CHAPTER 8

Statutory interpretation

The law applicable to the facts of a dispute may be contained in an Act of Parliament, and knowing the law then involves interpreting a legislative text. Unlike case law, where judges construct their own texts out of precedents (*rationes decidendi*), with statute law the texts are presented to them.

Legislation may be described as law made deliberately in a set form by an authority, which the courts have accepted as competent to exercise that function[1]. From sparse and scanty beginnings, its use steadily increased until now the output of statutes has assumed formidable proportions. Although the volume and the nature of certain kinds of legislation may be subjected to criticism, there is universal agreement that deliberate law making of this kind is indispensable to the regulation of the modern state. The part played by the judges in the struggle between the prerogative and Parliament enabled them to preserve in their hands a considerable measure of power, one aspect of which is that what becomes 'law' is their interpretation of statute through the operation of *stare decisis*. As Lord Devlin has put it:

> 'The law is what the judges say it is. If the House of Lords were to give an Act of Parliament a meaning which no one else thought it could reasonably bear, it is their construction of the words used in preference to the words themselves that would become the law'[2].

In this way the judicial doctrine of *stare decisis* has come to be superimposed upon the doctrine of the supremacy of the Crown in Parliament.

When confronted with the task of interpreting a statute judges say that their task is to ascertain the 'intention of Parliament' as can be gathered from the meaning of the words used. This quest is no less elusive than the search for the *ratio decidendi* of a case. For instance, where Parliament enacts a provision on a mistaken view of the law, the courts will give effect to it according to what the law really was in their view[3]. This may be a by-product of the rule that express words, or necessary implication, are required to change the law. Such being the case, the point is: if Parliament did take a mistaken view of the law, in what sense are courts giving effect to the intention behind the enactment? Reference to intention seems to be superfluous.

Secondly, whose intention is it that is relevant? It cannot be the intention of the body which may have recommended the measure, such as the Law

1 On this description of legislation see *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 159.

2 Devlin *Samples of Law Making* p 2. See also Lord Reid in *London Transport Executive v Betts* [1959] AC 213 at 232, [1958] 2 All ER 636 at 645. If, of course, the court is not bound by the previous decision it will consider the statute *de novo*: cf *R v Board of Control, ex p Rutty* [1956] 2 QB 109, [1956] 1 All ER 769, with *Richardson v LCC* [1957] 2 All ER 330.

3 *Birmingham City Corpn v West Midland Baptist (Trust) Association (Incorporated)* [1969] 3 All ER 172 at 179-180, 188, 190.

Reform Committee, nor of the draftsman[4], nor even of the members of Parliament who voted it through, for a good many of them may not have attended on that day, or may have voted only in obedience to party dictates[5]. An Act is the product of compromise and the interplay of many factors, the result of which is expressed in a set form of words[6]. Ascertaining the 'intention of the legislature', therefore, boils down to finding the meaning of the words used—the 'intent of the statute' rather than of Parliament[7].

Further difficulties arise from the fact that 'meaning' and 'intention' are ambiguous words. Does the present case fall within what the legislature 'meant' to refer to by the wording it has used (reference), or does it fall within the purpose which it 'meant' to accomplish (purpose)[8]? The two methods of treating a statute represented by these questions might be designated respectively as 'interpretation' and 'construction', but the activities of the judiciary cannot be separated in this way, for the distinction between interpretation and construction is not clear-cut. Where language is equivocal, the decision whether the wording was 'meant' to refer to the situation before the court, which no one may have contemplated at the time of the passing of the statute, inevitably imports a measure of 'construction'[9]. In such cases it is difficult to see where 'interpretation' leaves off and 'construction' begins. As to the ascertainment of legislative purpose, this would appear on the face of it to permit a court to venture outside the enactment for available evidence as to the policy behind it so that the wording may be construed in the light of this. The practical question is how far a court is expected to go in search of such evidence, for without some limit the inquiry might be pursued to unreasonable lengths. English tribunals have evinced reluctance to venture outside the enactment itself, which means that its wording is to be construed in the light of policy only in so far as this can be gleaned within the four corners of the statute. This limitation narrows still further the distinction between 'construction' and 'interpretation'.

Another difficulty derives from the fact that statutes seek to control the future by using broad terms of classes and categories. These are man-made, and there are inevitably *casus omissi*, so that a measure of discretion is imported into every decision as to whether a provision applies to the case in hand or not.

Nor do words have proper meanings. A word may bear the meaning put upon it by the user, that understood by the recipient[10], or the usual meaning.

4 Lord Simon thought that in ordinary cases the intention of the draftsman would be sufficient: *Ealing London Borough Council v Race Relations Board* [1972] AC 342 at 360-361, [1972] 1 All ER 105 at 113-114; and in *Maunsell v Olins* [1975] AC 373 at 391, [1975] 1 All ER 16 at 26.

5 For the difficulties, see Lord Wilberforce in *British Railways Board v Pickin* [1974] AC 765 at 796, [1974] 1 All ER 609 at 625-626.

6 For changes during the passage of a controversial Bill producing inconsistency in the use of words, see Lord Diplock in *Jones v Secretary of State for Social Services* [1972] AC 944 at 1008, [1972] 1 All ER 145 at 183-184.

7 Holmes 'The Theory of Legal Interpretation' (1898-99) 12 Harv LR 417; Fuller *The Morality of Law* p 87. Is the quest for intent a relic of the theory that laws are commands of a sovereign? As to this see ch 16 post.

8 Lord Watson in *Salomon v Salomon & Co Ltd* [1897] AC 22 at 38.

9 Eg *Re Regulation and Control of Radio Communications in Canada* [1932] AC 304 (whether 'telegraphs' in the British North America Act 1867, includes broadcasting).

