's was a legal and intellectual analysis of the difficulty of coming to a conclusion on disputed facts. The families of soldiers, and possibly even soldiers

themselves, despite their training in military rules on the use of force, are likely to assess the factual problems and competing "life interests" differently: they must feel it proper to shoot armed terrorists, unless it is clear that soldiers' safety is not at risk in adopting any lesser degree of force. But the rule that use of deadly force is tightly circumscribed is the law, and soldiers are and must be equally bound by it, if the right to life is not to be diminished by too speedy self-defence responses. Similarly, they can in no circumstances engage in extra-judicial executions as a preventative measure to put suspect terrorists permanently out of circulation.

The Interaction of Freedoms of Expression, of Information and of other Human Legal Rights

Interaction between freedom of expression, including the freedom of the Press to hold opinions and to communicate them, the freedom of peaceful assembly, the freedom of the public to receive information and ideas, the rights of everyone to respect for his private life and his correspondence and the interests of public security, of public safety, of the prevention of disorder or crime and of the protection of the rights and freedoms of others inevitably causes problems. Criticism of Ministers', officials' and judges' decisions on such matters are highly personalised (in both senses): where the critic stands depends on where he has been sitting. For example, recent judgments requiring the media to disclose photographs to the police in circumstances where other evidence is not readily available and broadcasting restrictions on supporters of terrorist organisations are not unreasonable choices between competing rights and interests. Take first the duties of Press

photographers. The purposes for Press photographers' presence at assemblies seem to me to be fourfold: they are there to report that a certain matter is a fact of such public concern that there has been a protesting assembly; they are there as observers of how the public authorities behaved in controlling that assembly and their evidence is useful should those authorities have behaved unlawfully (have there been Press objections to surrendering photographs evidencing police misbehaviour?); they are there to inform the public if those assembling misbehaved (it is such evidence that the Press wishes to withhold on the basis that photo-journalists will be exposed to crowd hostility and possible attacks, an argument implying that if police beat up photographers, evidence should not be disclosed of police misbehaviour); and they are there in the commercial or property interests of their newspapers which wish to increase circulation by providing interesting coverage. They may also be there for the purpose of exercising their own freedoms of association and of expression. That journalists' and photographers' evidence is made available or that they are subpoenaed as witnesses will not prevent future reporting of the facts and circumstances, although it may make photographs more difficult to obtain. We are a literate and listening public, so we lose little should gloomy photographers rather choose to enjoy a day of rest, unlike reporters and the police at weekends, both of which professions must, in the public interest, remain on duty. But I should not poke fun at photo-journalists: their images and the direct impact of seeing events can alter public perceptions, the most significant change in the United Kingdom occurring in October 1968 with the nation-wide television coverage of the then unreformed Royal Ulster Constabulary in action against a peaceful civil rights demonstration in Londonderry. Had British politicians thereafter acted

with more speed and the appropriate degree of sensitivity, both when implementing changes to give full civil, political and economic rights in Northern Ireland and when supervising the enforcement of public order, the tragic developments of the last two decades might well have been aborted.

Nor can it be said that it was wrong to strike a balance which to some extent invaded freedom of expression of three specified organisations, two of which are political parties which impliedly seek public support for terrorists on the electronic media. Against their freedom of expression must be set the public interest in preserving public safety and preventing crime. Unfortunately, when broadcasting restrictions on the words of any person representing such specified organisation were imposed in October 1988, the responsible Minister first virtually described them as a sop to persons affronted by such conduct, although the proper justification for the restrictions was that, by limiting propaganda, they also limited the recruitment of new supporters for such violent causes. The public right to information and ideas is only marginally affected, because these can be communicated by voice-over, while the informant still enjoys the right to impart his ideas, although he does not obtain the benefit of using publicly-funded electronic equipment to do this in the most effective and lively fashion necessary for successful propaganda. In the event, the IRA privately complains that its recruitment levels have dropped since Sinn Fein became less able to speak sympathetically for it. A similar measure has been in force in the Republic of Ireland since the early 1980s. That survived challenges both under administrative law and under the Republic's Constitution, despite its fundamental rights Article protecting free speech. In short, a choice and adjustment between competing rights was made that was within the bounds of reasonableness.

British courts pronouncing on the validity of the Ministerial restriction have taken a similar view.³⁰

Freedom of speech has always been problematic in a number of respects. Speech may invade the rights of other persons to their dignity and reputations whether it be done by way of freedom of expression or by exercising the right to impart information. Again, there is no United Kingdom equivalent of the American law of privacy. Conversely, the law of libel as developed by British courts pays insufficient regard to the need for information to be publishable by the Press about public figures and financiers. In the United States, because of judicial interpretation of the First Amendment to the Constitution which provides for freedom of expression, there is a recognised public interest in permitting comment on the activities of those in the public realm, provided that the comment is in good faith and not malicious. Except in the case of public officials, the Press is well-advised to conduct some inquiry into the allegations so as to establish that it has not been malicious. Without enjoying this American protection, some United Kingdom financial journalists and their newspapers have, nonetheless, investigated shady financiers and risked libel actions in order to inform the public of potential dangers. Investigative journalism may well have given more protection to investors than have the activities of the Department of Trade, Bank of England, the Stock Exchange and the regulatory bodies under the Securities and Investments Board. Until the law of libel is changed, gagging writs will continue to be issued and will muzzle most financial Press watchdogs, thereby denying the investing public warnings in due time. Furthermore, because of the technicalities of the defence of fair comment, honest and well-informed commentators may be liable because they have made a factual mistake. They have no appeal on the facts and

face the lottery of the jury system, although excessive awards can, since 1990, be revised by the Court of Appeal.

From the standpoint of the person facing comment and criticism, there may be grave harm and personal suffering. Unless they are wealthy, defamed persons have no practical remedy, as Legal Aid is unavailable in libel actions. Nor are they protected from dredged-up truthful tales about their past, because there is no law of privacy. Since early 1990, major newspapers have appointed Press Ombudsmen to remedy the evils of sensationalist journalism to increase circulation. Such self-regulation may temporarily improve matters, especially because the Press fear that the recommendations in the Calcutt Report will be implemented.³¹

Earlier I dealt with a public right to information, but particular individuals may need information which competes with a public right to confidentiality. For example, a person under compulsory investigation, such as a financier suspected of an offence, may claim that it is fair to inform him of suspicions so that he can properly answer questions put to him. If fraud is an issue, there is a countervailing public interest: protection of the rights of individuals who have contributed to pension funds or who have invested requires that the state have investigatory powers without a duty to give advance warning of available evidence, because disclosure would in many cases of so-called "white collar" crime, something in any event difficult to prove, enable a dishonest person to destroy incriminating evidence.

Another complex confidentiality issue relates to privacy and the collection and supply of data by the police, the National Health Service, Social Security officials, the Inland Revenue, employers, banks and shops. Collection and sale of data has become a large-scale business activity, useful in preventing fraud or the giving of credit

to bad payers. There can be no objection if businesses make relevant information available to other firms, provided both that such data can be checked by the persons whose names are supplied and that they are also sent a copy of it. Sending a copy is neither practised nor legally required. To make this compulsory would not impose undue costs on those who sell such information, which is often unreliable, needs checking and can gravely harm individuals. There is currently a right to request data suppliers to provide details of what is recorded about the inquirer, but this is an inadequate safeguard because most persons are unaware of their right to make such a request and information changes with the passage of time. Another complex issue involving competing interests is the supply of data by public bodies gathered for public purposes and then sold to cut their costs, for example, by local authority sales of electoral registers. In contrast, some state authorities maintain undue confidentiality, despite a significant competing interest. For example, a procedure is needed to require the income tax authorities to supply the addresses and incomes of persons who have either disappeared or defaulted and are liable for maintenance of children and spouses.

Conflicts of Rights in a Family Context

The family provides a fertile ground for many cases of conflict of rights. Newspapers daily reveal conflicting interests within and concerning the family: personal freedom to pursue happiness and autonomy on the part of an unhappy parent seeking to obtain a divorce competes with the interests of children of the family that their welfare be properly secured. The interest of protecting privacy of the family and the home is

countervailed by the interests of ensuring that children are well fed, well treated and not abused in any fashion. Such conflicts have involved the professionals who seek to resolve them: just as judges are regularly subjected to unfair criticism by those unfamiliar with the precise details of cases, so have social welfare departments been criticised. It is not a facile alibi to say that social welfare officers face invidious choices in the course of protecting the interests of children without treating parents unfairly. They often need to make such choices at times when there is suspicion, but not firm proof, as the facts are unclear. Even when they know that action is necessary, they have to choose between harming children by possibly unnecessarily removing them into care, or by leaving them with their families where the children have been abused, but with whom the children's affections are engaged. With hindsight, social workers' decisions either way may be wrong, but generalised attacks on the profession are grossly unjust. It is to be hoped that the procedures in the Children Act 1990 will, by revising and clarifying the law relating to children and family services and emphasising the paramountcy of children's welfare, result in better decision-making affecting children—but that will depend upon resources being made available for more social work staff and improved training to ensure sensitivity and caution in evaluating the situation, with due weight being given both to evidence by appropriate experts and that of the children themselves.

At later stages in life there are yet other conflicts. These arise in relation to the right to life and possible euthanasia. Currently the medical profession and the law deal silently with problems arising from long-drawn-out terminal illnesses. The law protects everybody's right to life. By implication—and certainly by acceptance of international human right standards—the law also

prohibits the subjection of persons to degrading treatment. Contentious questions arise. Should extremely ill persons be kept alive on life support equipment or alive in great pain, which in some cases cannot be suppressed by drugs? Should persons be kept alive in a state which they consider undignified, say by tube feeding over long periods when they would prefer their lives to end? Even if the wedge principle argument against any state killing, which begins philanthropically but can end in eugenic murder, can be met by safeguards, an insuperable problem remains. Many such ill persons are not capable of making rational, uninfluenced choices because they suffer deep feelings of guilt and of fear of imposing upon their families. Euthanasia (whether involving help with suicide or authorising action by persons of good will) is better regulated by conscience than by a permissive law. The present position, that assistance with self-killing or a deliberate acceleration of death constitute criminal offences, seems a safer way of resolving such tragic conflicts, provided that there continues to be sympathetic judicial exercise of discretion to accept pleas of guilty to lesser offences and on sentencing.

Looking after the family and ensuring the right to respect for individuals' private and family life may conflict with other public interests in relation to immigration restrictions on bringing non-EEC workers' families to the United Kingdom. The public interest is that of the contributing taxpayer, who has to fund public costs, whether of housing or of the alleged risk of increased unemployment of other persons already resident here. Of course, that interest needs to take into account the fact that an immigrant head of household will himself have been a contributing taxpayer.

There are yet other competing interests relating to the home and to personal living. In the property law area

every citizen is a "nimby": no property owners welcome erection of mental hospitals adjacent to their homes; and middle class home owners, tenants and owners of homes in council estates alike object to proximity to a site for travellers, gypsy children being stereotyped as petty thieves. Farmers and those who love the countryside environment object to seeing travellers' caravans encamped along the highway. This is an area where the judiciary has been enlightened, extending the protection of the Race Relations Act to travellers as an ethnic group.³²

Is a Bill of Rights the Remedy?

The preceding outline of changing conceptions and circumstances and difficulties in reconciling competing rights and interests should have proved that a Bill of Rights would not be a panacea—even if it would be sensible preventive medicine and a solvent for some complaints. Complex rights and their relationships with other rights require regulation by laws specifically devoted to the particular concern, because only Acts of Parliament and consequential subordinate legislation can contain appropriate institutional arrangements, procedures and necessary detailed explication of rules. For example, no Bill of Rights can achieve the outcome of a detailed Freedom of Information Act according a right to official information about governmental decision-making, subject to meeting criteria for classifying detailed material which it is contrary to the public interest to disclose. Nor could one deal satisfactorily and comprehensively with sensitive matters of immigration policy. Indeed, a specific Administrative Procedure Act would prove of more help to those treated unfairly,

including immigrants and asylum seekers. A Bill of Rights would not displace the need, so long as there are "troubles," for legislation in Northern Ireland. Nor could it provide the machinery and detailed safeguards of a comprehensive United Kingdom-wide Emergency Powers Act, applicable when appropriate, either in relation to grave peacetime problems, such as terrorism, or in time of war. Successive Governments have not wished to pass a United Kingdom-wide Emergency Powers Act and have made do with temporary measures directed to terrorism in connection with Northern Ireland affairs only. They have regarded enactment of such a measure when needs are not pressing as an embarrassing and thus unnecessary Parliamentary task. The consequences will be either unlawful action, abuse of power by use of legislation designed for other purposes and without the necessary fine-tuning, or rushed enactment without adequate consideration—a process to be seen in earlier phases of the Northern Ireland conflict and which, *inter alia*, caused the United Kingdom difficulties with the European Convention enforcement machinery, leading to considerably revised rules on detention of suspected terrorists.

Apart from new Acts, specific amendments to existing legislation will be required, as in the case of the Data Protection Act and the Defamation Act. Similarly, amendment to the Security Service Act 1989 is needed to allay public concern that there be democratic accountability of the Security Service. The 1989 Act was an advance in that it provided for the Service to be overseen by an expert although unreviewable Tribunal. Substitution of a Committee of Privy Councillors, including ex-Ministers from all parties, would bring in a public political element and create greater confidence that the Service will be apolitical so far as concerns internal politics. Again, amendment of the Interception of

Communications Act 1989 is necessary in order to provide a remedy for unauthorised interception: the Act regulates the giving of permission to intercept, but does not provide sanctions for failure to seek authorisation. Until there is such a sanction, citizens will not be protected against unauthorised invasion of privacy by persons in official positions with access to methods of communication.

To argue for yet more laws and specific amendments to deal with human legal rights deficiencies is not inconsistent with urging a Bill of Rights. Seeking a Bill of Rights is a different demand, involving different issues, and achieving similar but different purposes. The two demands are complementary, a point repeatedly made by advocates of a Bill of Rights, which is a set of general principles incorporating minimum legal standards, rather than detailed legal rules, and which can, even when not directly in issue, assist in interpretation, either where there are omissions in legislation, or where a situation not governed by the common law arises and application of such principles would be appropriate.

No sensible person has ever argued that a Bill of Rights can tackle detailed questions or that the courts are appropriate bodies to work out administrative blueprints for detailed implementation. This is putting up an Aunt Sally. No one has disputed that judges have only been trained to deal with issues which tend to be specific and are not equipped to dream up legislative and administrative schemes. Even the American courts have shied away from that task. Objections, couched in language claiming that judges are incapable of deciding in a broad legislative fashion, show misunderstanding of the scope and applicability of a Bill of Rights.

Vagueness and indeterminacy will always be with us; precision is an illusion; rules potentially conflict; rules have to be interpreted; rules have to be applied and

mediated by the particular circumstances; litigation and the need to take public decisions on particular issues tend to arise randomly; and no Bill of Rights could comprehensively cover all relevant issues. But none of these difficulties are serious objections to adopting a Bill of Rights and asking the judges to interpret it. If we took these difficulties as serious objections to judicial decision-making, then there should not be courts at all and, in lieu, palm tree justice by administrators or politicians. If that is the choice, we should ask ourselves, let alone asking the mythical woman in the street, if she would prefer to be adjudged by a senior civil servant (perhaps from the Department of Social Security) or by a politician whom she does not know, or by a judge (and I do not mean a Justice of the Peace who these days is more likely than not to be a woman). The answer will probably be that the judge is likely to be fairer than a civil servant or politician. I, for one, would rather entrust my liberties to the judges, despite all their defects as described in numerous books and articles, well-knowing that there will always be discrepancies between ideal statements of rules setting out legal rights and their application in practice.

Objections because of the Current Judicial System

The main objection by opponents of a Bill of Rights is that the judiciary is undemocratic, unaccountable and unqualified. This is an over-simplification and misleading. Unaccountability is a chimera: judges are intensely conscious of their peers and of public opinion, even though, except for the odd rogue elephant, they remain silent when criticised. Saying that they are unaccountable ignores the fact that in every case a public reasoned

justificatory judgment must be given and that this is subject to public criticism and to scrutiny within the judicial hierarchy. If undemocratic means that judges are not elected and not "a representative judiciary," that is a virtue, because standing for election is corrupting and would tend to distort their intervening judgments in anticipation of their restanding for election. An independent judiciary (in the sense that their judgments are their own and not dictated by the executive or Parliament) has been achieved after nearly 400 years of struggle.³³ Removing that independence in order to make the judiciary democratically accountable would destroy a safeguard against fluctuating public pressures.

Insertion of an element of public scrutiny and somewhat more and different political influence than that which now exists is desirable. I reach that conclusion because of the way in which the making of judicial appointments is perceived. Comments akin to gossip about life-style and social origins have gripped the Press's and public imagination, and, unless their concerns are met, attacks will continue to be made on the judiciary whose legitimacy will be put at risk. A Judicial Service Commission, provided that it is genuinely independent once appointed and in the main composed of lawyers with knowledge of the necessary skills and character, seems the only possibility, if change there is to be. The risk will be that if such a Commission reports to Parliament, unless existing conventions about not debating judges' conduct except upon a substantive motion are embodied in Parliament's Standing Rules and Orders and treated as binding, there will be endless comments on judicial behaviour in every court throughout the kingdom. Without such a limitation, Members of Parliament would soon over-politicise the judiciary.

I should add that appointment of a Commission will not, in my view, bring much change in the nature of

judicial personnel or even in relation to who will be considered likely candidates for appointment. Judging is a highly-skilled activity, especially in the British system with its oral presentation (although written briefs have become more frequent) and its practice of immediate delivery of impromptu judgments in trials. The forms of organisation of the legal profession result in absorption and ultimate conformity to the values of the profession generally, with outsiders becoming insiders. The efficiency and integrity of the judicial system depends on peer group knowledge and a keeping up of standards of conduct by reason of close association—which is not to say that a sole practitioner at Land's End cannot be honest or a good advocate. Subject to the provisions of the Courts and Legal Services Act 1990 making solicitors eligible for appointment, I believe that any Commission would select judges from much the same group of personnel who have hitherto been drawn upon.

Judges were attacked for being executive-minded long before *Liversidge v. Anderson*. If one cares to think back, they were illiberal in cases in the First World War and have been charged with tenderness towards the executive since the time of Charles I. As in any walk of life, some have been and are and some are not, while, even in the darkest days, with some judges rubber-stamping the executive, there have been others providing counter-foci in dissenting judgments. A recent example of an enlightened judge little known to the public is Lord Lowry, formerly Lord Chief Justice of Northern Ireland. His career belies some mealy-mouthed academic assessments of the Northern Ireland judiciary. For example, a recent book states that

“any hope that the judiciary would mitigate the unfairness of special laws against political violence has generally not been fulfilled.”³⁴

Two cases of 1922 and 1967 are used to support that generalisation about the period up to the time of "the present troubles." Yet, in this connection, there is no mention of Lowry C.J.'s remarkable decision in *R. v. Londonderry JJ., ex p. Hume* in which in 1972 he declared to be *ultra vires* regulations purporting to give powers to the armed forces.³⁵ Off the cuff, I can think of four major Lowry judgments which are outstandingly liberal in a context of increasing violence: *R. v. Flynn and Leonard* and *R. v. Corey*³⁶ gave the courts a wide discretion to exclude confessions because of oppression or undue prejudice; *R. v. Donnelly and Others* affirmed the need for corroboration and caution in dealing with evidence by "super-grasses"³⁷; and *R. v. Adams* narrowly interpreted what constitutes the offence of profession of membership of a prescribed organisation so that fighting talk on behalf of Sinn Fein and parading with IRA prisoners in the Maze Prison, did not make Mr. Adams an IRA member and thus criminally punishable.³⁸ In contrast, the Japanese-American cases in the Second World War show that judges with a 150-year-old tradition of interpreting a Bill of Rights can be far less courageous. All depends in any system on the integrity of the man in the judicial seat. Of course, other judgments by other judges can be cited as ones that could or even should have gone the other way. But, as I said in my second Lecture, overtones of conspiracy theory too often peep out when critics dislike judgmental outcomes.

All judges, constrained by the need to write judgments, let alone by their legal professional traditions, set out the rational arguments as between competing claims. In considering the issues raised, judges attempt to be neutral with regard to interests advanced, trying to avoid partiality to either the state or the individual, even if their personal sympathies lie on one side. Similarly, they

attempt to give equal consideration to the welfare of all who will be affected by their actions. Although their decisions are not consequence-based, they are alert to the consequences for individuals and for the state of the law. If, because of the rigidity of statute or existing case law, judges feel constrained to give a ruling which they think inconsistent with what they believe to be just, they often respond by indicating imperfections in the law and a need for legislative reconsideration. When enunciating rules, judges formulate these impersonally, seeking to make them applicable in identical fashion among all persons. Furthermore, they acquire a belief in the values inherent in any legal system and aim at giving effect to law's values such as stability, continuity, consistency, the satisfaction of expectancies and the securing of order in society. Judges who depart from these traditions are few. Exceptionally, a judge follows his personal predilections and may for a time be acclaimed when these accord with journalistic public opinion. Woe betide such a judge, because sooner or later his predilections will lead him astray and the favourable publicity in which once he basked will become chilling criticism, undermining his own position and that of his fellow judges. There are no rewards for correct guesses identifying any particular judges.

Even though assisted by their reasoning procedures, which after a time become subconscious, judges, like administrators and politicians, can face severe problems in evaluating competing claims, assessing the facts, weighing the merits, attributing weight to different values and interpreting these. For example, freedom of expression may be claimed by a speaker, but his words may at the same time be fighting words inciting disorder, or defamatory of another, or, if in pictorial form, corrupting of the young or involving violence towards or degradation of other persons. Over time the

judiciary has developed criteria to invoke when deciding against upholding a freedom alleged to be applicable and instead giving effect to other interests, such as public safety, public order, or public morality, or when deciding that the rights and freedoms of other persons must prevail. Statutes regulating and creating rights incorporate similar criteria, such as that the action taken be in the interests of public health or of good town planning. Yet criteria themselves are not decisive as they too require interpretation and application.

Every Operating Legal System has to Choose between Priorities

Every legal system that recognises rights, whether in some form of Bill of Rights or in ordinary law, has to decide what rights to accord, how to adjust competing rights, whether to give particular rights priority, and whether to treat some as absolute. In making such decisions the justifications for according certain rights more weight will require evaluation in light of the political theory on which that state is built. Some of the rights will be accorded on an individualist basis, in that it is believed that the human individual is entitled to certain enforceable benefits, needing space to develop his personality and to protect himself with power to invoke those rights. Other rights accorded to individuals can be justified as being in the collective interest, because their recognition will bring about a particular public culture which is for the public good. Indeed, both justifications can apply to the same rights. In any event, whatever the justification and whatever the legal system, the recognition of rights is a political choice and so is

any decision made about priorities, however abstract the proffered reasoning.

Belief in the necessity for absolute rights depends upon taking a pessimistic, but nonetheless realistic, view of the nature of political society. Doing so entails two conclusions: *firstly*, rights are particularly valuable in making life in a polity tolerable; and, *secondly*, rights are necessary as barriers to absolutism by the organs of society. Agreement that rights should have a provisional *prima facie* priority is generally agreed, but it is very difficult to decide, what, if any, rights are so basic that they must be absolute. There is some danger in using Professor Dworkin's derived trumps imagery, because trumps come up frequently in ordinary games, while basic rights as absolute barriers in all circumstances whatsoever must not be so extensive in number or scope as to cause the collapse of society into chaos. For example, free speech is crucially important for a free society, but in time of emergency, free speech cannot be an absolute right with priority over all other rights and interests—perhaps one who has lived in unstable societies and seen in practice the effect of inflammatory speech in promoting passion and violence has a different perception from those who have not. Even so, I believe that free speech must have the strongest presumption of priority, because it facilitates interchange of ideas, results in exposure of abuses of power and ultimately leads to political change.

The UN Covenants indicate the views of states as to what rights must be absolute by providing that there can never be derogation from certain defined rights—of course bearing in mind that the very fact of defining a right imposes some limitations by way of exclusion. In terms of the Covenants, the following important rights are absolute: the right to life; the right not to be subjected to torture or to cruel, inhuman or degrading

treatment or punishment; the right not to be held in slavery or in servitude or to be required to perform forced labour; the right not to be held guilty of a retrospectively created criminal offence or to be subjected to a retrospectively heavier penalty; the right to recognition everywhere as a person before the law; and the right to freedom of thought, conscience and religion. Such few rights as the world community has been able to agree to be absolute reflect an international moral consensus. There can be no justification for their violation, and, should this occur, a remedy, even one punitive of the state concerned, is essential.

The international moral consensus extends to making other rights subject to restrictions prescribed by law, provided such restrictions are necessary in a democratic society either in the interests of national security, or public safety, or the prevention of disorder or crime, or for the protection of health or morals, or the protection of the rights or freedoms of others. These criteria parallel those developed by judges in state legal systems. Despite international consensus on the specified criteria for restrictions, any evaluation of the relationship between rights and restrictions will always be controversial: criteria or rules have to be selected as relevant; those criteria have to be interpreted and choice made between conflicting interpretations; the facts and circumstances have to be discovered, bearing in mind that the actual amount of knowledge available is always limited; then there has to be an evaluation of the criteria in relation to the circumstances; account has in such an exercise to be taken of the consequences; and consideration has to be given to any mode of implementation and the extent or degree to which the matter should be pursued. Thereafter assessments of the outcome will differ, depending on both the nature of the intellectual analysis and upon the standards adopted for evaluation

by any observer. Decision-making is not easy and one should not too lightly assume that decision-makers are either wicked or weak.

What I have said in this and my second Lecture should now come together. I pointed to difficulties inherent in evaluating competing rights, interests and values in relation to particular facts, irrespective of whether that evaluation is by judges, legislators or administrators. I pointed to the difficulties in practice caused by changing conceptions of human rights and of values and by difficulties of interpretation and assessment, and in my second Lecture to resources-dependent problems of furthering particular rights or values. Paradoxically, that problem is not one which the courts have overtly taken into account, although they have taken decisions which consequentially imposed millions of pounds in costs on public sector authorities by protecting individuals' rights, for example, by recognising entitlement to particular Social Security benefits or by protecting particular property rights.

An Evaluation of Governments' Records on Civil and Political Rights in Practice and some Prescriptions

Having in my second Lecture evaluated the state of welfare rights, let me now evaluate the congruence in practice in the United Kingdom between civil and political human legal rights and human rights values. One of the advantages of age is that it lends perspective, which is not the same as enchantment or complacency. I decline to talk about "Thatcherism" or to concentrate on the last 10 years. I believe that "attacks" upon civil liberties, if attack is the appropriate noun, will always occur whatever Government is in office.

Because of the great power of the Press and the damage as well as the good it can do, there will always be some limitations on its freedom. Public secrecy on security matters will be insisted upon by all governments. When, 30 years ago, I was doing historical research, I advocated a 30 years' rule, after which members of the public could look at government internal documents. Now I believe that a 50 years' rule is necessary for certain documents—and perhaps longer in exceptional cases—if civil servants and Ministers are to be able freely to communicate their concerns and to discuss issues. The alternatives to such a rule are likely to be either non-recording of material or subsequent destruction. Where matters relate to foreign affairs they may many years later affect the United Kingdom's current security. For example, disclosure of controversial action in the 1950s about the United Kingdom's behaviour as an imperial power at that time opposed to decolonisation, for example in Kuwait or Iraq, even if combined with later official statements that we "are sorry we behaved like that then," will not mollify public opinion in independent states, whose political support the United Kingdom may require. Often, only after the passage of a lengthy period can wounds be healed and past internal debate about possible policy choices not be subject to dangerous political exploitation.

In all governmental decision-making there needs to be a considerable degree of confidentiality, particularly in its early stages, if there is to be efficiency. All administrators in central or local government, trade unions or any institutions of whatever kind know that leaking of information about preliminary proposals made merely for internal discussion and clarification of ideas, is damaging to rational consideration. Only too often leaks occur when a pre-emptive strike is made by those who

wish to abort discussion at its outset and these are happily taken up by newspapers, who justify whatever they publish as being in the public interest, a claim in a limited sense true, because anything possibly affecting government, however contingent, is of interest to politically interested persons. Memoranda, minutes and discussion are necessary for efficient formulation, application and criticism of policies. Governments must be able to expect confidentiality from their civil servants, provided always that appropriate mechanisms are in place for civil servants to complain about any government impropriety. Only if there are no such possibilities should civil servants use other channels such as the Chairman of an appropriate Select Committee or the Speaker of the House and, failing all else, approach the Press. I am unsympathetic to civil servants who, on the assumption that no action will be taken or remedy afforded, rush to the Press or to individual MPs rather than first attempting to use the available machinery. Civil servants have duties to their employers, that is the state, in the form of the government in office at the time, and the state, as is any other employer, is entitled to confidentiality when conducting its business. When a Freedom of Information Act is enacted, these problems will to some extent diminish. Civil servants should not, in the interim, break the law. If they decide to act as pioneers and provokers of reform, they then have to choose to pay the legal price and take the historical praise.

The Official Secrets Act 1989 effected a step backwards by removing the defence of disclosure in the public interest. That defence had been developed by the jury in the *Ponting* case and in the *Spycatcher* judgment by Scott J., as he then was, and the House of Lords confirmed it as a defence in civil litigation, where it is still available. I am puzzled that academic writers often wish to be

polemical and are grudging with praise, making comments criticising the disappointing performances of the judges involved in the *Spycatcher* cases, combined with a less than enthusiastic admission that they actually found against the Government and upheld the ability of the Press freely to report allegations of scandal in government. Criticism should have been concentrated upon the administration and the parliamentary majority, which removed the judicially-created defence to criminal charges under the Official Secrets Act 1989. That the Government reacted in this fashion probably owes much to the conduct of *The Sunday Times* and its handling of earlier publication: the Government became unwilling to rely on editorial judgment to be sufficiently cautious in evaluating what should be disclosed in the public interest before a rush to publication and enhanced circulation from carrying sensational stories. Equal unwillingness to trust the judges to evaluate the validity of a defence that publication was in the public interest is indefensible. Nonetheless, the Press has been left with a potentially good defence: any jury will have to decide whether disclosure is "damaging," which in practice means that editors must evaluate the material, reach a conclusion whether or not it is "damaging" and then, should they decide to publish, face the risk of prosecution. Because juries, other than in spy cases proper, have traditionally looked askance at Official Secrets Acts prosecutions, the real risks to newspapers are of nuisance and legal costs, rather than of criminal conviction. Admittedly, were there a defence of disclosure in the public interest, the public interest would be seen to be better protected, although such a defence would not wholly remove the risk-cost factor. That could only be avoided by exceptional (and even unwarranted) self-restraint by newspapers or prior clearance through an extended consultative or modified "D" Notice system.

The Press properly opposes prior constraint, so it must risk taking courageous action after careful consideration, relying on the public's good sense, something normally likely to be manifested in any jury's verdict.

My major criticism arises from the techniques adopted by Ministers and their draftsmen when proposing reform: they tinker with details, rather than concerning themselves with principled reconsideration, missing opportunities to re-examine human rights aspects, as, for example, when enacting measures dealing with interception of communications and continuation in effect of, as well as alterations tightening up, laws dealing with terrorism. Some topics are shied away from, for example, reconsideration of anti-discrimination legislation to give better protection to persons from various ethnic groups by, for example, providing for ethnic monitoring in employment, for introduction of class actions and for imposing contract compliance conditions for the award of public sector contracts. A serious omission is failure to extend anti-discrimination law to prohibit discrimination against the ill, the disabled and homosexuals and lesbians, a subject to which I will revert. Even when reforming, Governments do less than they ought. For example, Article 9.5 of the UN Convention on Civil and Political Rights requires a victim of unlawful arrest or detention to have "an enforceable right to compensation." In the United Kingdom claims are dealt with merely on an *ex gratia* basis set out in a statement by the Home Secretary on November 29, 1985. Only if there have been exceptional circumstances or a serious default by the police or a public authority have *ex gratia* payments been made. Thus between 1986 and 1988 only 16 people were paid compensation for unlawful detention, while 19 further people were compensated for being held in custody charged with an offence not pursued or following an acquittal on appeal.³⁹

Failure to embark on comprehensive reform is a defect to which successive Governments have been prone. For over 50 years there has been criticism of police questioning and of the Judges' Rules, of police powers in relation to demonstrations and assemblies, of telephone tapping and of the Official Secrets Act, with mounting demands since the 1960s for more disclosure to the public. Criticism of that kind will and should continue, because there will always be miscarriages of justice and some unlawful bureaucratic action irrespective of the government in office. Whatever parliamentarians say when in opposition, governments become reluctant to intervene against Home Office advice until campaigners and ex-judges have made it more than obvious that it is necessary to reopen a case. Anyone who doubts these points should compare the 1975 first edition of the *NCCL Civil Liberties in Britain* guide with its equivalent, the fourth edition, published in 1989 and look at publications since the NCCL's foundation in 1934. (The NCCL is now renamed Liberty.)