10 See Lord Reid's protest against the way in which his words had been interpreted: *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793 at 813, [1971] 1 All ER 150 at 164.

The last is a compromise between the first two[11], and is complicated by the fact that although most words do have an area of agreed application they are also surrounded by a hinterland of uncertainty, which is where disputes arise. Ideally one ought to proceed on the meaning intended by the user, but this is impossible with emanations from a body like the legislature. There is no one legislator or group, whose assistance can be invoked, and it is obviously impractical, whenever a statute comes up for consideration, to ask members of Parliament to elucidate what they individually or collectively 'had in mind'[12]. Moreover, in the case of antique enactments, whose framers have long since disappeared, the present members of Parliament are in no better position than judges to explain what their predecessors may have intended. It is the judges on whom the task devolves to ascertain the meaning as best they can.

It would seem on outward appearances that judicial interpretation of statutory provisions does follow a syllogistic style of reasoning, and that the major premise being 'given' in the form of some statutory rule, the judge is at least relieved of the task, which he has to perform so often with case law, of finding an appropriate major premise. Such a view is misleading. For words are often ambiguous, so it still remains necessary for a judge to elucidate the major premise. Also, in cases of doubt, which are the ones that present difficulty, it is not possible to separate the settlement of the major and minor premises. Fact-finding and premise-finding are interrelated: a court hears the evidence and determines the facts, and any doubt as to the scope and applicability of a given statutory provision may well be resolved by the view taken of the facts. So discretion even in the application of statute, is unavoidable.

The discretionary element is given another slant through the relationship between the courts and Parliament over the centuries. The tendency has been on the whole towards a restrictive rather than a liberal exercise of discretion, which prompted Pollock to comment caustically that the attitude of judges

> 'cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds'[13].

It would be unfair to attribute this restrictive attitude to judicial wickedness, because historical factors combined to produce it.

In the Middle Ages it was felt that the task of interpreting the law should be discharged by those who ordained it, for the very word 'interpretation' connoted evasion. Parliament, meeting at random, was hardly the body best suited to do this, and judges were the persons on whom the responsibility was placed because the need for interpretation more often than not arose before them and, more especially, because at that time they took part in the legislative processes. 'Do not gloss the statute', Hengham CJ admonished

11 *McInerny v Lloyds Bank Ltd* [1974] 1 Lloyd's Rep 246.

12 Lord MacDermott: 'There is no means of ascertaining parliamentary intention by scrutinising the minds of those who voted for the enactment in question': 'Some Requirements of Justice' [1964] JR 109; Lord Morris: 'It is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law': *Davies, Jenkins & Co Ltd v Davies* [1968] AC 1097 at 1121, [1967] 1 All ER 913 at 922.

13 Pollock *Essays in Jurisprudence and Ethics* p 85, and see also p 242: 'catastrophic interference'. So, too, Stephen J speaking as a draftsman said 'it is necessary to attain if possible to a degree of precision, which a person reading in bad faith cannot misunderstand': *Re Castioni* [1891] 1 QB 49 at 167.

counsel 'for we know better than you; we made it'[14]. In course of time judges ceased to partake in legislation and so lost their knowledge of the background and context of statutes. With the rise of the Court of Chancery the common law courts may have felt inclined to relinquish to it the exercise of discretion, in interpretation as well as in other matters. The attitude of judges shifted in this way to something more like what it is today. A statute was viewed as a text and judges could only infer the policies of Parliament from what was said in it. Another historical development started with the fact that much early legislation was concerned with special privileges and particular derogations from the common law. This should be set alongside the belief, which then prevailed, that the common law was self-sufficient and ought not to be interfered with lightly. Both factors prompted judges not to accord wider effect than was necessary to what were, in fact, exceptions created by statute, and it is to this tendency that Pollock refers. Again, doctrines concerning the inalienable rights of Man began to make headway in the eighteenth century, and were no doubt influential in restricting statutory encroachments on the rights of individuals. The penalties of the criminal law, too, used to be among the most savage of their day and the growing humanitarianism of the age made judges interpret penal legislation more narrowly than they might otherwise have done.

The restrictive attitude towards statute induced by these factors had an unfortunate effect. Statutes of the nineteenth century came to be drafted in meticulous detail so as to provide for every conceivable contingency, since judges could not be relied on to help out with omissions. This abundance of detail only inspired a still more restrictive attitude, for Parliament was taken to have specified everything that needed to be covered and a *casus omissi* was assumed to have been intentionally left out. This is probably the reason behind judicial reluctance even now to fill in the gaps in a statute. The point shows incidentally how unhelpful the phrase 'intention of Parliament' is. A different influence in more recent times has been the ever increasing regulation by statute of more and more spheres of activity, which has sometimes inspired in courts a desire to preserve the common law from being engulfed. The following utterance of Lord Tucker is an example:

> 'It appears to me desirable in these days, when there are in existence so many statutes and statutory regulations imposing absolute obligations upon employers, that the courts should be vigilant to see that the common law duty owed by a master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations'[15].

There are other factors of a more general nature. For instance, much may depend on the merits of the dispute, and in this connection it is important to stress that the finding of the facts does sometimes influence the view taken of the statutory premise. A decisive part is also played by the degree of sympathy which the court entertains towards the objective in view. Judges do weigh up considerations of social and individualist policy and the balance

14 YB 33 & 35 Edw 1 (Rolls Series) 82. The same judge accepted Royal explanations of doubtful enactments, YB 30 & 31 Edw 1 (Rolls Series) 441. At times the judges themselves inquired of the King's Council what a statute meant: Thorpe CJ in YB 48 Edw 3, fo 34b.