More examples confirm that failures are trans-governmental: retrospective legislation has been enacted by all governments; all have allegedly infringed freedoms of association and had disputes with powerful trade unions; excessive use of executive power by governments was constantly attacked before the judiciary reshaped administrative law in the 1960s; local authorities were considered undemocratic in denying rights of participation in planning and in avoiding public access to their meetings; *habeas corpus* has long been criticised as having degenerated into a merely formal procedure from one effectively securing individual liberty; and civil servants, particularly under the Wilson government with its Kitchen Cabinet, have intermittently complained about undue governmental interference with policies and

functions. In case I have been misunderstood, let me emphasise that because all Governments are, and will be, at fault, I am *not* arguing that reforms are unnecessary or that administrations be not criticised. But criticism should not be partisan, with silence about the peccadilloes of predecessor Governments, especially when these remain relevant. Criticism for governmental insistence upon confidentiality, with references confined to the *Spycatcher* litigation and the *Ponting* and *Tisdall* cases, is equally applicable to an earlier Government which commenced the Crossman Diaries litigation (concerning confidentiality by Ministers, but which raised the same legal issues), instituted criminal proceedings against Messrs. Aubrey, Berry and Campbell under the Official Secrets Act and ordered the deportation of Messrs. Agee and Hosenball. The demands for initiatives to protect official confidentiality and national security began with those actions.⁴⁰ Equally there needs to be understanding that national security and confidentiality are sometimes necessary to enable governments to function. The problem is that persons who invariably give priority to civil liberty except in war, and perhaps even then too, and persons who automatically give priority to security, can never agree on the balance to be struck or the facts and issues involved, except to differ.

Taken overall, I believe that measures in the sphere of criminal procedure are improvements. Clarification of police powers in relation to pre-arrest procedures, especially taking in people to "assist with inquiries," has long been desirable. The pity is that lack of clarity remains, despite the Police and Criminal Evidence Act 1984, which will within a decade require major amendment and further checks on police powers. Codes of Practice operated in conjunction with the Act, but without mandatory sanctions of inadmissibility in the event of non-observance, raise questions as to whether

the best way has been adopted to ensure police fairness to suspected persons. As now drafted, the Codes do not cover all police dealings with suspects. Only subsequent empirical evaluation will show the effectiveness of the Act in guaranteeing fairness. Whatever the ultimate law, continuing scrutiny of the exercise of police powers will remain essential, human frailty being ever present. Indeed, police powers must never be strongly presupposed to have been properly exercised. Instead, any presumption of regular usage should be easily displaceable. Plans for better training of police, especially in handling the public, may help. Nonetheless, even now certain reforms are obviously needed to discourage police abuse of suspects. Adoption in England and Wales of the Scots evidential rules excluding unlawfully obtained evidence and requiring corroboration of confessions is long overdue.⁴¹ When tape-recording of all interviews with suspects is in operation, untaped evidence should become inadmissible, something not so far stipulated. An alternative mode of reform, introduced by the United Kingdom in some of her colonies, would be to require that confessions must be made in front of a magistrate. Despite its cost in police and Justices' time such a reform would preclude most allegations of police brutality, although then some suspects would still allege that they had been threatened beforehand or risked subsequent assault. In contrast, suspected terrorists will, until reliance on political methods of change replaces terrorism, have to continue subject to enhanced police powers of detention and questioning under the Prevention of Terrorism (Temporary Provisions) Act 1989. How that Act and its operation is viewed of course depends upon the supporter's or critic's assessment of danger to society and risks of loss of civil liberties.⁴² These are matters on which persons concerned to preserve freedom can reasonably disagree.

The dreadful state of prisons and the need for reconsidering the Prison Rules has much concerned the present government, with the Secretary of State for Scotland and the Scottish Prison Service pursuing an enlightened penal policy well ahead of the Home Office. Doubtless, because of risks of yet more European Commission on Human Rights proceedings and further findings by the Commission that provisions of the Prison Rules are contrary to the Convention, Prison Rules and Prison Standing Orders in England and Wales have, after much internal heart-searching by departmental and other committees, been revised to remove antiquated notions of military discipline, such as disciplinary offences should prisoners make groundless complaints or ventilate their complaints before using official channels. It here needs remembering that Home Office civil servants cannot push through a reform or even give it effect unless the ethos of the Prison Service alters and prison officers are professionalised. Apart from Government pressures to that end, far more public money has recently been spent to provide single-cell accommodation and sanitary facilities, while the need to detain juveniles separately from adults is beginning to be met. Should anticipated reforms materialise, things ought to improve. "And about time too," as Alice would say. It is much to the credit of the present administration that they appointed the last Hamlyn Lecturer, Lord Justice Woolf, to survey the state of prisons while inquiring into the Strangeways Prison riot and that they also appointed the outspoken Judge Stephen Tumim as Chief Inspector of Prisons. In retrospect, fair observers will recognise that more liberalisation and improvement of the prison system will have been effected since 1983 than has been achieved by any other modern British government.

Leaving aside the earlier failures by successive governments to provide resources when faced with demands

for expenditure on more popular causes than improved penal accommodation, overcrowding in prisons has not been caused by the judges or by Governments, who cannot say when prisoners are due to be lodged that "there are no vacancies." The large number of persons in prison arises from the sentencing powers of Magistrates' Courts, which handle the vast bulk of criminal offences. Apart from well-rehearsed arguments for more generous parole provision and substitution of novel forms of supervision in lieu of imprisonment, such as electronic tagging and new forms of community service, a major cause of over-full prisons has been decisions by Justices of the Peace (43.8 per cent. of whom in 1988 were women, generally representative of community attitudes about protecting the public). Justices remand unconvicted persons in custody rather than on bail, if they consider that an accused person has no suitable accommodation. If prisons are not always to be full, either there must be more bail hostels or social workers to find suitable supervised accommodation, or new legislation must make bail mandatory in nearly all cases. The most drastic alternative would be for professionally trained judges to take over such work, despite the cost and outcry that would be caused by reducing the scope of Justices' historic participation in the administration of justice. Another method of reducing the prison population on remand has recently been introduced by Guidelines for the Police, indicating that they should caution offenders, old and young alike, more frequently, rather than prosecuting. Unfortunately, these Guidelines do not require Chief Constables to provide ethnic statistics of those cautioned and those prosecuted. Once ethnic statistics become available, anomalies become obvious. For example, 12 per cent. of male prisoners were non-white, as were 21 per cent. of female prisoners, whereas the ethnic minorities were at that

time (1987) 4.5 per cent. of the total population. This indicates the desirability of monitoring all sentences of imprisonment on an ethnic basis. The Government has declined to do so, arguing that this would add confusion and reinforce existing prejudices. Its alternative is

“a clearly stated policy on race issues, a top management which is fully and publicly committed to it, and a structure and procedures for putting it into effect. The policy and procedures have to cover equipment, training, the development of staff, the delivery of the service and a system for monitoring performance.”⁴³

Judgment of this policy's efficacy in changing outcomes will have to await such developments, which in any event do not touch on sentencing, rather dealing with happenings in prison.

In view of Lord Justice Woolf's impending report, it is appropriate only to make the shortest comment.⁴⁴ A further large instalment of prison reform is overdue. A prisoner remains a citizen and his rights, other than his personal liberty, should be accorded as fully as possible. There needs to be a principle of minimum intervention, for example, allowing him to read, write, see TV and associate with others so often as is feasible. Likewise, there is no justification for denying conjugal rights and for even punishing prisoners' spouses by denying them the regular opportunity of and facilities for engaging in sex when visiting. Nor should medical protections be denied to prisoners: hypodermic needles should be freely available to avoid sharing by prisoners, who, despite the unlawfulness, indulge in drugs; and condoms need to be freely available, both in prisoners' and the public interest, to prevent the spread of HIV/Aids. Despite the Home Office view that homosexual conduct and homosexual rape on admission to prison seldom

occurs, such activities occur regularly in all situations where men are confined, whether on ships, in military barracks, in schools or in prisons, and at all periods of history, being well-evidenced in Victorian times in the United Kingdom.⁴⁵ It is extraordinary that the official reason for refusing to supply condoms is that no part of a prison is private, so that, because committed in prison, homosexual acts between consenting adults will be criminal, while for the Home Office to provide condoms would condone, if not encourage, such acts.

In a modern welfare state prisoners should be entitled to educational and welfare benefits, unless there is just lip service to the notion that prison is intended to be rehabilitative as well as punitive and deterrent. Prisoners have a right to training, education and rehabilitation, even if the latter is not always effective. On purely pragmatic grounds of benefit to society as a whole, expenditure for such purposes is essential. Successive Governments have for too long ignored the rights of prisoners as citizens, despite the issue coming into the domain of public debate as long ago as 1971 with the establishment of the organisation PROP, the foundation of the British Institute of Human Rights and Lord Kilbrandon's remarks, together with a subsequent Cobden Trust study.⁴⁶ I hope that the United Kingdom will within a short period no longer be considered, as it now is by those who know prisons, to have some of the worst conditions in Western Europe, and that when next the Committee of Inspection under the European Convention for the Prevention of Torture or Inhuman or Degrading Punishment Treatment visits the United Kingdom they will see conditions greatly differing from those prevailing in mid-1990.

I also hope that current attempts to privatise remand services and prison services will not be pursued. Only organs of the state (that is, the United Kingdom) and

then in carefully defined circumstances, can lawfully deprive persons of their liberty and hold them in custody. Delegation to state employees, subject to full supervision, is of necessity permissible as the state has to act through its employees, but contracting out such powers and responsibilities to commercial organisations will, I submit, be found to be a sub-delegation by organs of the state (even if authorised by the highest state organ, Parliament) and therefore in breach of the United Kingdom's international obligations. The state is in a very real sense a chosen person (*delectus persona*) and only its organs and personnel can possess qualities of the kind required for them to be entrusted with the exercise of so important a function as custodianship of persons deprived of their liberty. If it is remembered that not only is the state the entity exclusively entrusted with power to invade personal liberty, but that the state is also the body entrusted with the duty of protecting persons' liberty, it becomes obvious that the maxim *delegatus non potest delegare* must apply. However carefully Home Office or Treasury personnel may scrutinise any contractual sub-delegation of the right to invade personal liberty and even if they set up machinery for inspection to deter abuse, sub-delegation is impermissible. In contrast, provision of services for prisons, such as catering, would not be unlawful. Surprisingly, despite awareness for more than two years that prison privatisation in other countries is being examined by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities as a potential breach of the right to liberty and security of the person and freedom from arbitrary detention, the Home Office has decided to pursue such contractual sub-delegation, presumably having obtained legal advice from legal civil servants that adoption in the United Kingdom of such a policy is not prohibited by the international treaties to which the

United Kingdom is a party and that in practice there will be no abuses of power. If it is borne in mind that the state has hitherto been unable fully to professionalise the Prison Service, it is remarkably naive to take it on trust that some or other "security" service will be nearly as well trained or as effective as the incipient profession of prison officers.

The United Kingdom has become a plural society, but there has been no general legislation to end discrimination on religious grounds. Obviously legal rules cannot abolish prejudiced attitudes, but they can at least ensure that those of different religions are generally equally treated and able freely to observe the practices entailed by their faiths, always provided that they do not harm others. Appropriate areas for consideration of legislative intervention are religious holiday entitlements, measures safeguarding choice of garb, whether at work or elsewhere and repeal of the law of blasphemy. Amendment of the Public Order Act is also needed to remove technical defences based on lack of intention to provoke disorder where an offensive statement, known by the speaker or writer to be likely to provoke disorder (and irrespective of whether any such remark was anti-religious, racist, sexist, or exhibiting a particular political bias) was made or circulated. Admittedly, such an extension of the criminal law would impact upon freedom of speech and could be construed as encouraging religious or other extremists to respond with violence, thus automatically rendering criminal continued public expression of the views violently protested against. The answer to such an objection (namely, that this would give an effective future veto on the subsequent making of such statements) is that the Director of Public Prosecutions should evenhandedly prosecute both those who engage in or incite others to violence and those who provoke disorder by their

statements. Both categories, those who speak or write, and those who react violently to such statements, are abusing human rights values of free speech and free protest.

Because compulsory assimilation, effected by limited institutional provision, denies the right to remain of different religious persuasion, there is need for re-examining such institutions, particularly schools. In any such re-examination it must also be remembered that separate schools can be at the cost of indoctrinating or even of forcing those within a minority, especially girls, into conformity with minority traditions which may limit their personal freedom, deny equal opportunities and depart from equality between the sexes. Certainly, if there are to be more publicly-funded religious schools, their teachers must be academically satisfactory and able to deliver the National Curriculum, while equal educational opportunities must be provided for all pupils. Those results could be achieved by adequate inspecting machinery in conjunction with the Secretary of State for Education's powers when considering whether to authorise voluntary bodies of a particular religious persuasion to establish a new voluntary-aided school. If initially satisfied as to academic criteria, provision of equal opportunities and ability to meet expenses required to be met by the establishing body, it seems unreasonable that the Secretary of State may deny permission on the ground that there is not "an overall need for extra maintained school places in the area," a criterion currently permitting him to refuse permission. The interests of small groups, seeking to keep their distinctiveness, raise perplexing issues, and Governments need to handle these hyper-sensitively, with understanding of different traditions⁴⁷ and acting generously, even if the results are additional calls on state resources and administrative problems, requiring a degree of alertness

by school inspectors that persons within religious schools are equally enjoying educational opportunities.

One recent major measure seems inappropriate in a plural society. I refer to the provisions of the Education Reform Act 1988, requiring acts of school worship to be wholly or mainly of a broadly Christian character. Although there is the safeguard that Local Standing Advisory Councils on Religious Education may allow schools to provide alternative worship, this seems inadequate to prevent children from minority religions being influenced in school assemblies by religious precepts not subscribed to by their families. If voluntary bodies are not being permitted to establish schools, this matter is of genuine and immediate concern.

As mentioned earlier, United Kingdom law does not prohibit discrimination on grounds of age, ill-health, or sexual orientation as opposed to discrimination on grounds of sex (that is, male or female). Official policy discourages discrimination against HIV positive persons, but there is no specific provision, other than that dismissal must in all cases be fair, preventing homosexuals and lesbians from facing discrimination in their employment on grounds of their sexual orientation. Indeed, the state itself practices some discrimination in the Diplomatic Service which has not employed even acknowledged homosexuals. Nor is there any general prohibition on discrimination against such persons, as for example, where facilities are denied them because of their sexual orientation. A field in which some intervention, both in the interests of persons affected and of the general public, is necessary is life insurance. Many insurance companies decline life cover to persons who have had an HIV test, unless there is a "good" reason for taking such a test (say, working as a medical laboratory technician) and the potential insured's lifestyle (whatever his or her sexual preference) is not one

involving risks of infection. Companies are commercially justified in adopting a restrictive approach to cover, because issuing policies to persons with life-styles which put them at risk would place a burden on all other insured persons. Nonetheless, public awareness of companies' attitudes now means that persons who are potentially HIV positive are reluctant to take tests lest it affect their ability to obtain life cover, especially as the raising of mortgage finance for house purchase is often, although not always, dependent upon taking out life insurance. Conversely, to protect themselves from undue liabilities, insurance companies require an individual applying for a large life policy to take an HIV test. If the United Kingdom's policy of voluntary testing for Aids/HIV is not to be undermined, with persons reluctant to take tests, it is prudent to establish a state scheme offering life insurance at reasonable rates to persons who voluntarily undergo a test, prove negative and are declined cover. Of course, insurance is only for unknown risks and there can be no new life cover for persons who already are HIV positive. Fortunately, because the National Health Service is not insurance-based, such persons are at no time discriminated against in the matter of health care—as they would be under a private health insurance system of the kind which operates in many countries abroad and has required legislative intervention.

Difficult questions of weighing competing interests arise out of dismissal from employment of homosexuals and lesbians who work in proximity to children and young persons. The same issues arise in relation to parental rights and the welfare of children in custody proceedings where a parent is not a heterosexual, although some prejudice in this field may be dispersed by a recent judgment by Mrs. Justice Booth: she granted care and control to a lesbian mother, considering this

factor in the overall context of the paramountcy of the child's welfare.⁴⁸ Similar issues have been canvassed following attempts by non-heterosexuals to adopt or foster children. Again, negative views of non-heterosexuals, even when they set up stable relationships, motivated enactment of Section 28 of the Local Government Act 1988, which prohibits local authorities from intentionally promoting homosexuality, *inter alia*, by publishing materials or by teaching that homosexuality is acceptable as a family relationship. Negative views of male homosexuality also support the continuance of limitations on the legality of sex between men, in particular the different age of consent (21), whereas 16 is the age of consent for heterosexuals. In all such cases competing interests are considered to be involved, with the majority of the general public believing that non-heterosexuals will proselytise their life-style among young persons and children, who should only be permitted to choose such a life-style or to consider it upon reaching a mature age. Here there are incommensurable standards founded upon deeply-seated beliefs and little empirical evidence either way. In such circumstances, public representatives and Governments tend to follow the general state of opinion in society. It is, nonetheless, parliamentarians' duty as a matter of conscience, just as it has been in relation to possible reintroduction of hanging, to keep such matters under review, looking at them sensitively and in the light of increasing scientific knowledge. As soon as is appropriate, any discrimination on grounds of sexual orientation requires removal on the basis that the right to pursuit of happiness and free development of the personality should be exercisable, provided that harm will not be occasioned to others. Until such knowledge is available, it is not unreasonable to consider whether past conduct or attitudes indicate that a person dealing with

children is likely to misconduct him or herself towards his or her charges because the welfare of children and young persons must be paramount in potential cases of conflict of rights or interests. However, there must never be a general presumption that persons known to have a different sexual orientation are unfit and will occasion harm to young persons.

A last development, within the capacity of the judiciary to introduce, is a doctrine of proportionality in terms of which they would evaluate whether the substantive measures taken and the means employed were required and were appropriate limitations on rights. Signs of such a doctrine already exist in administrative law. An additional benefit of incorporating the European Convention on Human Rights is that it would import that doctrine, which is prevalent in Europe and may in the long run be incorporated by judgments of the European Court (EEC).

Conclusion

My conclusion is that neither British society nor the present administration has been like Rip Van Winkle and forgotten civil liberties. Nonetheless, all Governments tend to take a few winks, and need prodding, if they are not to nod off. The Press, by and large, and non-governmental organisations perform outstandingly well as alarm clocks. Governments do tend to be complacent, slow to change and inherently nervous. They do not consider their prime task to be promotion of civil liberty and are relatively immune to protest and criticism of police misbehaviour or to allegations of discrimination against those who seek a home in a country considered by much of the world to be a haven of freedom and

opportunity. Indeed, it needs saying that, as a result of its history and situation in Western Europe, the United Kingdom is highly privileged and relatively one of the freest countries when viewed in a world context.

If one were to give a termly report it would say: "the work is difficult, yet could do better."⁴⁹ A major way of encouraging all governments to do better is to have as a goal the achievement of human rights values. This would in time occur, if Parliament incorporated the European Convention on Human Rights as part of United Kingdom law. The Convention is ready to hand and is unexceptionable, being accepted by all major political parties. Governments and Members of Parliament would then become more aware of the Convention's preamble which reads:

"reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common observance of the Human Rights upon which they depend; being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take steps for the enforcement of certain of the rights stated in the Universal Declaration ... have agreed ... [to] secure to everyone ... the rights and freedoms defined in ... this Convention."

Notes

¹ A. V. Dicey, *Law and Opinion in England*, *op. cit.* p. 47.

² Much earlier, similar ideas underpinned the approach of Professors Lasswell and MacDougal in their article "Legal Education and Public Policy" (1943) 52 *Yale L.J.* 203, which suggested re-designing law

school curricula: "Our present major purpose is to promote the adaptation of legal education to the policy needs of a free society. Therefore, our first principle is that all legal structure, definitions, and doctrines must be taught, evaluated, and recreated in terms of the basic democratic values. Not only the legal syntax but also all legal structures and procedures must be related to the larger institutional contexts, the factual settings, that give them operational significance."

³ e.g. the right of detained persons to consult a solicitor can only exceptionally be subjected to delay, whereas in England and Wales consultation can be delayed for 36 hours in cases of serious arrestable offences. Regarding police misconduct, there is automatic reference in Scotland to the Procurator Fiscal to decide if there should be a criminal prosecution, whereas in England and Wales, the relevant Chief Constable has discretion whether to refer cases to the Director of Public Prosecutions. The right to silence by an accused person without there being power in the court to comment on this is least extensive in Northern Ireland, reasonably limited in Scotland and total in England and Wales. Abolition of the right to silence is a contentious issue between would-be criminal procedure reformers and legal practitioners, who uphold it as a human legal right.

⁴ Major improvements to the Fair Employment (Northern Ireland) Act 1976 were made in 1989: wide powers of investigation and monitoring were granted to the Commission; discrimination, direct or indirect, on grounds of religion was made illegal; and employers in breach of compliance with the 1989 Act are not eligible for public sector contracts and government grants.

⁵ This analysis of the nature of how law operates to leave residual "liberty" has been paralleled in political discussion from Hobbes in *Leviathan* (Part 1, Chap. XIV) to Isaiah Berlin in his Inaugural Lecture, *Two Concepts of Liberty*, (O.U.P., 1955). Liberty is in one sense negative, that is, there is freedom from interference, with emphasis being placed on the inability of others to interfere—indeed on their duty to refrain from interfering. Liberty is in another sense positive in that the person endowed with it has ability to act or not as she chooses, emphasis here being placed on the power of the right-holder. Those who wish to attack political individualism make the point, raised in my second Lecture, about traditional concepts of human rights not comprehending social and economic rights to receive material benefits from the state, with emphasis in their analysis being placed on the limited entitlement of persons to material goods. The word "negative" has been misunderstood by the philosophically unsophisticated, a danger of any such debate entering the public domain, and its pejorative overtones have been

rhetorically exploited by some opponents of personal liberty to oppose acceptance of the concept of individual human rights.

- ⁶ See the significant cases of *Factortame Ltd. and Others v. Secretary of State for Trade (No. 2)* [1991] 1 All E.R. 70 (Court of Justice of the European Communities and H.L.) and *Factortame Ltd. v. Secretary of State for Trade* [1990] 2 A.C. 85. The Court of the European Communities has now given United Kingdom courts power to grant interim injunctions against the Crown in cases where a breach of Community law is claimed.
- ⁷ See Bob Hepple, "The Implementation of the Community Charter of Fundamental Social Rights" (1990) 55 M.L.R. 643-654.
- ⁸ European Court of Human Rights decision of November 29, 1988, (1989) 11 E.H.R.R. 117.
- ⁹ Article 15. Measures derogating from the right to life can be taken by a state to the extent strictly required by the exigencies of the situation.
- ¹⁰ *Third Periodic Report by the United Kingdom of Great Britain and Northern Ireland to the Human Rights Committee under Article 40, International Covenant on Civil and Political Rights*, (October 1989), p. 4.
- ¹¹ Paradoxically, the current Scottish Lord Chancellor, Lord Mackay of Clashfern, has by insisting on removal of restrictive professional practices in England and Wales, so as to make legal services more widely available to the public, been the target of adversarial rhetoric. In historical perspective the Courts and Legal Services Act 1990 will give the ordinary man in the street better access to legal services as well as implementing long-overdue rationalisation of the court system recommended by the Civil Justice Review Committee set up by his predecessor, Lord Hailsham. His Lord Chancellorship will be characterised as ushering in a period of major reform, despite the Cabinet's failure to provide the increased resources for Legal Aid as a social service, which are necessary if access to justice is to become an effective human legal right for all citizens.
- ¹² For a thoughtful account of the issues, concluding that judicial reform must be squarely on the agenda of any political party, see "Refurbishing the Judicial Service" in *Public Law and Politics*, Carol Harlow ed., (Sweet & Maxwell, 1986), pp. 182-206.
- ¹³ *R. v. Secretary of State for the Environment, ex p. Brent L.B.C. and Others* [1982] 1 Q.B. 594; and *Pickwell v. Camden L.B.C.* [1983] 1 All E.R. 602. See also *R. v. Merseyside C.C., ex p. G.U.S. Ltd.* (1982) 80 L.G.R. 369. Central government always has the last word with its ability to introduce new provision. When the courts remain "neutral" after approval by Parliament of revised statutory guidance, they are criticised by writers for failing to intervene. Even Lord Scarman would not set aside statutory guidance on local authority financial

targets in *R. v. Secretary of State for the Environment, ex p. Nottingham C.C.* [1986] W.L.R. 1. As Lord Bridge said, persuasion needs to be offered "not to the judges who are not qualified to listen, but to the department, the minister, all members of Parliament and ultimately to the electorate" (at p. 23). An overall view of the attempts to transform local government operations in Britain in the last decade is given in Hugh Butcher, Ian G. Law, Robert Leech and Maurice Mallard, *Local Government and Thatcherism*, (Routledge, London, 1990).

In 1990 the Treasury would have been even more upset by Lord Justice Woolf's decision in the Divisional Court in *R. v. Social Security Fund Inspector, ex p. Sherwin and Others*, *The Independent*, February 23, 1990. The court held that guidance given to Social Security Officers in the Social Fund Manual that a Social Fund Officer must not make a payment which will result in the local budget being exceeded, unless it had been increased, was unlawful in that the Secretary of State had imposed budget restraints in mandatory terms which were inconsistent with the intended flexible nature of the scheme to meet exceptional needs.

¹⁴ See *R. v. Secretary of State for the Home Department, ex p. Herbage* (No. 2) [1987] 1 All E.R. 324; *R. v. Deputy Governor of Parkhurst Prison, ex p. Hague and Others*, [1990] 3 All E.R. 687 (C.A.); and *Leech v. Deputy Governor of Parkhurst Prison* [1988] A.C. 533.

¹⁵ *English Law—The New Dimension*, 1974 Hamlyn Lecture, *op. cit.* p. 75.

¹⁶ (Methuen, London, 1977).

¹⁷ Edmund Burke, *Reflections on the Revolution in France* (1790) C. C. O'Brien ed., (Penguin, 1986) pp. 117–153 *passim*.

¹⁸ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1865), (Macmillan, 10th ed., 1967), p. 199.

¹⁹ *Commentaries on the Law of England*, J. F. Archbold ed., (William Read, London, 1811), Book IV, Chap. 33, p. 443.

²⁰ U.N. Convention on the Elimination of all Forms of Discrimination Against Women. *Initial Report of the United Kingdom of Great Britain and Northern Ireland*, Foreign and Commonwealth Office, (May 1987).

²¹ See especially paragraph 178 of their 1990 Report. There was similar tough questioning facing United Kingdom representatives at the United Nations Committee on Economic, Social and Cultural Rights. See *Report on the third session (6–24 February 1989)*, United Nations, Economic and Social Council, Official Records, (1989), Supplement No. 4, pp. 52–59.

²² *Third Periodic Report . . . to the Human Rights Committee* (1989), *supra*, p. 9.

²³ I have seen "minded to refuse" notices based on undisputed facts declaring that the Secretary of State was minded to refuse the application for asylum. For example one Turkish Kurd had twice

been tortured and detained between 1982 and 1987 and had on many subsequent occasions been detained and questioned. Another had not been beaten since 1987, although the police were searching for him. In the view of the Immigration Service Headquarters Group A these Turkish Kurds did not have a well-founded fear of persecution, although the notices admitted that "Kurds in parts of Turkey cannot be said to enjoy cultural or political freedom" and stated that individual circumstances would be considered.

²⁴ *Third Periodic Report . . . to the Human Rights Committee* (1989), pp. 4-5.

²⁵ *Ibid.* pp. 83-84.

²⁶ [1988] A.C. 958. Their Lordships set aside the Court of Appeal's judgment which had held the Home Office decision to be unfair. Lord Justice Bingham had stated that "asylum decisions are of such moment that only the highest standards of fairness will suffice." In all the circumstances of that case his Lordship considered that, in order for representations to be meaningful, the mind of an applicant should have been directed to considerations likely to defeat his case (his earlier answers to officers' questioning). Furthermore he should have been given a meaningful right to supplement his previous answers where questions had been asked through an interpreter, with account being taken of the strain to which an applicant may well be subject on first interview: *Secretary of State for the Home Department v. Sittampalam Thirukumar* [1989] Imm.R. 402 at 415. Lord Donaldson M.R. also took the view that the Home Office should in fairness have given the complainant every assistance by letting him see his previous answers and the reasons for the Home Office's decision in order that proper representations could be made because the initial decision was not irreversible (p. 409). These are not the judgments of an executive-minded judiciary. Although the Court of Appeal cautiously refrained from making any general statement about natural justice or procedural propriety, it treated fairness as a concept variable according to circumstances and then detected unfairness.

²⁷ *Ibid.* p. 81.

²⁸ A non-polemical account is given by David Bonner, *Emergency Powers in Peacetime*, (Sweet and Maxwell, 1985), p. 166. The position up to July 29, 1988 is surveyed in G. Hogan and C. Walker, *Political Violence and the Law in Ireland*, *op. cit.* This work has a good bibliography. There is a robustly critical account of British and Northern Ireland measures in K. D. Ewing and C. A. Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain*, (Clarendon, Oxford, 1990), pp. 208-254.

²⁹ *Reference under s.48A of the Criminal Appeal (Northern Ireland) Act 1968 (No. 1 of 1975)* [1977] A.C. 105 at 138.

³⁰ *Cp. The State (Lynch) v. Cooney* [1982] I.R. 337 with *R. v. Secretary of State for the Home Department, ex p. Brind* [1990] 1 All E.R. 469 (C.A.); affd. [1991] 1 All E.R. 720 (H.L.).

³¹ Such fears were expressed by the editor of *The Times*, Mr. Simon Jenkins, on June 22, 1990 and by Brian MacArthur in *The Sunday Times*, June 24, 1990. See *Report of the Committee on Privacy and Related Matters*, chaired by Mr. David Calcutt Q.C., H.M.S.O., (London, 1990). Ultimately a right to privacy and a right to reply by persons complaining that they have either been defamed, unfairly harmed or misrepresented will need legislative consideration. Of course, enactment of such specific measures and even a Bill of Rights confirming free speech will not eliminate disputes. Two hundred years of experience of the United States Bill of Rights, where safeguards for the Press and for individuals' privacy have been developed by the courts, show that there will always be dissension between those offended or angered by or fearful of the Press's, publishers' and writers' power and its exercise. Whereas American courts have used the First Amendment to cut down the scope of libel law, they have to some extent created the right to privacy to protect interests not covered by the common law: much of privacy law operates as a species of libel law.

³² *Commission for Racial Equality v. Dutton* [1989] 1 All E.R. 306.

³³ Every time one uses such rhetorical language a qualification must be added: judges in their capacity as bureaucrats are not independent. They are subject to the judicial hierarchy in their administrative role and even to influence from the executive when they assume extra-judicial tasks. In their personal conduct they are also prone to influence. See R. B. Stevens, "The Independence of the Judiciary: The View from the Lord Chancellor's Office," (1988) *Oxford Journal of Legal Studies*, Vol. 8. No. 2, pp. 222-248. Sir Alfred Denning's outspokenness in *Freedom under the Law*, his 1949 Hamlyn Lecture, provoked the Lord Chancellor (Jowett L.C.) into personal objection, but the future Lord Denning did not repent, defending his comments on the lack of appeal to the courts from tribunals and "drastic departure from all our traditions" (at pp. 83-84). He argued that the matter was so "fundamental" that it was "outside the realm of party politics": Stevens, *op. cit.* p. 232.

³⁴ Hogan and Walker, *Political Violence and the Law in Ireland*, *supra*, p. 33.

³⁵ [1972] N.I. 91. In England Lord Denning had declined jurisdiction, regarding the matter as too hot a potato to handle and insulating himself with the rationalised language of statutory interpretation: See *Re Keenan* [1972] 1 Q.B. 533.

- ³⁶ [1972] N.I.J.B. (B.C.C.) and [1979] N.I. 49. In circumstances of political violence it is remarkable that the judge was prepared to impose strict limitations on questioning of suspects.
- ³⁷ [1986] 3 N.I.J.B. 48.
- ³⁸ [1978] 5 N.I.J.B. 148.
- ³⁹ *Third Periodic Report . . . to the Human Rights Committee*, p. 56. Taking full account of acquittals and non-prosecutions of persons who in truth were guilty, these figures are ludicrously small in relation to the number of cases nationally which were not pursued or in which convictions were set aside.
- ⁴⁰ I find partisan argument that there has been a steady erosion of basic liberties over the past decade unconvincing: see Peter Thornton, *Decade of Decline: Civil Liberties in the Thatcher Years*; National Council for Civil Liberties, 1989. Ewing and Gearty, *op. cit.* p. 129, despite their generally polemic tone, fairly make reference to these cases, but believe that "while all British Governments this century have been obsessed by questions of secrecy and security, the last ten years has seen these obsessions carried to remarkable lengths." This differentiating verdict would disappear were the authors older. The real difference between the 50s and 60s, and even 70s atmosphere, is that the current Government has been willing to tackle both certain reforms and other tightening-up measures long thought necessary by all its predecessors who were too often unwilling to take any risks of reform or to incur any odium for taking action in which they believed. 1990 is an altogether freer world, despite all the grumbles and deficiencies still needing remedy. There is more perspective in Geoffrey Robertson's *Freedom, the Individual and the Law*, 6th ed. of Harry Street's invaluable Pelican on civil liberties. Mr. Robertson Q.C., a supporter of Charter 88, considers (at p. 402) that "Excesses of power committed under both Labour and Conservative administrations, make the prospect of merely substituting one Government with another a counsel of despair for those genuinely concerned with civil liberty."
- ⁴¹ Had Professor T. B. Smith's 1961 Hamlyn Lecture, *British Justice: The Scottish Contribution*, been taken more account of and earlier, the English criminal justice system would have been much improved. There are many other distinguished Hamlyn Lecturers such as Professor Glanville Williams (1963), Professor Rupert Cross (1971) and Professor John Smith (1988) who for decades constructively criticised the English criminal justice system and have contributed to its improvement.
- ⁴² See the references in n. 28 *supra* and M. Hurwitt and P. Thornton, *Civil Liberty: The Liberty/NCCL Guide*, (Penguin, 4th ed., 1989), pp. 153-161, and, for the law prior to 1986, Clive Walker, *The*

Prevention of Terrorism in British Law, (Manchester University Press, 1986).