15 *Latimer v AEC Ltd* [1953] AC 643 at 658, [1953] 2 All ER 449 at 455. See also *Harding v Price* [1948] 1 KB 695 at 700-701, [1948] 1 All ER 283 at 284; *Davie v New Merton Board Mills Ltd* [1959] AC 604 at 627, [1959] 1 All ER 346 at 355. See on this Friedmann *Law and Social Change* pp 93 et seq.

does not always work out in favour of the administration. The details of this will be postponed until Chapter 10.

It has also long been the fashion to treat statutes and other documents alike. The sanctity that used to attach to the seal and to the wording of written instruments is proverbial, and the reluctance of courts to redraft a document for the parties has been carried over to statutes. The unhelpful attitude towards Parliament may also be a carry-over of the *contra proferentem* rule applicable to documents to the effect that 'where doubt arises the words must be construed most strongly against him who uses them'[16]. Such treatment of statutes and documents as if they are alike is mistaken, for there are important differences. Documents are often only records of past events, and are mostly confined to specific transactions; they also affect specified parties and not the public at large. Statutes differ in each of these respects. Finally, the aversion to giving an appearance of acting outside the judicial function by legislating, attributable perhaps to the doctrine of the separation of powers, may also be responsible.

The present state of statutory interpretation suggests that something is amiss with the judicial approach to the whole exercise. Statutes are designed to operate over indefinite periods of time, so they should be viewed in a continuum. Unfortunately, the reverse has been the case. The distinction may be expressed by differentiating between the referential approach as to what a statute 'means', ie what its words refer to here and now, and the purposive approach as to how it is to be 'applied'. 'Application' is a continuing process and the application of a provision to a particular case is only one step in a journey[17]. There are, of course, limits to the continuous adaptation of statutes, which are not easily specified. It should stop short of altering the character of a statute, eg changing a procedural provision into a substantive one, or the introduction of wholly new doctrine[18]. A comparison might be made with laying a line of bricks. If a bricklayer simply lays each brick, moment by moment, in line with the previous brick as straight as he thinks it should be positioned, the line will soon start to meander this way and that. No competent bricklayer does this; he has a line stretching out in front so that he can lay each brick with a guide to the whole linear extension. The policy of a statute may be likened to its plumb-line extending into the future and the constructions placed on its wording should be in accordance with that policy. This method of approach is becoming more fashionable, but it has not been so in the past because there has been too little appreciation of the fact that statutory regulation continues and has temporal extension. Instead, the tendency has been for cases to be decided on a moment to moment basis, with the result that the ins and outs of the lines of cases on scores of statutes have made this one of the sorriest corners of British jurisprudence[19].

There is no single set of rules of statutory interpretation. It would be truer to speak of conflicting approaches and guidelines, largely supported by *dicta*. Lord du Parcq, while not regretting that the so-called rules of construction had 'fallen into some disfavour' went on to add:

16 *Langham v City of London Corpn* [1949] 1 KB 208 at 212, [1948] 2 All ER 1018 at 1020 (applying the rule to a private Act of Parliament).

17 *Keys v Boulter* [1971] 1 QB 300 at 305, [1971] 1 All ER 289 at 292.

18 For an extreme example of the difference in approach, contrast the views of Lord Denning MR and the House of Lords in *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385.

19 For one example, see Jennings 'Judicial Process at its Worst' (1937-39) 1 MLR 111.

> 'It must be remembered, however, that the courts have laid down, indeed, not rigid rules, but principles which have been found to afford some guidance when it is sought to ascertain the intention of Parliament'[20].

The Employment Appeals Tribunal has said that the guidelines laid down by courts or industrial tribunals in applying statutes to particular facts are not binding legal rules. The statute alone is law and judges cannot add to or subtract from the law as expressed in it[1]. A shrewd writer summed up the position admirably:

> 'A court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it'[2].

REFERENTIAL APPROACH

'Literal' or 'Plain Meaning Rule'

Judges frequently use the phrase 'the true meaning' of words in the pursuit of their task. The most widely used canon of interpretation, the so-called '*Literal*' or '*Plain Meaning Rule*', is best summed up in the words of Jervis CJ:

> 'If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice'[3].

There is a tendency to imagine that the courts are thereby giving effect to the intention of Parliament on the hypothesis that 'the words themselves do, in such a case, best declare the intention of the lawgiver'[4]. On the contrary, it would seem that whenever the '*Literal Rule*' is being applied any reference to the intention of Parliament is better avoided, since there is something comic in ascribing to Parliament an *intention* to enact absurdities or injustices. Moreover, since Parliamentary intention is to be gathered from the words used, it is no more than what the judges interpret Parliament as having intended.

> 'What we must look for' Lord Reid once said 'is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the

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20 *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 410, [1949] 1 All ER 544 at 550. See also *Croxford v Universal Insurance Co Ltd* [1936] 2 KB 253 at 281, [1936] 1 All ER 151 at 166; *Hamilton v National Coal Board* [1960] AC 633 at 641-642, [1960] 1 All ER 76 at 79; *Cheng v Governor of Pentonville Prison* [1973] AC 931 at 949, [1973] 2 All ER 204 at 212; the Law Commission *The Interpretation of Statutes* p 14.

1 *Wells v Derwent Plastics* [1978] ICR 424.

2 Willis 'Statute Interpretation in a Nutshell' (1938) 16 Canadian BR p 16. Llewellyn in *The Common Law Tradition, Deciding Appeals* Appendix C, lists twenty-eight opposing canons of 'Thrust and Parry' and nineteen of 'Thrust and Counterthrust'.

3 *Abley v Dale* (1851) 11 CB 378 at 391. See also Lord Bramwell in *Hill v East and West India Dock Co* (1884) 9 App Cas 448 at 464-465; Lord Esher in *R v City of London Court Judge* [1892] 1 QB 273 at 290; Lord Atkinson in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 121-122.

4 Tindall CJ in *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at 143; Lord Reid in *IRC v Hinchy* [1960] AC 748 at 767, [1960] 1 All ER 505 at 512 (quoted in n 5 infra, and see also the other references).

> consequences which flow from the appellants' contention. But we can only take the intention of Parliament from the words which they have used in the Act'[5].

The rigid exclusion until very recently of extrinsic evidence relating to the contextual background of a statute reinforces the point that the concern of courts with Parliamentary intention does not often go deeper than words. There is thus no point in referring to such an intention as if this is something apart from judicial interpretation and to which they are giving effect. Indeed, there are judicial utterances of the highest authority to that effect[6].

The '*Plain Meaning Rule*' suffers from the inherent weakness that it is not always easy to say whether a word is 'plain' or not.

> 'The cases in which there is real difficulty' said Lord Blackburn 'are those in which there is a controversy as to what the grammatical and ordinary sense of the words, used with the reference to the subject matter, is'[7].

In *Liversidge v Anderson*[8] the majority of the House of Lords thought that the words, 'If the Secretary of State has reasonable cause to believe', were ambiguous, since they might mean either that the Secretary of State *has* reasonable cause to believe, or that he *thinks that he has* reasonable cause to believe. Lord Atkin, on the other hand, was of opinion that there was no ambiguity, and he concluded his powerful dissent speech in these words:

> 'After all this long discussion the question is whether the words "If a man has" can mean "If a man thinks he has". I am of opinion that they cannot, and that the case should be decided accordingly'[9]

A vivid illustration of the point is *IRC v Hinchy*[10]. The Income Tax Act 1952 provided that a person who fails to deliver a correct tax return shall 'forfeit the sum of £20 and treble the tax which he ought to be charged under this Act'. The defendant made a return under a particular heading which was £32 19s 9dless than it should have been. The tax assessable on this amount, which he should have declared, was £14 5s. The rest of his tax assessment came to £125 6s 6d, which would have made up a total assessment of £139 11s 6d. The Court of Appeal held that the Act meant that he should pay £62 15s, being £20 plus treble the sum of £14 5s. The House of Lords, however, held that it meant that he should pay £438 14s 6d, being £20 plus

5 *IRC v Hinchy* [1960] AC 748 at 767, [1960] 1 All ER 505 at 512. See also Lord Macmillan in *IRC v Ayrshire Mutual Insurance Co Ltd* [1946] 1 All ER 637 at 641 (literal interpretation adopted even though parliamentary design was admittedly otherwise. 'The legislature has plainly missed fire'); Lord Guest in *Davies, Jenkins & Co Ltd v Davies* [1968] AC 1097 at 1123, [1967] 1 All ER 913 at 923.

6 *Leader v Duffey* (1888) 13 App Cas 294 at 301; *Wicks v DPP* [1947] AC 362 at 367, [1947] 1 All ER 205 at 207; *Magor and St Mellons RDC v Newport Corpn* [1952] AC 189 at 191, [1951] 2 All ER 839 at 841; *IRC v Dowdell O'Mahoney & Co Ltd* [1952] AC 401 at 426, [1952] 1 All ER 531 at 544.

7 *Caledonian Rly Co v North British Rly Co* (1881) 6 App Cas 114 at 131-132. 'There were those who thought that the meaning of this word [premises] was clear (Lord Diplock and Lord Simon of Glaisdale) and there were those who thought it ambiguous (Lord Reid, Viscount Dilhorne and myself): per Lord Wilberforce in *Farrell v Alexander* [1977] AC 59 at 72, [1976] 2 All ER 721 at 725; *Croxford v Universal Insurance Co Ltd* [1936] 2 KB 253 at 280, [1936] 1 All ER 151 at 166; *Goldman v Hargrave* [1967] 1 AC 645 at 664-665, [1966] 2 All ER 989 at 997.

8 [1942] AC 206, [1941] 3 All ER 338.

9 [1942] AC 206 at 245, [1941] 3 All ER 338 at 361.

10 [1960] AC 748, [1960] 1 All ER 505.

treble the sum of £139 11s 6d[11]. Both tribunals were applying the 'plain meaning'.

The 'plain meaning' canon of interpretation is ill-suited to modern social legislation, which inaugurates whole schemes and policies, nor does it give guidance in marginal cases. A further drawback is that it requires that words are given their ordinary meaning at the time of enactment[12]. If this were rigidly adhered to it would stand in the way of interpreting statutes so as to adapt them to the changing needs of a developing society.

The '*Plain Meaning Rule*' has evolved many explanatory riders, sub-rules and a host of 'presumptions of legislative intent', into which it is not proposed to enter here[13]. None of these presumptions is binding for a variety of reasons: (a) there is no order of precedence between conflicting presumptions; (b) presumptions themselves are often doubtful, being the subject of contradictory judicial pronouncements; (c) in case of conflict with a presumption a court may adopt an interpretation without referring to the presumption; and (d) there are no means of resolving a conflict between a presumption and the purpose of a statute.

'Golden Rule'

An appreciation of some of the difficulties inherent in the '*Literal Rule*' led to a cautious departure, styled the '*Golden Rule*': the literal sense of words should be adhered to unless this would lead to absurdity, in which case the literal meaning may be modified[14]. It contradicts the '*Literal Rule*' according to which, as explained, the plain meaning has to be adhered to even to the point of absurdity. The difficulty of deciding when words are plain and when they are not has already been mentioned. Presumably, for the purpose of the '*rule*' now being considered, the words though plain should not be too plain,

11 See now Finance Act 1960, s 44, on assessment of penalties. See generally *R v Davis* (1870) LR 1 CCR 272; *Richards v McBride* (1881) 8 QBD 119; *Edwards v Porter* [1925] AC 1; *R v Board of Control, ex p Winterflood* [1938] 2 KB 366, [1938] 2 All ER 463; *London Brick Co Ltd v Robinson* [1943] AC 341, [1943] 1 All ER 23; *Fisher v Bell* [1961] 1 QB 394, [1960] 3 All ER 731.