- ⁴³ *Third Periodic Report ... to the Human Rights Committee*, p. 12. The figures are derived from pp. 9 and 11 of the Report.
- ⁴⁴ Since writing this the Woolf Report has become available. See Cm. 1456, *Prison disturbances April 1990: Report of an inquiry by the Rt. Hon. Lord Justice Woolf [parts 1 and 2] and his Honour Judge Stephen Tumim [part 2]*, H.M.S.O., (London, 1991).
- ⁴⁵ See P. A. Thomas, "HIV/Aids in Prison" (1990) *The Howard Journal of Criminal Justice*, Vol. 29, No. 1, at pp. 1-13.
- ⁴⁶ See P. English, "Prisoners' Rights: Custodiet Ipsos Custodes?" in *Fundamental Rights*, J. W. Bridge and Others, ed., (Sweet and Maxwell, 1973), pp. 201-218.
- ⁴⁷ These complex issues and their background are well covered by J. S. Nielsen, "Muslims in English Schools," *Journal Institute of Muslim Minority Affairs*, [January 1989], Vol. 10 No. 1, pp. 223-245.
- ⁴⁸ On the very day of this Lecture, November 1, 1990, her judgment was reported in the Press. She was applying the Court of Appeal's decision in *C. v. C. (A minor)* [1991] 1 F.L.R. 223. The Court of Appeal had held that the fact that a mother had a lesbian relationship did not of itself render her unfit to have the care and control of her child. It was, however, an important factor to be taken into account, having regard to the fact that in present-day society it was still a normally held view that the ideal environment for a child was the home of caring parents and that a lesbian relationship was an unusual background in which to bring up a child, likely to cause problems to her outside the home. The balance had to be struck taking account of such a fact.
- ⁴⁹ I do not claim to be a great mind thinking like the marketing adviser to a political party, but I had written this before the teachers' cliché in the second half of the sentence was adopted as a political slogan to describe the present government's record.

4. People and Education for Human Rights

Recapitulation

In earlier Lectures I showed how the United Kingdom and her erstwhile colonies, as a result of the interaction of human thinking and historical events, contributed to the development of concepts and theories of human rights and to institutional practices protecting human legal rights. Those thoughts and practices in turn assisted in the development of a universal international legal ethic of human rights, irrespective of whether the concept of human rights could be philosophically or anthropologically underpinned. This international legal ethic with its agreed standards has been feeding back to the United Kingdom, reinforcing internal conceptions and practices regarding human rights, reminding us of our traditions. In explaining this I demonstrated the psychological effects of engaging in rights-talk and linkages between legal rights, moral or human rights and

values, showing that all law is the outcome of value choices, with values so permeating social institutions that they are reflected in constitutions and legal rules. Those inter-relationships between values, human legal rights, Government economic and fiscal policies and constitutional arrangements, continue to impose dilemmas of choice on politicians, administrators and judges. When particular outcomes fail to satisfy sections of society, who believe that their values are being inadequately implemented or protected, demands by significant groups for constitutional change tend to surface—like the campaign since 1988 for a new constitutional settlement and a Bill of Rights.¹ In discussing those issues I evaluated the state of civil, political, economic and social rights in 1990 and, as a female pedagogue, wrote a termly report on Governments saying that: “The work is difficult, yet could do better.” Putting this in more lawyer-like language, my verdict, using the standard of judicial review and of appeal on the facts, was that Governments by and large had acted “not unreasonably” and remained within the penumbra of reasonability, even if in many instances one would not have reached the same conclusion. A major way of encouraging all Governments to do better is to have as a goal the achievement of human rights values. By incorporating the European Convention on Human Rights into United Kingdom domestic law, Parliament would be adopting such a goal.

Education in Citizenship

The other side of the coin of the campaign for a new constitutional settlement has been a complementary approach of rebuilding citizenship institutions. That

approach implicitly tackles the need, if human legal rights are to be effective and human rights values are to be maintained, for members of society, especially those who operate its institutions, to be imbued with human rights values. That entails thinking about how people are socialised and reconsideration of education in human rights values and about human rights. If non-partisan approaches, utilising an inter-party consensus on encouraging citizenship, are adopted, this may well lead to enactment of a Bill of Rights, which will then function as an agreed source of values for infusing into education with long-term consequential effects on general attitudes. Of course, any Bill of Rights would also fulfil the traditional functions of such a measure. Thus it would serve as a bench mark or standard for evaluating the justness of legislation, judicial decisions and administrative practices and decisions and would provide guiding principles for legislators, judges and administrators.

In my first Lecture I quoted Barker's comment that, when we talk about the state and society,² we are talking about organisations and arrangements constructed, sustained and revised by the thoughts and dealings of persons, and in my third Lecture I quoted Blackstone's admonition not to be tempted to think of our constitutional and legal systems as "of more than human structure." Thus if we care about the nature and conduct of society, we need to concern ourselves about persons and their thoughts. As always, the leading philosopher of conservatism, Burke, expressed the necessity in unforgettable prose:

"Never wholly separate in your mind the merits of any Political Question from the Men who are concerned in it."³

In analysing the behaviour and policies adopted by the French National Assembly Burke pointed out that if we

knew it only by its title and function, nothing could be imagined more venerable and that any enquirer, subdued by the image of virtue and wisdom of a whole people collected into focus, would hesitate to condemn even things of the worst aspect. He also diagnosed why men were as they were:

"But no name, no power, no function, no artificial institution whatsoever, can make the men of whom any system of authority is composed, any other than God, and nature, and *education*, and their *habits of life* have made them . . . After I had read over the list of the persons and descriptions elected into the *Tiers Etat*, nothing which they afterwards did could appear astonishing . . ." ⁴

Sounding a little like certain English barristers who in 1988 had an apocalyptic vision of the consequences of reorganising the legal profession, Burke lamented:

"Judge, Sir, of my surprize, when I found that a very great proportion of the Assembly (a majority I believe, of the members who attended) was composed of practitioners of the law. It was composed not of distinguished magistrates, who had given pledges to their country of their science, prudence, and integrity; not of leading advocates, the glory of the bar; not of renowned professors in universities;—but for the far greater part, as it must in such a number, of the inferior, unlearned, mechanical, merely instrumental members of the profession. There were distinguished exceptions; but the general composition was of obscure provincial advocates, of stewards of petty local jurisdictions, country attornies, notaries, and the whole train of the ministers of municipal litigation, the fomenters and conductors of the petty war of village vexation. From the moment I read the list I saw

distinctly, and very nearly as it happened, all that was to follow."⁵

Burke's eloquence, despite his lack of love for the lower orders of the legal profession, is rather more persuasive than the ugly jargon of "socialisation" in explaining that men's attitudes and capacities are culturally acquired in the course of family life, school life, social relations, the worlds of work and of political life. Habit, instruction, the moral environment in which we live, the ideas, beliefs, illusions, and prejudices which we encounter—and these are different for different societies at different times—leave us with a set of value-dispositions or beliefs and capacities to reason and to act. From earliest life in the family, throughout pre-school education and schooling, thoughts and capacities are being acquired. Pre-school education is the most important shaping factor from which not all benefit equally. The latest year for which reliable statistics were available was 1984 when 45.3 per cent. of children aged three or four were in various forms of school, with a similar percentage for pupils aged between two and four being in maintained or registered day-care places or with registered child minders.⁶ People spend a minimum of 11 years of their lives in formal education. For those who enjoy the benefits of pre-school education and tertiary education about 25 per cent. of their lives is likely to be spent being formally trained.

Education, Television and the Press

Talking about young children leads me into a controversial area, with which a society used to traditions of free speech has been reluctant to grapple. Those attempts

made have automatically been characterised as illiberal, but I do not fear facing that grave impeachment. I begin with the electronic methods of communication in front of which most small children spend so much time and which even the best of parents use to obtain some peace and time to rest. We all accept that children are taught by television and that specially tailored childrens' programmes should be made. Public opinion is also beginning to accept that older children should not be exposed to violence, video nasties, pornography rented by parents and even to so-called soft porn. When the same point is made about adult exposure, it is not considered that viewers are being "educated." The argument immediately shifts and it is said that there is an onus of proof to show that harm is being done to mature persons, who have the right of self-expression. The change in approach is masked by employing the language of human rights, with the right of freedom of expression being set up as the primary value. Public thought in this whole area is inconsistent.⁷ Only too often also, argument runs into the sands about lack of empirical proof about harm being effected by certain kinds of material and on whom the onus rests to show harm or its absence. A new approach is needed. It is time comprehensively to reconsider the role of the printed word, pictorial representations and electronic methods of communication, not merely in respect of a relatively small area of their operation, such as promotion of violence and pornography, but in relation to their overall educational role. Professor Dworkin has provided a sophisticated analysis of the purposes of freedom of expression.⁸ I, as a simple unphilosophical person, cannot begin to approach his refined elaboration, but some teleological account may help analysis. Freedom of expression historically began with the right of individuals to express their religious beliefs and political

views. It then broadened into the freedoms of pamphleteers, philosophers, authors, journalists and proprietors of papers to express themselves. There has always been an aspect of self-fulfilment in self-expression, so that freedom of expression can be described as a way of exercising autonomy. It seems to me that Dworkin is wrong when he places relatively less weight on the function the press has in informing the public when counterpoising it to the individual's rights to possess pornography. Ever since the invention of the telegraph, and even more with the development of television, the role of the media (an ugly, but convenient neologism) has been to reveal grave wrongs and to inform the public of events which should concern them. For example, *The Sunday Times'* exposure of inhuman and degrading treatment during the 1971 internment operation in Northern Ireland led to wholesale revision of the security laws. Before those changes, operations in Northern Ireland and interrogation and arrest of suspects were conducted as they were in the last phases of imperial decolonisation in places such as Malaya and Aden and with little concern for civil liberties, which were luxuries confined to the British mainland. In short, the media alert the public to abuses, just as did 19th century Factory Acts inspectors' reports. Only from journalism do the majority of people learn about events and how close observers have evaluated these. Furthermore, ability of television drama to alert the public to grave social ills is unparalleled: for example, the drama *Cathy Come Home* (1966) made the British public aware of the extent and consequences of homelessness.

Possibly, the modern media are the most significant influence in the moral and educational process which continues to shape opinions, beliefs, acceptance of values and preferences over a lifetime. Because of this

country's general self-regulatory traditions and politicians' apprehensiveness lest they be pilloried for attacking freedom of expression, there has been no rationalisation of the media's educational role. I believe that self-regulation by the media in this sphere has hitherto been as unsatisfactory as it has been in safeguarding individuals from unfair reporting. As responsible professionals, it is time for newspapers and journalists to recognise their major educational functions and through their self-regulatory bodies to draw up a Code of Practice on their responsibilities, both moral and educational in the widest sense. To assert that their prime function is moral and educational is not inconsistent with accepting that the media have other functions, like giving amusement and pleasure. Nor is it inconsistent with accepting journalists' and proprietors' rights of free expression and of giving information. Furthermore, property rights are involved: except for *The Guardian*, *The Spectator*, the *New Statesman and Society* and some academic and professional journals, the purpose of publication is to earn revenue from advertising. Those bodies who have been able to influence Press standards, such as the Advertising Standards Authority with its Codes of Practice, have insufficiently taken account of the enormous educational and conditioning aspect of everything that the media publish. One of the most significant failures is the absence of an adequate code on the portrayal of women in advertising. Taking a robust view of the fun or pleasure romantic or mildly pornographic material give some persons, overlooks the consequential effect that continuous subliminal saturation of the public, male and female, with such material has on attitudes to the role and position of women.⁹

Earlier, in my third Lecture when talking about civil and political rights, I referred to some of the conflicts that have occurred between successive Governments and

the media. All Governments have sufficiently interfered with the media so as to irritate, but not to silence them. When Ministers complain, warn or seek to apply any degree of restraint, the media generally become more cautious, because such admonitions work—in American legal jargon—as “a chilling factor.” The real cause for most of the problems between politicians and journalists arises from the fact that all news reporting or commenting is, for reasons of space, selective and, being the account of one particular person, inevitably subjective. Responsible journalists do attempt to report facts in context and to be impartial, but those criticised will always react adversely, the more so when the account (necessarily) stands on its own, only in a subsequent programme or report being “balanced” by one with different emphasis. One recent attempt to pre-empt Government intervention and regulation of Press content has been voluntary establishment of Press Ombudsmen.¹⁰ This voluntary self-regulatory machinery of course facilitates complaints to newspapers, but it does not tackle the problems of overall balance in television and radio programmes and their effects over a long period on people, young or old, in shaping their perceptions. It is not a single programme or editorial that is troubling, but the drip, drip, drip over time, especially in coverage over the months preceding elections. Nor do the new self-regulatory arrangements, even in relation to newspapers, deal with issues of balance: *The Guardian* Ombudsman to whom a complaint was made, properly replied that there is no statutory duty or otherwise on the Press to be balanced. He merely thought that the editor could have been more courteous, instead of writing that the views sought to be expressed in an answering article were “insubstantial and boring.”¹¹ In other words, all editors need do is to be polite. Old people, already educated, spend 40 hours a week

watching television. Governments, and sometimes even oppositions, fear that they are being conditioned as voters. These factors explain recent unwise attempts to provide detailed criteria for the electronic media in making and presenting programmes. Only the most generalised guidelines can be tolerated without crossing the thin line between guidance and prior restraint, that is, some form of censorship of political comment. A large degree of tension over criticism, confidentiality and security between Governments and the Press, television and radio is inevitable: the media's function is to inform and criticise, and *all* governments seek to avoid exposure and will from time to time go to the edge of permissible reaction. One only has to think back to Harold Wilson's later relations with the Press and to Labour Ministers' attitudes in 1978 and 1979. Polemical assertions that liberty "is ill in Britain" in conjunction with personalised frustrated diatribes about leading political figures miss the point: both parties when in office will and do behave similarly. I find it ironic that one who argues that Thatcherism has rendered "freedom just another preference . . . [and] intellectual liberty just another commodity," should be so vociferous an exponent of the case for a right to pornography. Pornography is a commodity which reduces sexual pleasures to simple preferences to be enjoyed. Pornography causes, using Dworkin's own words, "corrupting insensitivity" to and "cheapens" relationships between the sexes, just as it "diminishes" the dignity of human beings who are used instrumentally, namely women and children. Dworkin's fluency and intellectual standing have unfortunately been relied on by other academics (such as Ewing and Gearty) to buttress their analysis that liberty is ill in Britain and to assert that freedom of expression has become a dispensable commodity, carelessly jettisoned. One look at Britain's Press or television current affairs

programmes, let alone listening to the radio, gives the lie to such assertions. Freedom of expression has been and will always be a field of battle and marginally shifting fortunes, but Carlyle's comment in *The French Revolution* remains valid:

"Great is Journalism. Is not every able Editor a Ruler of the world, being a persuader of it?"

A more effective and less controversial way of allowing freedom of expression and simultaneously ensuring public awareness of risks of partiality would be to require all reporting, documentary programmes, and "faction" to carry "Government Health Warnings." The idea could be extended to all newspapers. The warning should not be small, like those on cigarette packets, but should be blazoned in a one-inch wide strip across the middle of each non-advertising page of newspapers. Suitable wording would be: "All reporting is selective. Criticism is one of our jobs. *Always think for yourself.*" In the case of television the warning should be inserted before, after and during intervals in the news or other documentary television programmes. Equally, nightly political Chat Shows would be more illuminating were they preceded by and intermittently interrupted or flashed-over by statements that "This is a non-Party *POLITICAL* Broadcast. Be alert and think for yourself." Proprietors may contend that this will entail wastage of newsprint, television frames or airtime, but they have not disputed the usefulness of seeing politicians preceded by a required notice saying "This is a Party Political Broadcast." Journalists have no reason for objecting to such a warning, which would not be construed as an adverse reflection on their fairness, because it would equally extend to comments by political figures quoted or reported. The generalised approach suggested is not unreasonable, because subjectivity is

inevitable, whoever speaks, whether it be a presenter, a reporter, an interrogator or a responding interviewee. Reminders of subjectivity are particularly necessary when plausible or captivating people put forward ideas which cannot be analysed in the short time available. If "viewers" object on grounds of distraction or aesthetics to such an interruption, the warnings could be made subliminal—let me stress that they are the only subliminal messages that should ever be permitted.

It is appropriate here to remind readers of the domination of the United Kingdom media by various multi-national companies and the problem of cross-media ownership. Amusingly, British Satellite Broadcasting on February 23, 1990, distributed a glossy brochure, *Raising Kane? Media Ownership in a Free Society—Diversity, Fair Competition and the Public Interest*, arguing for safeguards to keep the control of television, radio and newspapers in separate hands, and implicitly attacking Rupert Murdoch in simultaneously issued material. BSB explained that concentration of media power can lead to too much power in too few hands; a uniformity of editorial approach; the peddling of self-interest; and even distortion. Within the year BSB was merged with the Murdoch television interests (for good financial reasons) and there was silence again about the dangers of reduced coverage and homogenised opinions with concentration of power.

Whatever the attitudes adopted in a free society to media, one thing is necessary, namely "tele-education" in schools.¹² Pupils need to be taught to assess television independently, bearing in mind that photographs and pictures have powerful presumptive validity. Some naively think these cannot lie. Furthermore, subjective opinions and inevitably selective reporting of events enjoy authority, because of their presentation on a public medium which most of the public regard as objective.

The dangers are reinforced by the generalised human tendency to credulity. We presume things are correct and honourably stated, rather than having been enthusiastically, emphatically or even rashly said. Those who read, listen or watch are engaged in a form of continuing further education. One critical of televisual views might well say that like Pavlov's dog viewers are being "conditioned." Putting it less tendentiously, information technology, combined with marketing techniques, is restructuring attitudes and social relationships and we must all remain aware of it, especially while it is happening.

The illusory presumption that opinions mediated by a newspaper or by some electronic equipment are more objective than are those in face-to-face communication is particularly dangerous: the projection adds false authority on top of the presumption of validity. People need constantly to be reminded that, both in face-to-face relationships and when receiving media communications, they ought to be thinking to themselves: "What I have just read, heard or seen is no more than that individual's view of the facts and only his opinion."

Before leaving the educational and informational role of the Press, let me quote another great Scot and humanitarian, Sir James Mackintosh, the first to introduce jurisprudence into the study of law in the United Kingdom, a disciple of Bentham and reformer of the criminal law, who has prime responsibility for abolition of capital punishment for many crimes, including petty shoplifting, and would have got the credit for abolishing it for over 100 crimes had not Robert Peel, the Home Secretary, having earlier opposed Mackintosh, preempted him. Mackintosh was obviously not thinking of the 1790s equivalent of the tabloid press when he wrote, in attempting to answer Burke's comments on writers in

his *Reflections*, that it was after the art of printing that there came to be a

“clarinet by which the opinions of the learned passed immediately into the public’s mind . . . The philosophers of antiquity did not like Archimedes, want a goal to fix their engines, but they wanted an engine wherewith to move the moral world. The press is that engine and has subjected the powerful to the wise.”¹³

Perhaps I would be happier if what the printing press produced in newspapers, periodicals or between cardboard covers really was always the words of the wise. Even then, those wise words would be subjective. Burke’s point cannot be refuted about the power of the literary cabal which, possessed with a fanatical degree of proselytism, had easily progressed to a spirit of persecution. Confining the reputation of sense, learning and taste to themselves or their followers, they had blackened and discredited in every way all those who did not hold to their faction. He even, like Tocqueville later, blamed them for revolution, believing that:

“Writers, especially when they act in a body, and with one direction, have great influence on the publick mind.”¹⁴

Burke’s rhetoric may have been over the top, but it is the thoughts of thinkers communicated to us—perhaps from the Finchley constituency as well as from Hampstead and Wapping—which shape our attitudes.

The Effect of Education on Values

As I have already indicated, education and shaping of attitudes begins in the family and in the pre-school

years, and continues in the 11 years of formal schooling now compulsory. I cannot do better in emphasising the role of education than to quote that great public health reformer, Sir John Simon:

“Education, in the full sense of the word, is the one far-reaching true reformer, for which in all domains the sufferers have to work and hope: not the mere elementary school-business of reading and writing, nor even merely those bits of learning with some super-addition of a bread-winning technical proficiency; but education which completes for self-help and for social duty, by including wisdom and goodness among its objects; the education which teaches standards of moral wrong and right, gives height to character and aim, acts orthopaedically on the twisted mind, and applies its own hygienic discipline to the shaking-palsy of purposeless life. Education in that sense is not something which one man can receive passively from another, as he might receive an injunction or a legacy, but is something which his own nature must actively go forth to meet. It in truth is as a process of fertilisation, a process in which one generation of minds can only awaken the germs of another, a process in which fructification requires time.”¹⁵

In short, education is a continuing process teaching about moral right and wrong, inculcating values and provoking responses in the “pupil.” Values should not be received passively by way of “frontal teaching” the modern jargon for Simon’s Victorian metaphor of receiving a “legacy or an injunction,” but should occur by encouraging pupils to grow intellectually. This is what good educationalists have always done and underlies current phraseology about education and communication being joint human endeavours. That is not mere rhetoric, but a genuine expression of both

purposes and sentiment. Neither teachers, nor for that matter writers, journalists or lawyers, apart from the need to earn some bread, would engage in communication and educational endeavour if they did not believe that it was effective for their own development, the development of others and the improvement of social life. There is nothing new in emphasising the consequences of education on public life and its use for that purpose: from the time of Plato education was recognised as the one indispensable requirement for a good state, with knowledge and enlightenment being major political forces leading towards improvement.

Qualifications must be placed on the ability of education to shape individuals and the whole community. Lest I be accused of making Francophobic remarks, let me add some English names to the list of thinkers about knowledge as leading to progress. Bacon, Locke, Voltaire, Turgot, Condorcet and D'Holbach all saw education as leading to a better society. It is a measure of the power of Burke's rhetoric that we accept that French Enlightenment thinkers literally believed in the perfectibility of man and that they would have asserted that people will be cured of error by the mere fact of bringing them the truth. Such writers knew there were aspects of will and passion. If pressed, they would have admitted too that a degree of self-deception seems to be a human need. Even if over-optimistic about the power of education, thinkers of the French and the Scottish Enlightenments—with Adam Smith in particular urging compulsory schooling and adverting to the duties of the state¹⁶—brought centre-stage again the idea that if there is to be a transition to a materially and morally better society, sound education is essential.

For the last 20 years the English educational system has been afflicted by doubt whether values can with propriety be taught. We are all aware of the well-worn

joke about the New England history lesson on the Pilgrim Fathers, who left to secure their freedom to worship God in their own way and to force others to do the same. Teachers are alert to the dangers of a powerful state having control over education.¹⁷ The paradox is that the most articulate of the thinkers to warn of such dangers, Wilhelm von Humboldt, later became Prussian Minister of Education and helped build up one of the best educational systems in the world. Jeremy Bentham, as reformer, took a similar stance. He accepted that, as a utilitarian, the risk had to be taken of employing education which was admittedly a form of coercion, manipulation and propaganda. (Indeed, some of his proposals prove the dangerously autocratic attitudes of certain would-be educational reformers). Bentham's disciple, John Stuart Mill, observed how "history bears witness to the success with which human beings may be trained to see the public interest as their own," but, in view of its benefits and despite his views on individual liberty, supported education by the state.¹⁸ In contrast, Bentham's contemporary, William Godwin, like Joseph Priestley before him, had not wished to trust an absolutist state with such power. Godwin believed that "so powerful a medium, under the direction of so ambiguous an agent," ought not to be permitted.¹⁹ If there is to be state education in morals, whose views are to prevail? Should it be the views of parents, who have a right under Article 1 of the First Protocol to the European Convention that

"the State should respect the right of parents to ensure such education and training in conformity with their own religious and philosophical convictions?"

Or is it to be what the DES thinks pupils need? Is it to be those who shape the National Curriculum? Or teachers, the NUT and other teaching unions? The

answer in practice can only be that democratic governments (who are in the last resort electorally accountable) are permitted a margin of appreciation in laying down and implementing policy. If they fail to adopt policies on moral education and the state and its agents do not educate in that sphere, then other institutions will. As lawyers so often point out, omissions are commissions by default.

A major sticking point for modern educationalists has been the problem adverted to in my first Lecture, belief in cultural relativism. This has caused them to doubt whether what they are communicating by way of values is true. They forget about practical reasoning and the reality of people continuously acting as moral agents. Another reason for unwillingness to communicate values is the modern tendency to denigrate the traditional virtues, which, along with religious belief, have in an increasingly secular society, been regarded as matters of personal preference. Only recently are communitarian thinkers beginning to reassess the need for civic virtue and manners, including courtesy and friendship, dignity, industry and humility.²⁰ When others not of their cabal did so, this was described as reasserting "Victorian values." For 30 years it has been very "old hat" to talk of wisdom, courage, temperance and justice, of faith, hope, love, prudence and fortitude, except in a religious school. If duty, honour, self-respect, benevolence, charity, gratitude, dependability, consistency, conscientiousness, independence, pride in achievement and awareness of shame, were added to the list of virtues, many educationalists would until recently (and some perhaps still now) have thought that to communicate such concepts diminished the personality of the less able while encouraging selfish individualism. But those dispositions are indubitably virtuous: they lead to observance of moral standards as a matter of self-

realisation and self-satisfaction in refraining from doing harm and instead doing good and effecting justice. Far from being Victorian values, they have a pedigree from Greece, Rome, Florence and seventeenth and eighteenth century Britain and Europe, where notions of manners, taste and civic society were added, thus requiring the list to be lengthened by good manners, politeness, friendship, dignity, industry and humility. The virtues advance the quality of life, so long as undue weight is not placed on any particular set to the detriment of others. It is perhaps appropriate to quote the guru of 1990, Adam Smith, who would extend the principle of benevolence universally:

“He is certainly not a good citizen, who does not wish to promote, by every means in his power, the welfare of the whole society of his fellow citizens . . . The wise and virtuous man is at all times willing that his own private interest should be sacrificed to the public interest of his own particular order or society. He is at all times willing, too, that the interests of this order or society should be sacrificed to the greater interest of the state or sovereignty of which it is only a subordinate part. He should, therefore, be equally willing that all those inferior interests should be sacrificed to the greater interests of the universe, to the interest of that great society of all sensible and intelligent beings.”²¹

The Citizenship Approach

Smith’s comments bring me to another approach, recently developed by a group of thinkers, who see this

either as an alternative or as supplementary to a new constitutional settlement. The 1980s prophet, if one is to be singled out, is Ralph Dahrendorf, the distinguished European sociologist, although Professor Ian Lister, Professor of Education at the University of York, has for many years been putting forward similar arguments in relation to Human Rights teaching in schools.²²

Dahrendorf's 1985 Hamlyn Lecture re-awakened English interest in T. H. Marshall's social thought about citizenship rights and duties, which had by then become the preserve of political scientists, particularly American and Scandinavian ones. Dahrendorf propounded a theory of institutional rebuilding with reconstitution of democratic institutions creating conditions for initiative, but also for control, with both being related to the rights and interests of citizens. He concluded that:

“economic and social policy . . . must still be informed by the search for the greatest life chances of all members of society, and that means, by citizenship for all.”²³

T. H. Marshall's language of citizenship²⁴ was then revitalised in United Kingdom discussion by political scientists, including Raymond Plant. The *New Statesman and Society* in June 1988 took up Dahrendorf's and Plant's publicisation of the concept of citizenship to employ as a preliminary to Charter 88. Citizenship was said to offer the best hope of reconciling individualism and social justice. Earlier, Mrs Thatcher, as Prime Minister, and her Government had captured the high ideological ground with their monopoly of the rhetorical word “freedom” and they were not prepared to see the opposition monopolise another “hoorah” word such as “citizenship.” Accordingly, the Prime Minister and other

members of her Cabinet in July and August 1988 hijacked the notion of citizenship.²⁵ To differentiate their version from the *New Statesman* concept the adjective "active" was put in front of citizenship. I suspect some mischievous but learned mandarin, wishing to ridicule the Poll Tax rationale (taxation leads to real representation) recoinced Sieyès phrase "active citizenship," and gave it to Ministers as a term used by Aristotle about participation in the *polis*. Sieyès, major theorist of the early French revolutionary period and prime target for the philosopher of Conservatism, Burke, had introduced a tax-based voting system designed to exclude the proletariat. It confined the franchise to "active citizens" who had paid in tax the equivalent of three days' wages for an unskilled labourer. All others were "passive citizens."

The fashionability of citizenship talk led in late 1988 to the Speaker of the Commons establishing an all-party Commission on Citizenship. Since then, several Cabinet Ministers have used the term "active citizenship" to emphasise the responsibility of all to play a role in social voluntary programmes, in community life and in activities encouraging conformity with law such as Neighbourhood Watch Schemes. By early 1990 in non-partisan fashion both parties were invoking citizenship to bind young people into society through citizenship education taught across all subjects. "Citizenship," "participation" and "community" have become the currency of politicians of all descriptions, each putting their own distinctive slant and gloss on a concept which goes back to Aristotle and his views that the end of the state was the common promotion of a good quality life for its citizens.²⁶

The *Report* of the Speaker's Commission on Citizenship published in September 1990 was based on theory and was not a mere

“mélange of the best sense that could be made of an English muddle of well-meaning bits and pieces on the general theme that it would be nice if the term ‘active citizen’ could be developed.”²⁷

Underlying the *Report* is the notion that, if British society is to hold together, a richer culture of citizenship is necessary, so that the many different collectivities in the United Kingdom will share a sense of community, of common involvement and common responsibility, thus strengthening social institutions which have over the last 40 years intermittently shown fragility. Some concern has been expressed that citizenship can be an excluding and chauvinist concept, denying protection to non-citizens. That was certainly not the Commission’s approach. A fair immigration law, sympathetically administered, would in any event dispel such fears.

The *Report* tackled a wide range of institutional arrangements and the way in which they give effect to human rights’ values, although using a different vocabulary. Indeed, its thrust was similar to that of those who seek a new constitutional settlement. Ruefully I must admit that the *Report* anticipated my last lecture, arguing for an all-pervasive educational approach: the ideas of the age are always prevalent. The *Report* also recommended a thorough review of all public services, review and codification of the law relating to the entitlements and duties of citizens and the appointment of a Standing Royal Commission on Citizenship. Such a Standing Commission should have the functions of documenting social, economic and cultural aspects of citizenship, considering new legislation on the rights and duties of citizens and stimulating public discussion.²⁸

If there is a non-partisan approach to education about citizenship rights and duties,²⁹ fears that schools will be

used for indoctrination should diminish. But the reasons for not making citizenship or human rights education a subject *in its own right* in the new National Curriculum are manifold—although it should certainly be a major aspect informing teaching in specific disciplines where appropriate. There is the genuine risk, remarked upon by Dr. Leuprecht, the Council of Europe's Director of Human Rights, that

“a low mark in human rights would give the child or adolescent little incentive to defend such rights.”³⁰

There is also the official justification that it would be difficult to assess performance in such a subject. Then there are political concerns that there would need to be teaching about specific matters which are not the subject of consensus. Those concerns could be met by teaching human rights on the basis of the international treaties agreed by the United Kingdom, namely, the UN Universal Declaration, the UN International Covenants, the European Convention on Human Rights, the EEC Declarations of Principle and EEC higher law, all of which incorporate major elements of the international legal ethic of human rights. It is certainly not against conscience for teachers to communicate the national consensus; rather, if they failed to do so, they would not be making pupils aware of established traditions of the society in which they will have to live. It will no longer do to say that human rights are a bourgeois conception and to dismiss the need for future adult members of society to be made aware of such standards and of their own personal and general human legal rights.

Teaching the values and the virtues is, I submit, simultaneously defensible and necessary. People need to learn to sift their desires by reasoning, if they are to be

free to make choices.³¹ They need to make moral discriminations, and they need self-understanding and self-control. Teaching pupils to think sensitively about values and their competition is not indoctrination. Instead, it facilitates self-development and choice, leading to an alert autonomy, admitting, of course, that ideas will feed back into individuals' psychological furniture.