12 Eg *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1022, [1940] 3 All ER 549 at 553; *Ewart v Ewart* [1959] P 23 at 31, [1958] 3 All ER 561 at 564; *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385.

13 See pp 114-132 of the second edition of this book, and any work on statutory interpretation. See also Dias *Bibliography* pp 86-90 for literature.

14 *Becke v Smith* (1836) 2 M & W 191 at 195. See also *Grey v Pearson* (1857) 6 HL Cas 61 at 106; *River Wear Comrs v Adamson* (1876) 1 QBD 546 at 549; *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 117; *Re Sigsworth, Bedford v Bedford* [1935] Ch 89 at 92; *Francis Jackson Developments Ltd v Hall* [1951] 2 KB 488 at 494-495, [1951] 2 All ER 74 at 78-79; *HRH Prince Ernest Augustus of Hanover v A-G* [1955] Ch 440, [1955] 1 All ER 746 (first instance); *Sumner v Robert L Priestly Ltd* [1955] 3 All ER 445 at 447; *Thompson v Thompson* [1956] 1 All ER 603 at 607; *Re Lockwood, Atherton v Brooke* [1958] Ch 231, [1957] 3 All ER 520; *London Transport Executive v Betts* [1959] AC 213 at 247, [1958] 2 All ER 636 at 655; *R v Oakes* [1959] 2 QB 350 at 355-356, [1959] 2 All ER 92 at 94-95; *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616 at 655, 658, [1969] 1 All ER 82 at 88, 90; *Re Parkanski* (1966) 56 DLR (2d) 475 (Can); *Bromilow and Edwards Ltd v IRC* [1970] 1 All ER 174, [1970] 1 WLR 128. The '*Golden Rule*' was considered by Lord Simon in *Cheng v Governor of Pentonville Prison* [1973] AC 931 at 949-950, [1973] 2 All ER 204 at 212-214; he also considered absurdity: see at 957-958, and at 219-200. In *Applin v Race Relations Board* [1975] AC 259 at 283, [1974] 2 All ER 73 at 90-91, he seems to give the name '*Golden Rule*' to the '*Plain Meaning Rule*'. The '*Golden Rule*' was again considered by him in *Maunsell v Olins* [1975] AC 373 at 390, [1975] 1 All ER 16 at 25.

but the apparent plain meaning would lead to a result too unfair to be countenanced. Lord Reid put the matter as follows:

> 'To apply the words literally is to defeat the obvious intention of the legislature and to produce a wholly unreasonable result. To achieve the obvious intention and to produce a reasonable result we must do some violence to the words ... The general principle is well settled. It is only when the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result that the words of the enactment must prevail'[15].

If absurdity is considered at all, it is apparently judged as at the time when the statute was passed[16]. Moreover, the rule is hardly suited to giving effect to social policies. The paucity of authority reflects the uncertainties of its application.

The absence of a coherent set of rules of interpretation is best seen when judges adopt opposing canons in the same case. Thus, in *A-G v HRH Prince Ernest Augustus of Hanover*[17], a statute of 1705, 4 Anne c 4 (or 4 and 5 Anne c 16), declared

> 'that the said Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, be and shall be, to all intents and purposes whatsoever, deemed, taken, and esteemed natural born subjects of this kingdom'.

The appellant, who was born in 1914, and was admittedly a lineal descendant of the Princess, claimed that he was a British subject by virtue of the Act. By s 12 of the British Nationality Act 1948 all persons who, on a specified date, were British subjects were to become citizens of the United Kingdom and Colonies. The House of Lords, upholding the Court of Appeal, held that on the plain meaning of the words a lineal descendant of Princess Sophia, born over 200 years after the passing of the Act of 1705 and before the Act of 1948, enjoyed United Kingdom citizenship, notwithstanding the somewhat startling implications of such a conclusion. For, according to this decision, The German Kaiser must have been a British subject, while Prince Ernest himself had fought against this country in the Second World War. In the court of first instance Vaisey J, while acknowledging that statutes do not lapse, alluded to the absurdity of interpreting the wording literally and held that this particular statute was limited in its operation to the lifetime of Queen Anne; but the Court of Appeal and the House of Lords rejected this interpretation, adhering to the literal meaning[18].

15 *Luke v IRC* [1963] AC 557 at 577, [1963] 1 All ER 655 at 664; *Adler v George* [1964] 2 QB 7, [1964] 1 All ER 628.

16 *Prince Ernest Augustus of Hanover v A-G* [1956] Ch 188 at 218, CA (affd [1957] AC 436 at 461-462, 466, 472, [1957] 1 All ER 49 at 54, 56-57, 60, HL). The Court of Appeal revsd the decision at first instance: [1955] Ch 440, [1955] 1 All ER 746.

17 See n 16 supra.

18 In the House their Lordships in the course of argument questioned whether the Act of 1705 had survived the Act of Union with Scotland 1707, which introduced an entirely new conception of British, as distinct from English, nationality. Counsel on both sides declined to argue the point, and a majority of their Lordships expressly reserved their opinions as to what their conclusion might have been had the point been considered. Nor was the point taken as to whether the Prince's claim was affected by the Royal Marriages Act 1772. On the nationality issue, therefore, the decision is worthless, since it was reached without taking material statutes into account: see pp. 128, 130 ante.