A further objection to such teaching has been made by some teachers reluctant to become involved in what is not regarded as "real teaching." Others do not believe it right to devote class-time to interpersonal issues, and yet others have felt that they would have difficulties in coping with controversial moral issues, especially if they have not been properly trained or are unclear as to their own views.³² Any deficiency on the last count can be remedied by teacher-training in such areas, which is rapidly being extended. Those who oppose teachers' participation should remember that if the school does not make such ideas accessible, other ideas will be fed in by the family, the media and the playground peer group.

One need not worry over-much about communication by schools of particular moral and human rights values in a society with free expression: there are always dissenters and innovators to whom people will be exposed. Freedom of expression would itself need to be taught within schools and would be best taught by allowing democratic rights to thrive in some structured daily discussion in class from an early age. Such procedures provide training in "how to listen," "how to defend points of view," "how to discuss points of view" and "how to reach a compromise," at the same time affording an opportunity in a practical context of discovering potential violations of human rights.³³

The best educational practitioners and Her Majesty's Inspectorate have pointed out that a major objective of

schools is to prepare pupils to meet the intellectual and social demands of adult life and to help them form "an acceptable set of personal values."³⁴ If not characterised as "human rights" or "political" or "peace studies and conflict resolution" teaching, this is more acceptable to politicians. Nonetheless, the same concepts and values will, with our common culture and traditions, be prominent in any approach. Reverting to human rights education, pupils need to be taught—and it can be done in a variety of subjects including history, geography, biology and literature—how to reason, to recognise their prejudices and passions and those of others, to be critically self-aware, and to think of the possible consequences of their attitudes and behaviour in relationship to themselves and others.³⁵

Suspensions in recent years that peace studies, civics and political education in schools' programmes are identified with left-wing thinking have spilled over to human rights teaching, which was equally considered to be a political subject, unsuitable for introduction into a supposedly neutral institution. Because of those attitudes, many schools offered civics programmes which were boring, uninteresting and confined to study of institutional forms. Courses were seldom taught in a critical fashion and, since pupils were not made aware of the practical reality of institutional operations and their consequences, classes were resented and considered by pupils to be irrelevant.

Pupils have also resented what is known as "frontal teaching." Were this to be adopted in human rights teaching, it would be counter-productive and negate the ideals of human rights. According to Paulo Freire, in "frontal teaching"

"the teacher teaches and the students are taught; the teacher knows everything and the students know

nothing, the teacher thinks and the students are thought about; the teacher talks and the students listen—meekly; . . . the teacher chooses and enforces his choice and the students comply; the teacher chooses the programme content and the students (who were not consulted) adapt to it.”³⁶

Many teachers, including University teachers, and I have been such a one, have tended to react defensively to student reaction to their opinions, but that is an initial reaction on first exposure—and it is in direct conflict with the notion to which all educationalists make obeisance, namely that education is not about rote-learning but about shaping the critical faculties. The trained teacher can surmount the difficulties of engaging in constructive discussion, not by using questions for social control, or rhetorically or dismissively. Students need to be invited to express their views, to pose questions and to exchange views with each other. Questions can be used to encourage pupils to consider sympathetically views which they themselves do not hold. Students’ questions in turn invite teachers to express their own opinions openly and clearly, at the same time posing further open questions inviting more investigation of the issues. The University of York’s Political Education Research Unit has found that such questions were fruitful in encouraging what they described as procedural values, fairness, respect for truth and for reasoning, toleration and freedom.³⁷ If there is no mechanism for allowing pupils to express their views, or if their views are totally ignored, not only in class but in the conduct of teaching, there is a hidden authoritarian agenda. Academic talk about human rights will be seen by pupils to be a hypocritical mockery.³⁸ Pupils, certainly from adolescence onwards, cannot be coercively

conditioned, rather they are influenced by ideas and procedures being made accessible. Thus more teacher training in self-awareness and how to apply democracy is necessary, if, instead of counter-reaction, there is to be positive intellectual engagement. Should pupils, exercising their critical faculties and after having examined various competing British internal traditions and other traditions, whether European or international, make their own choices, which then differ from those of their teachers and the controllers of our education system, that is how thought develops: the most significant contributions have always come from either revolutionary or from conservative thinkers, rather than from the middle of the road. There is a crucial human right involved: the right to be different and to reject that would undermine the concept of human rights itself. I am, and certainly all good teachers are, aware of the danger in thinking that a few who consider themselves superior or more enlightened can re-make others into what they think they ought to be.

Perhaps the greatest difficulty in ensuring effective human rights teaching was pointed to by Bernard Crick. In a book written in 1978 for the British Hansard Society's Programme for Political Education (the argument being related to that, but *à fortiori* applying to human rights education) Crick wrote:

"The real difficulties of political education are likely to lie . . . in its encouragement to action. There are still some who appear to want 'good citizenship' without the trouble of having citizens."³⁹

Despite the Council of Europe's Committee of Ministers having in May 1985 made a Recommendation to Ministers of Member States, entitled *Teaching and*

Learning about Human Rights in Schools, including a recommendation that the text be drawn to the attention of persons and bodies concerned with school education, the United Kingdom, unlike other members of the Council of Europe, had not as late as mid-1990 forwarded that Recommendation to schools and teachers. The DES's justification was that education was not national and that it was a matter for local authorities and private schools.

The Council of Europe's Ministers' Recommendation affirms *values*. These are: *respect* for dignity of the individual and for differences; tolerance; equality of opportunity; pluralistic democracy; an end to racist and xenophobic attitudes; responsibility; participation; non-violence; positive and non-abrasive personal relationships; and sympathy for the concepts of justice, equality, freedom, peace, dignity, rights and democracy. The Ministers contended that such understanding should be both democratic and based on experience and feelings. Accordingly, they require students to have knowledge of human rights acquired in a climate in which participation was encouraged. Furthermore, students ought to have both intellectual and judgmental skills and social skills.⁴⁰ The clear message emerges that students should learn not to attribute moral blinkers to those who disagree with them.

Some human rights problems have been internal to the education system. The National Curriculum based on the Education Reform Act 1988 had as one purpose promotion of equal opportunities and removal of sexual stereotyping. The standard curriculum for pupils from age 16 means that girls and boys should in future be taught the same courses. Thus, provided that funds are made available, girls will obtain equal access to new technology, like microcomputers, and have the same opportunities to study science and technical subjects.

Training after school should assist the young who are under-privileged and excluded—although in the long-term a much enhanced programme is necessary—but that brings one full-circle to the dependence of human legal rights on availability of resources and value-choices of politicians and the Treasury.

Before leaving school education let me make two obvious points: firstly, schooling affects the whole society, general public and future parents in their conceptions of their duties. Secondly, human rights or moral education is not being propounded as a simplistic solution. I am aware of the dangers of reductionism in putting forward complex social and economic issues as simple moral questions and have emphasised that moral principles are themselves complex and often conflicting. What the moral perspective can do is to assist in handling such questions, shaping likely decisions and their modes of implementation.

I have said little about duties or obligations in these lectures. The Committee of Ministers of the Council of Europe considered that knowledge of duties, obligations and responsibility was also necessary, but duties are a topic in themselves and appropriate for a jurisprudential Hamlyn Lecturer, who will face the up-hill task of describing in un-rhetorical and non-Victorian language the other side of the citizenship and human rights' coin.⁴¹ Before leaving the topic of duties I shall make the banal but too often ignored point that we all tend to claim rights, while frequently forgetting our duties, these being prominent only when we think of what we are owed by the state or by other persons. Despite the fun poked at the phrase, we need to think of our station and its duties, not like the rich man in his castle and the poor man at his gate, but in the context of a co-operating society in which all can express their autonomy and make satisfying psychological and material choices—or,

using the rhetorical words of the UN Universal Declaration of Human Rights, "enjoy better standards of life in larger freedom."

Those Who Administer

Talk of duties and those who have to perform them in a state, leads me to Pope's memorable couplet in his *Essay on Man*:

"For forms of government let fools contest;
Whate'er is best administer'd is best."⁴²

Education in human rights thinking for professionals and bureaucrats is essential. Two levels of training are necessary for the Civil Service—admitting that some training is already given. Firstly, general training is necessary to create an ethos of human rights thinking and open-mindedness. Administrative conservatism and bureaucratic ease are preferences that require de-conditioning. They are not unnatural, because civil servants have as a major part of their duty the need to defend the *status quo* in their Ministry—and do so superbly. Where most tend to fall down is in critically evaluating current policies and institutions with a humane perspective. This is not because civil servants are hard-hearted, but because they have not been guided to use criteria of that sort and fear political repercussions. (If Ministers also cared about human rights, which in the long-term they would come to do, were there a Bill of Rights, this would be remedied.) Secondly, specific training is needed for several groups of public servants. We tend to concentrate on more visible public employees. We should rather direct our first concerns to

those who form the elite of the Treasury whose need for virtual re-education I raised in my second Lecture.

The second group is made up of Government lawyers attached to various departments of state. They translate values into legislation, observing or breaching human rights standards and creating or infringing human legal rights. It is they who give advice on administrative action involving implementation or otherwise of such rights. Unless imbued with human rights values, they risk falling into the trap of finding arguments to underpin policies which are arguably in contravention of the United Kingdom's international human rights obligations, even if as lawyers they are able *bona fide* to rationalise their advice, as for example, in relation to the internal Home Office debate which has continued for two years on privatisation of prisons, remand services and probation, despite measures of that kind being under international investigation.⁴³

The third group are Home Office personnel within the Immigration Department and Prisons. Difficult though the task of Immigration Officers is, no-one who has regularly travelled through the ordinary channels at Heathrow, rather than the VIP lounge, can but recognise that courtesy is often absent and that it is unwise to stand behind a passenger of dark complexion. Then there is much needed human rights training for prison officers adverted to in my third Lecture.

Recent initiatives taken by the Police Training Council and by individual police forces (such as the early 1990 Metropolitan Police's Plus Programme's attempt to change the culture of the force by making a "statement of common purpose and values") have yet to be translated into practice. If these initiatives are fully implemented and the attitudes sought to be created filter through the system to all levels from lower to middle ranks, to leaders, to the Federation and to Policeman's

Clubs, there may then be changes in police behaviour. Even if such changes are primarily designed to create a more favourable public opinion of police forces, they should be welcomed: such a public opinion will not be created unless there are genuine changes in police conduct. One specific method of speeding up such changes—apart from training in human rights generally, which is not yet happening in any depth, training only being given in areas considered to be relevant to the exercise of specific police powers—would be the stationing in every police station of an officer, expert in human rights general thinking as well as about human legal rights in criminal procedure and in public order matters. Such an officer should be charged with the duty of informing his colleagues of the need for conformity to human rights standards. Another difficulty about universalising standards throughout the country is traditional decentralisation. Paradoxically, the arguments against centralisation of police forces, with retention of regional forces as a bar to absolutism, have in effect been barriers to consistent reform, whereas they have proven not to be barriers to firm public order action when inter-county co-operation and large-scale maintenance of order exercises have been needed.

Other professionals, whether in central or local government like social workers and Social Security Officers, or in the private sector, including union leaders and journalists, let alone lawyers, are equally in need of specialised human rights training. Lawyers are the skilled technicians who are instrumental, together with the judiciary, in a co-operative enterprise—for that is what the civil and criminal procedure systems together constitute—for translating values into legal human rights. The profession and the judiciary together have the responsibility of bringing about a just community and of protecting individuals and their rights. Some will

help in doing so more than others. For example, criminal lawyers assist in securing civil liberty; labour lawyers enforce workers' rights and welfare rights; general practitioners secure peoples' rights generally; and corporate lawyers facilitate wealth creation and employment. Lawyers and other professionals exercising similar advisory and representative functions have a potentially noble role. They assist vast numbers of people to protect their interests and human legal rights in accordance with existing rules developed by the political order; they are able to monitor those rules; and, being in a position to point to deficiencies, they can urge modification. All need to be aware of values.

This brings me, possibly presumptuously, to the education of Members of Parliament. They will have been operating our form of Government, which as Bentham's inspirer, Helvetius, pointed out, is a great teacher. MPs are well aware that politics are founded on public opinion and its management. They apply market principles and marketing to democracy, with each elector being induced to exercise his utility preferences in the electoral ballot, the very modern model of a modern market place. But MPs have themselves been subjected to formal and informal processes of education. Political institutions exert their influence on everyone throughout the whole of their lives, but operate more directly on Members of Parliament. A Bill of Rights would be an even more effective influence. Let me quote Sir James Mackintosh again:

"A Declaration is the expedient which keeps alive public vigilance against the usurpation of partial interests by forcefully bringing the general right and general interest to the public eye."⁴⁴

A constitutional Bill of Rights involves legislators and the executive in *explaining* and *justifying* conduct as being in

conformity with the rights and values in the Bill. It not only recalls power-holders to their duties, but instils in them a sense of such duties. It also functions as a transcendent norm by which to evaluate power-holders' work and the legal system they keep in existence or alter, giving MPs external, non-party standards by which to evaluate the practice of the executive, which they are in theory supposed to control. In short, a Bill of Rights functions like Natural Law once did. The norms set out in a Bill of Rights are, of course, multiple and sometimes conflicting. They will doubtless be selectively appealed to. Admittedly, general principles in themselves settle nothing, but they do at least give some direction, even if with pluralism of values in our differentiated society and competition between them, disputes will not end. Were standards in a Bill of Rights complemented by sector by sector specific legislation and, even better, conjoined with reviewing bodies with delaying powers, of the kind proposed by Mr Hattersley M.P., such institutional machinery to further human rights values would tend to more effective human legal rights.

One particular difficulty has been suggested, namely that the major political parties could not reach agreement on protection of property. This may not be so, because of the new emphasis on citizenship and political changes within the parties. The concept of "property" is an honourable one, supported by thinkers of right and left. It has not been the preserve of acquisitive or possessive individualists or a mere reflection of bourgeois capitalism. The historic moral justification for the institution of property is the individual's natural right to life and hence to the means to life at more than an animal level. Property is also justified by the right to one's own body and hence to the fruits of one's labour. To these moral justifications Jefferson added the notion that property in the means of one's labour was an indispensable

safeguard of individual liberty, being a guarantee against government tyranny and economic oppression—a view likely to have been confirmed by the peasants of Eastern Europe had they been given such an opportunity. This Jeffersonian view was modernly reasserted in Hayek's liberal thought. The Jefferson justification of liberty also rests on the right to life, which requires to be a fully human one. Modernly, the concept of property has been broadened. It now includes the social and economic rights, but it is as yet not generally employed to cover rights not to be excluded. If it were, it would become apparent that a share in political power and a set of power relations, enabling the individual to have a fully human life, also flow from the concept of property. If property again becomes seen and is justified as instrumental to a full and free life, this will be a return in a wider and more effective sense to 17th century concepts of a man's property "in his life itself, in the realisation of all his active potentialities."⁴⁵ That concept is the equivalent of "citizenship" and modern human rights, to whose evolution all United Kingdom political parties are contributing.

In fact, politicians of all parties share elements of thought taken from the three major traditions prevalent in the United Kingdom since the 17th century: liberal individualism, civic humanism and utilitarianism. In deference to the present Lord Chancellor, one should add that the Scottish Enlightenment incorporated all three. So too, all political parties, drawing on these traditions, have contributed to the growth of this country's concepts of freedom, justice, citizenship and human rights. All politicians have been concerned about human rights, even if they have differed about the meaning of particular values, the appropriate content of human legal rights, the nature of mechanisms to ensure such rights in practice and, in the infinite variety of

circumstances in which decisions arise, have placed different weights on different elements from these non-hermetic traditions.

All major political figures are concerned with freedom of choice and conserving property, and combine those concerns with ideas of civic virtue, integrity, responsibility and participation. There is a basic consensus on what needs to be done⁴⁶ when specific decisions have to be taken, despite loudly professed criticism or denial that there is a middle ground. All have inherited the utilitarian tradition in seeking to reform institutions to secure maximal utility, even though others disagree with particular assessments of methodology and have different diagnoses of the outcome. Adoption of the European Convention on Human Rights will only be adoption of values in which all leaders profoundly believe. It is part of the common heritage of Europe and something which every Government as a member of the Council of Europe has for 40 years been committed to observing. Ultimately, however long political leaders may procrastinate, the Convention will become part of United Kingdom internal law and will reinforce the traditions it reflects, at the same time providing a focal point for change and development.

I hope I have not used this Hamlyn platform to paint a false nostalgic picture of the past. I know full well that there have been and always will be human suffering, callousness and evil passions. Nor am I proposing a secular substitute for earlier religious ideals of the good life. What I sought to do was to provide material for argument about why a society should adopt standards reflecting substantive and procedural values and incorporate those standards, procedures and values in its constitutional, legal and educational arrangements. They will always be only a starting point for dealing with complex political, social and economic issues. Procedural

values are perhaps most crucial. Differing contentions, varying accounts of the facts, multiple interpretations must be heard and weighed. What at first sight seems obvious is in reality often incorrect. This cannot be better put than in Mr Justice Megarry's remark about natural justice and decision-making:

"The path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."⁴⁷

I believe that the human rights perspective and the natural justice procedure help in handling issues in the legislative, executive or judicial spheres which will be problematic so long as human beings exist in communities. They also smooth the daily dealings of ordinary human beings by each having respect and concern for the other. Perhaps after all human rights thinking is yet another Hobbesian manifestation: it leads to voluntary co-operation rather than to mutual damage.

I should like to end by stressing that any consideration of human rights values and human legal rights should be a process of ethical thought, that is, one involving cautious and sensitive reflection, rather than one of moralising or indoctrination. Ethical thinking is always interrogative, not imperative.⁴⁸ As any administrative lawyer could have told the philosophers, we must all always acknowledge that while we may be reasonable, we may at the same time be wrong.

Notes

¹ "Significant" has been used rather than "large" because of the effectiveness of concerned pressure groups in publicising their ideas.

Whether the general public favours the specific proposals in Charter 88 is unproven. According to newspaper advertisements 18,000 people had by mid-1990 signed the Charter 88 call for a new constitutional settlement, *The Sunday Times*, June 24, 1990.

² State and Society are abstractions, reflecting different but overlapping conceptions. Society is an all-inclusive term to cover the plurality of interlocking groups and associations into which human beings fall and all their relationships. The state is an artificial person given legal authority by a constitutional framework. Smaller than society, the state has legal power to regulate all or any of the multiplicity of relationships within society. See Sabine and Thorson, *op. cit.* p. 676.

³ Burke's letter in late 1789 to a "very young gentleman at Paris," quoted in *Reflections, op. cit.* at p. 15.

⁴ *Reflections, op. cit.* p. 128, with my italics.

⁵ *Op. cit.* pp. 129–130. Burke continued to defame the mechanical part of the legal profession who could not be expected to conduct themselves with discretion. He could not believe that "these men, suddenly, and as it were by enchantment, snatched from the humble rank of subordination, would not be intoxicated by their unprepared greatness." Burke did not like learned doctors (medical) in parliament either, believing that professional and faculty habits disabled men from acquiring "a comprehensive connected view of the various complicated external and internal interests which go to the formation of that multifarious thing called a state" (pp. 130–133). Not believing in the perfectibility of men by speedy re-education or retraining (p. 152), but in life-long traditional development, Burke would not have been sanguine about re-forming lawyers, especially as he believed that it was the *vices* of mankind that caused miseries brought upon the world and that morals, laws, rights of men, etc., are mere *pretexts*. Rooting them out of the mind would not cure the evil (pp. 247–248).

⁶ *Initial Report of the United Kingdom ... under CEDAW*, (1987) *op. cit.* Table 3.1.

⁷ The need for examining the consistency of our moral stances is dealt with in this and in other contexts where there are differences of opinion as to morality and the practical effects of various options by Simon Lee, *Law and Morals: Warnock, Gillick and Beyond*, O.U.P., 1986, pp. 34–35.

⁸ *A Matter of Principle, op. cit.*

⁹ D. J. Enright, *Fields of Vision, Essays on Literature, Language and Television*, (O.U.P., 1988), pp. 46–47, subtly rebuts the exaggerations to which comment on effects of pornography is subject: "Moreover, while I don't imagine that a rapist's life, along with all those

pornographic mags and blue movies, flashes before his eyes as he jumps on his victim, I suspect that—in no specialised Freudian sense—it is quite possible to forget and still be marked. ‘Slowly the poison (which may be no worse, no more immediate than a clogging sediment) ‘the whole blood-stream fills.’ We don’t, as the saying goes, know what hit us.’ Even private availability of pornography with adults-only participation of persons portrayed and an absence of any hints of violence raises difficult issues. Pornography affects attitudes and exploits and degrades subjects, although a few participants believe they are providing therapy and opportunities for personal development. Bans encourage organised crime. Heavy taxation of such self-indulgent material as a personal luxury seems the best disincentive.

- ¹⁰ *The Times*, February 28, 1990, reported on the appointment of 17 press ombudsmen and the press’s five point code of practice agreed in November 1989.
- ¹¹ Professor Hugh Stephenson, reader’s representative, Second Report in *The Guardian*, 1990.
- ¹² Derek Heater, *Human Rights Education in Schools: Concepts, Attitudes and Skills*, Council for Cultural Co-operation, (Strasbourg, 1984), (DECS/EGT (84) 24), p. 24.
- ¹³ *Vindiciae Gallicae* (1791) in James MacIntosh, *The Miscellaneous Works*, (London, 2nd ed. 1851), pp. 571–572. By 1799 MacIntosh had changed his mind about Burke, now thinking him “the most severe and sagacious of reasoners,” quoted in *Reflections*, *op. cit.* p. 51.
- ¹⁴ *Reflections*, *op. cit.* p. 213.
- ¹⁵ *English Sanitary Institutions, Reviewed in the Course of their Development, and in some of their Political and Social Relations*, John Murray, (London, 2nd ed. 1897), p. 481.
- ¹⁶ *Wealth of Nations* Vol. 2, (University of Chicago Press, E. Cannan, ed., 1976), p. 305 (BK.V. Ch.I. Part III. Art. II).
- ¹⁷ The dangers of manipulating and indoctrinating children are discussed in essays by R. M. Hare and J. Wilson in T. H. B. Hollins, ed., *Aims in Education*, (Manchester University Press, 1964). See also J. P. White “Indoctrination” in R. S. Peters, ed., *The Concept of Education*, (Routledge and Kegan Paul, London, 1967) and I. A. Snook, ed., *Concepts of Indoctrination: Philosophical Essays*, (Routledge and Kegan Paul, London, 1972).
- ¹⁸ *Principles of Political Economy*, II.iii.1. Both Mill and von Humboldt were prepared to override the rights of the child, although Mill was more cautious as children became older.
- ¹⁹ *Enquiry Concerning Political Justice* (1793), K. C. Carter, ed., (Oxford, 1971), p. 238. Godwin believed that there was a danger of forming all minds on one model. No moral or political creeds should be taught: all must be open to reason. He ignored the fact that reason cannot

operate unless the facts to be analysed are made available and that this will inevitably require some teaching.

- ²⁰ The distinguished exception is Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, (1981) (Duckworth, 2nd ed. 1985). MacIntyre's post-script (p. 273) explains his three-stage account of the virtues. He first treats the virtues as qualities necessary to achieve the goods internal to practices (the latter being on-going modes of human activity within which ends have to be discovered and rediscovered and means devised to pursue them in the process of which new ends and new conceptions of ends are generated). He believes that the good life for man consists in seeking that life and that the virtues enable understanding of that life—thereby reaching the second stage of his account—namely, the virtues as qualities contributing to the good of a whole life. Finally, MacIntyre relates the virtues to the pursuits of good for human beings rather than *qua* individuals in their particular communities. Only in those moral particularities with their on-going traditions can the conception of good be elaborated (pp. 219–221). MacIntyre's approach is the ethical equivalent of the new historiography of Pocock and Skinner discussed in my first Lecture.
- ²¹ *The Theory of Moral Sentiments*, *op. cit.* VI.ii.2.11 and 3.3, at pp. 231 and 235.
- ²² See Ian Lister, *Teaching and Learning about Human Rights*, Schools Education Division, Council of Europe, Strasbourg, 1984 (DECS/EGT (84) 27). There is a good bibliography at pp. 39 *et seq.*
- ²³ *Law and Order*, (Stevens, 1985), pp. 138 and 161. Dahrendorf's ideas are much influenced by Jurgen Habermas, especially his view of socialised individuals being tied to each other in an integrated society by "a network of co-operation by the medium of communication," quoted in Dahrendorf at p. 51. See also Dahrendorf's "Paper to the Commission on Citizenship Seminar," April 14/15, 1989. Here, Dahrendorf saw citizenship as "the set of entitlements which is associated with full membership of a society." He also accepted that there were separate obligations, not a bargain, including obeying the law and paying taxes. Desirable actions by citizens, for example, voluntary charitable activity and participation, were a different concept, which should not be confused with the obligations of a citizen.
- ²⁴ See *Social Policy in the Twentieth Century*, (Hutchinson, London, 5th ed. by A. M. Rees, 1985).
- ²⁵ See Peter Kellner, "Forging a new political vocabulary" in *The Independent*, October 17, 1988. "Charter" is another such word taken up by the Labour Party in *United Kingdom: Charter of Human Rights: A Discussion Document for the Labour Movement*, (London, February

1976). The Human Rights Sub-Committee's pamphlet did not persuade the Labour Party's National Executive Committee to adopt a policy of enacting a Charter of Human Rights, but the word is bandied about in a variety of contexts, from enacting human legal rights (Charter 88) to consumer protection (a Charter for Consumers), a logical development from treating choice and freedom as consumer preferences. "Social" is another such word, used more by centrist politicians.

²⁶ Aristotle's *Politics*, Book III discusses citizenship of different kinds and what constitutes a virtuous citizen. His criterion is participation in holding office. He also makes distinctions in Book VII between the active and the philosophic life, which resurfaced in Roman form in the Florence of Machiavelli (1469–1527) and Francisco Guicciardini (1483–1540) and were resurrected in seventeenth century and eighteenth century England and from there went to America: see *The Machiavellian Moment*, *op. cit.* The conception of political community was again revitalised by Hannah Arendt in *The Human Condition*, (Viking, New York, 1958), and in *On Revolution*, (Chicago University Press, 1963). It was from her that Pocock borrowed his language: *op. cit.* p. 550.

²⁷ Joe Rogaly, "Between the lines, just plain old English tripe," *Financial Times*, September 12, 1990.

²⁸ *Encouraging Citizenship: Report of the Commission on Citizenship*, H.M.S.O., (London, 1990), pp. xxi and 42.

²⁹ *The Independent*, February 17, 1990, reported that both the Secretary of State for Education and the Labour spokesman on education emphasised the need for citizenship to be taught across subjects.

³⁰ In M. Abdallah-Pretceille, *Report of the European Teachers' Seminar on "1789–1992—Human Rights in Europe"*, Council for Cultural Co-operation, (Strasbourg, 1989), (DECS/EGT (89) 30), p. 14.

³¹ P. Gardner, "Liberty and Compulsory Education" in *Of Liberty*, A. P. Griffiths, ed., (Cambridge University Press, 1983), p. 109.

³² J. Walker, *Violence and Conflict Resolution in Schools*, Council for Cultural Co-operation, (Strasbourg, 1989), (DECS/EGT (89) 24), p. 32.

³³ K. Selle-Hosbach, *Report: Council of Europe Teachers' Seminar on Human Rights Education and the Teaching of Social, Civic and Political Education, 17–21 November 1986*, Council for Cultural Co-operation, (Strasbourg, 1988), p. 32.

³⁴ Quoted in Richard Pring, *Personal and Social Education in the Curriculum: Concepts and Content*, (Hodder and Stoughton, 1984), p. 2, citing the DES/HMI (1980) Report, *A View of the Curriculum*. This book and a more recent set of essays, *Personal, Social and Moral Education in a Changing world*, John Thacker, Richard Pring and David Evans, NFER/Neilson, ed. (1987), are invaluable guides to the

teaching of morals and methods for assisting pupils with their personal development and preparation for the next stages of their lives.

³⁵ Hugh Starkey, *Report of the Teachers' Course on "Teaching and Learning about Human Rights in Schools," 28-30 May 1984*, Council for Cultural Co-operation, (Strasbourg, 1985), (DECS/EGT (85) 17), p. 15.

³⁶ Paulo Freire, *Pedagogy of the Oppressed*, (Sheed and Ward, 1972), p. 59.

³⁷ Ian Lister, *Teaching and Learning about Human Rights*, *op. cit.* p. 17.

³⁸ Derek Heater, *Human Rights Education in School: Concepts, Attitudes and Skills*, *op. cit.* p. 25. Adam Smith was disillusioned by his experience as an Oxford student. He wrote in *The Wealth of Nations*, Vol. II., Bk. V., Chap. I., Pt. III., Art. II, "The discipline of colleges and universities is in general contrived, not for the benefit of the students, but for the interest, or more properly speaking, for the ease of the masters. Its object is, in all cases, to maintain the authority of the master, and whether he neglects or performs his duty, to oblige the students in all cases to behave to him as if he performed it with the greatest diligence and ability. It seems to presume perfect wisdom and virtue in the one order, and the greatest weakness and folly in the other. Where the masters, however, really perform their duty, there are no examples, I believe, that the greater part of the students ever neglect theirs. No discipline is ever requisite to force attendance upon lectures which are really worth the attending, as is well known wherever any such lectures are given . . . Such is the generosity of the greater part of young men, so far from being disposed to neglect or despise the instructions of their master, provided he shows some serious intention of being of use to them, they are generally inclined to pardon a great deal of incorrectness in the performance of his duty, and sometimes even to conceal from the public a good deal of gross negligence." See *The Wealth of Nations*, Vol. II, E. Cannan, ed., (Methuen, 4th ed., 1925), p. 253.

³⁹ In B. Crick and A. Porter (ed.), *Political Education and Political Literacy: the report and papers of, and the evidence submitted to, the Working Party of the Hansard Society's "Programme for Political Education,"* (Longman, London, 1978), p. 55.

⁴⁰ Council of Europe, Committee of Ministers, Recommendation No. R (85) 7 of the Committee of Ministers to Member States on Teaching and Learning about Human Rights in Schools (Adopted by the Committee of Ministers on May 14, 1985 at the 385th Meeting of the Ministers' Deputies).

⁴¹ The duties mentioned by Dahrendorf have been extended in a moral but not a legal sense by Mrs Thatcher as Prime Minister: see Clifford

Longley in *The Times*, January 19, 1990. She implicitly attempted to correct misunderstandings of her position, notably about "Victorian values" and "there is no such thing as society," explaining the moral and spiritual environment, "created by the values, standards and rules on which we base our life" and, adopting George Thomas' (now Lord Tonyandy) view, that the only ethic worthy of the dignity of men is that of love which was "never sentimental but embraces our duty to consider the needs and wants of other people."

⁴² *Essay on Man* (1734), Third Epistle, 1.303-4.

⁴³ For example, see the Green Paper, Cm. 966. *Supervision and Punishment in the Community: A Framework for Action*, H.M.S.O., (1990). I submit that certain aspects should never have seen the light of day. They will have serious consequences as ultimately the United Kingdom will be sucked into taking unlawful action resulting in more international criticisms. I believe that advisers should be trained to say to Ministers: "No. It cannot be done." And they should not hesitate to do so.

⁴⁴ *Vindiciae Gallicae*, *op. cit.*

⁴⁵ This is the approach later developed by the discoverer of "possessive individualism," C. B. Macpherson, in "A Political Theory of Property" in *Democratic Theory: Essays in Retrieval*, (Clarendon Press, Oxford, 1973). It would be foolish to reject the concept of the right to property merely because at particular historical times it provided political justification to the landed and commercial classes against the working class. Underlying the concept have always been presuppositions that there must be limits on the power of Governments and duties to secure the good of citizens.

⁴⁶ A good example of the core consensus was provided by deeds of two very different women politicians. Jenny Lee took the initiative in founding the Open University in 1969, but Mr Iain Macleod, Mr Heath's first Chancellor of the Exchequer, had "nominated it for extinction" in the run-up to the 1970 election at a time before the Open University had received any students. Jenny Lee's plans were fought for and saved by the incoming Secretary of State for Education in 1970. See Hugo Young, *One of Us*, (Macmillan, London, 1989), pp. 69-71. That Secretary of State also fought for nursery schools, new primary schools and for some other universities too, saving the financing of the college tutorial system at Oxford and Cambridge and those of the new universities of the mid-60s who had adopted college fees on the Durham model. The University Grants Committee had, before she assumed office, announced that the college fee paid by local authorities was to be abolished. Despite her saving the finances of Oxford colleges she was, for her actions as

Prime Minister and her later conversion to Treasury principles, put in the good company of Edmund Burke whom Congregation rejected for a D.C.L., proposed after his publication of *Reflections on the French Revolution*. Whatever "cuts" were made in university finances during her Prime Ministership, her radical moving away from a consensual middle ground has kept university teachers of politics, economics, social administration and law busy earning royalties and promotion with books on "Thatcherism."

⁴⁷ John v. Rees [1970] Chap. 345 at 399.

⁴⁸ Michèle Sellier, quoted in *Report: European Teachers' Seminar on "1789-1992—Human Rights in Europe," op. cit.* p. 14. I am indebted to Mme. Sellier for many insights.

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by

The Right Hon. Sir Harry Woolf, LL.B.

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