PURPOSIVE APPROACH

'Mischief Rule'

Statutes are generally of indefinite duration, and consideration of them in this way takes account of their changing functions and functioning. It has also been pointed out that words possess an inner core of agreed applications surrounded by a fringe of unsettled applications. The former indicates the general direction of development, while manipulation occurs in the fringe area.

The canon of interpretation that is best suited to give effect to this approach is known as the '*Mischief Rule*', which was propounded as long ago as 1584. In *Heydon's Case*[19] it was stated that

> 'four things are to be discussed and considered: 1st, What was the Common Law before the making of the Act; 2nd, What was the mischief and defect for which the Common Law did not provide; 3rd, What remedy hath Parliament resolved and appointed to cure the disease of the commonwealth; and 4th, The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*'.

The approach here laid down clearly contemplates inquiry into the policy and purpose behind the statute. There are echoes of it in several other judgments[20].

It is obvious that 'meaning' with reference to this '*rule*' connotes purpose, ie what the statute 'means' to accomplish. As Lord Denning MR has said 'We no longer construe Acts of Parliament according to their literal meaning. We construe them according to their object and intent'[1]. This canon also harmonises with the modern tendency to see how words are used[2].

On the other hand, the propositions in *Heydon's Case* were probably adequate to deal with the limited kind of legislation that then existed. Today, however, statutes put into effect new social experiments and operate on a scale much larger than before. *Heydon's Case* itself is thus somewhat

19 3 Co Rep 7a at 7b.

20 Plowden, note on *Eyston v Studd* (1574) 2 Plowd 463 at 465; *Eastman Photographic Materials Co Ltd v The Comptroller-General of Patents* [1898] AC 571 at 573; *London and County Property Investments Ltd v A-G* [1953] 1 All ER 436 at 441; *Barnes v Jarvis* [1953] 1 All ER 1061 at 1063; *Wycombe Marsh Garages Ltd v Fowler* [1972] 3 All ER 248, [1972] 1 WLR 1156. The '*Mischief Rule*' has been considered by Lord Simon in *McMillan v Crouch* [1972] 3 All ER 61 at 68-70, [1972] 1 WLR 1102 at 1109-1111; *Cheng v Governor of Pentonville Prison* [1973] AC 931 at 95?-954, [1973] 2 All ER 204 at 214-216; *Applin v Race Relations Board* [1975] AC 259 at 286-287, [1974] 2 All ER 73 at 89-90; *Maunsell v Olins* [1975] AC 373 at 393-395, [1975] 1 All ER 16 at 27-29.

1 *Engineering Industry Training Board v Samuel Talbot (Engineers) Ltd* [1969] 2 QB 270 at 274, [1969] 1 All ER 480 at 482. See Lord Denning's statement in *Nothman v London Borough of Barnet* [1978] 1 All ER 1243 at 1246, [1978] 1 WLR 220 at 228, repudiated by Lord Russell on appeal [1979] 1 All ER 142 at 151, [1979] 1 WLR 67 at 77. Cf Roskill LJ in *R v Duncalf* [1979] 2 All ER 1116 at 1121, [1979] 1 WLR 918 at 923. See further *Marshall v BBC* [1979] 3 All ER 80, [1979] 1 WLR 1071.

2 'Seeing that the words of the document are ambiguous, it is permissible to look at what was done under it': per Lord Denning MR in *IRC v Educational Grants Association Ltd* [1967] Ch 993 at 1008, [1967] 2 All ER 893 at 896. The case did not concern a statute but a document and Harman LJ thought that the remark should be confined to ancient documents: at 1012 and at 898.

inadequate; it needs to be broadened and adapted to meet the conditions of today. Lord Simon has suggested that five considerations might be taken into account: (1) the social background to identify the social or juristic defect; (2) a conspectus of the entire relevant body of law; (3) long title and preamble stating legislative objectives; (4) the actual words used; and (5) other statutes in *pari materia*. The exclusion of extrinsic material limits very largely the operation of this approach, and it is these exclusionary rules which have operated to displace the '*rule*', though they themselves are of later development. The most that a tribunal can do is to take judicial notice of the existing law[3]. Finally, it would require a greater degree of judicial legislation than under any other approach. Lord Denning used to be prepared to 'supplement the written word so as to give "force and life" to the intention of the legislature'[4]. The House of Lords pronounced emphatically against this 'naked usurpation of the legislative function'[5], and Lord Denning has since accepted this restriction[6]. A judge may not add words that are not in the statute, save only by way of necessary implication; nor may he interpret a statute according to his own views as to policy, but if he can discover this from the statute or other material, which it is permissible for a court to consult, he may interpret it accordingly[7].

The courts have adopted the '*Mischief Rule*', or an approach akin to it, in the following types of situations.

(1) The question whether or not a person is entitled to compensation for harm sustained as the result of a breach of a statutory duty depends upon whether the mischief, which the statute was designed to eradicate, contemplated damage to him or to the class of which he was a member[8].

(2) The decision whether *mens rea* is an ingredient of a statutory offence seems to rest upon whether the object and policy of the statute would thereby be defeated[9].

(3) Where statutory penalties are imposed on certain kinds of behaviour, the courts take account of the policy behind the statute in question to decide whether or not contracts contemplating such behaviour are void. The contract is void if the penalty is imposed in the interests of the public[10], but not if imposed in the interests of revenue[11].

3 *Escoign Properties Ltd v IRC* [1958] AC 549 at 566, [1958] 1 All ER 706 at 414. In *Dulleuc v Dulleuc* [1969] 2 AC 313, [1969] 2 WLR 811, the Judicial Committee consulted the report of a commission in order to elucidate the mischief that was being remedied.

4 *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481 at 498–499, [1949] 2 All ER 155 at 164 (on appeal [1950] AC 508, [1950] 1 All ER 1018); *Magor and St Mellons RDC v Newport Corpn* [1950] 2 All ER 1226 at 1236.

5 *Magor and St Mellons RDC v Newport Corpn* [1952] AC 189 at 191, [1951] 2 All ER 839 at 841.

6 *London Transport Executive v Betts* [1959] AC 213 at 247, [1958] 2 All ER 636 at 655; but see the reference on p 181 n 19. See also Lord Reid in *Goodrich v Paisner* [1957] AC 65 at 88, [1956] 2 All ER 176 at 185.

7 *Shah v Barnet London Borough Council* [1983] 2 AC 309, [1983] 1 All ER 226.

8 *Gorris v Scott* (1874) LR 9 Exch 125; *Knapp v Railway Executive* [1949] 2 All ER 508; *Hartley v Mayoh & Co* [1954] 1 QB 383, [1954] 1 All ER 375.

9 *R v St Margaret's Trusts Ltd* [1958] 2 All ER 289; *Wiltshire v Barrett* [1966] 1 QB 312, [1965] 2 All ER 271; *Rogers v Dodd* [1968] 2 All ER 22, [1968] 1 WLR 548; *Fletcher v Budgen* [1974] 2 All ER 1243 at 1247, [1974] 1 WLR 1056 at 1061–1062.

10 *Anderson Ltd v Daniel* [1924] 1 KB 138 at 147.

11 *Smith v Mawhood* (1845) 14 M & W 452 at 463. The mischief may also help to determine the penalty itself: *Kennedy v Spratt* [1972] AC 83, [1971] 1 All ER 805. 'Or' interpreted as 'either or both': *Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] 2 All ER 97, [1974] 1 WLR 505.

(4) The approach to statutes of a predominantly 'social' nature has been anything but consistent. There have, however, been cases in which the judges have taken a broad view of the background and policy of the statutes in question[12].

(5) The '*Mischief Rule*' is sometimes invoked in support of a literal interpretation[13].

(6) It has also been used in interpreting statutes giving effect to international treaties[14].

COMPROMISE APPROACH

Something can be said in justification of both the referential and purposive approaches. A combination of the two has been suggested by Lord Devlin so as to give effect to purpose so far as this can be ascertained from the meaning of the words used. 'I remain unconvinced' he said,

> 'that there is anything basically wrong with the rule of construction that words in a statute should be given their natural and ordinary meeting. The rule does not insist on a literal interpretation or require the construction of a statute without regard to its manifest purpose'[15].

Unfortunately, this does not resolve the difficulties. The 'natural and ordinary meaning' is what presents difficulty, as has been pointed out. Secondly, when is purpose 'manifest'? If the natural and ordinary meaning would lead to absurdity, such a result is manifestly not Parliament's purpose; so to this extent Lord Devlin's statement is akin to the '*Golden Rule*'. The question is how far beyond the statutory words a court may go in order to ascertain purpose.

Use of extrinsic material

It has been remarked that judges are reluctant to venture outside the statute for information as to its contents. The extent to which they do so is worth reviewing.

(1) The preparatory materials of an Act, the *travaux prèparatoires*, were formerly taken into account more than they are now. The attitude of Hengham CJ who admonished counsel that he knew best what an enactment meant since he had helped to make it[16], should be contrasted with that of Lord Halsbury, who declined to deliver judgment

12 *Howard de Walden v IRC* [1942] 1 KB 389 at 397, [1942] 1 All ER 287 at 289; *Latilla v IRC* [1943] AC 377 at 381, [1943] 1 All ER 265 at 266 (social need for taxation); *Summers v Salford Corpn* [1943] AC 283 at 293, [1943] 1 All ER 68 at 72 (policy of the Housing Act 1936); *Okereke v Brent London Borough Council* [1967] 1 QB 42, [1966] 1 All ER 150 (Housing Act 1961); *Brown v Brash and Ambrose* [1948] 2 KB 247 at 254, [1948] 1 All ER 922 (policy of the Rent Restriction Acts); Lords Diplock and Simon in *Jones v Secretary of State for Social Services* [1972] AC 944 at 1005, 1017-1018, [1972] 1 All ER 145 at 181, 190-191.

13 *R v Males* [1962] 2 QB 500, [1961] 3 All ER 705; *Letang v Cooper* [1965] 1 QB 232 at 240, [1964] 2 All ER 929 at 933.

14 *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696.

15 Devlin 'Judges and Lawmakers' (1976) 39 MLR 1 at 13.

16 YB 33 & 35 Edw 1 (Rolls Series) 82; and see p 169 ante.

because he had participated in drafting the enactment concerned[17]. Even recourse to Hansard is not permitted[18]. The modern attitude dates from the second half of the eighteenth century[19], and there are various explanations for it. One might be the principle that courts will not inquire into the legislative process. Another might be that the reporting of debates was for long prohibited. Perhaps also the association of statutes with other types of documents led to the extension of the rule which excludes extrinsic evidence as to the contents of documents. The vast and indeterminate nature of the inquiry, which the admissibility of such matter would open up, has shed a discouraging influence. 'These words may be ambiguous', said Viscount Simonds, 'but even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited'[20].

(2) Extrinsic considerations may be allowed, not to interpret the Act, but to explain the state of the law at the time it was passed[1]. Thus, Viscount Simon referred to the Report of the Law Revision Committee on contributory negligence, not in order to interpret the Law Reform (Contributory Negligence) Act 1945, but to ascertain causation in relation to the 'last opportunity' rule[2].

(3) Schemes framed under a statute may not be consulted. They may, however, be used to confirm the interpretation of the words of the statute themselves[3].

17 *Hilder v Dexter* [1902] AC 474 at 477. In *Lucy v W T Henleys Telegraph Works Co Ltd* [1970] 1 QB 393 at 407, [1969] 3 All ER 456 at 465, Edmund Davies LJ, who was chairman of a committee, whose report led to the Limitation Act 1963, declined to look at his own report, saying: 'Unfortunately ... that is an irrelevant consideration, as the law is to be found not in reports but in statutes'. See also *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 113, 126.

18 *Hadmore Productions Ltd v Hamilton* [1983] 1 AC 191, [1982] 1 All ER 1042.

19 *Millar v Taylor* (1769) 4 Burr 2303 at 2332; *Salkeld v Johnson* (1848) 2 Exch 256 at 273.

20 *Magor and St Mellons RDC v Newport Corpn* [1952] AC 189 at 191, [1951] 2 All ER 839 at 841. Lord Simon has supported the use of preparatory material in *McMillan v Crouch* [1972] 3 All ER 61 at 76, [1972] 1 WLR 1102 at 1119; and *Charter v Race Relations Board* [1973] AC 868 at 900, [1973] 1 All ER 512 at 527; but he has also pointed out certain difficulties in *Ealing London Borough Council v Race Relations Board* [1972] AC 342 at 361, [1972] 1 All ER 105 at 114. In *Davis v Johnson* [1979] AC 264, [1978] 1 All ER 841, Lord Denning MR advocated the need to look at reports or other *travaux prèparatoires* and confessed that he had done so in order to elucidate the meaning of the provision under consideration; but his view was repudiated by the House of Lords ([1979] AC 264, [1978] 1 All ER 1132). In *Firman v Ellis* [1978] QB 886, [1978] 2 All ER 851, he said that in construing a wholly new type of provision he was entitled to consider the report of the Law Reform Committee; but his view was repudiated by his brethren. If a statute incorporates without change a draft Bill attached to a committee report to Parliament, a majority in the House of Lords expressed the view that the report might be looked at, at least for information as to the mischief and the existing state of the law: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, [1975] 1 All ER 810.

1 *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 113; *Assam Railway and Trading Co Ltd v IRC* [1935] AC 445 at 457–459.

2 *Bey Andrew (Owners) v St Rognvald (Owners)* [1948] AC 140 at 149, [1947] 2 All ER 350 at 353; Lord Denning MR in *Letang v Cooper* [1965] 1 QB 232 at 240, [1964] 2 All ER 929 at 933; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, [1975] 1 All ER 810.

3 *Billings v Reed* [1945] KB 11 at 17, [1944] 2 All ER 415 at 419; *Howgate v Bagnall* [1951] 1 KB 265 at 274 [1950] 2 All ER 1104 at 1109. Regulations made under powers conferred by the words have been held to be inadmissible: *Stephens v Cuckfield RDC* [1960] 2 QB 373, [1960] 2 All ER 716; *Jackson v Hall* [1980] AC 854, [1980] 1 All ER 177; but cf *Britt v Buckinghamshire County Council* [1963] 2 All ER 175. A Government White Paper has also been held inadmissible: *Katikiro of Buganda v A-G* [1960] 3 All ER 849.

(4) International treaties, which have been given municipal effect by statutes, may not be consulted if the wording of the statute is clear and unambiguous[4], but if the statute itself refers to the treaty as the authoritative text and its own wording would lead to absurdity or is ambiguous, it is permissible to do so[5]. The use of *travaux prèparatoires* in the interpretation of statutes giving effect to treaties was considered by the House of Lords in *Fothergill v Monarch Airlines Ltd*[6]. Lord Wilberforce was prepared to consult such material only if it was public and accessible and clearly pointed to a definite legislative intention. Lord Diplock thought that courts should have regard to any material, which the delegates to an international conference considered would be available to clarify possible ambiguities; 'a court', he said, 'may even be under a constitutional obligation to do so'. Lord Scarman said that since in the great majority of states preparatory material is available as an aid to the construction of the particular treaty that was being considered, and since such material is used in the practice of international law generally, it should also be available to English courts, but only if there is doubt or ambiguity in the statute, or if the literal meaning appears to conflict with the purpose of the treaty.

A treaty will not cut down the scope of the plain and ordinary meaning of words in a statute, which have a wider application than the treaty[7].

The European Economic Community Treaty stands in a class by itself[8]. Lord Denning MR has said that British courts 'must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. To quote the words of the European Court in the *Da Costa* case; they must limit themselves to deducing from "the wording and the spirit of the treaty the meaning of the Community rules"' ... They must not confine themselves to the English text. They must consider, if need be, all the authentic texts, of which there are now eight .. They must divine the spirit of the treaty and gain inspiration from it. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it. So we must do the same'[9].

An indication as to how far this attitude may permeate through to the interpretation of statutes giving effect to other treaties came when

4 *Ellerman Lines Ltd v Murray* [1931] AC 126; *IRC v Collco Dealings Ltd* [1962] AC 1, [1961] 1 All ER 762; *Warwick Film Productions Ltd v Eisinger* [1969] 1 Ch 508, [1967] 3 All ER 367. When the statute is ambiguous, see *The Banco* [1971] P 137, [1971] 1 All ER 524; *Medway, Drydock and Engineering Co v The Andrea Ursula* [1973] 1 QB 265, [1971] 1 All ER 821. When the treaty is ambiguous, see *Macarthys Ltd v Smith* [1979] 3 All ER 325, [1979] 1 WLR 1289.

5 *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 421, [1954] 2 All ER 158 at 165; *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807, [1961] 1 All ER 495; *Salomon v Customs and Excise Comrs* [1967] 2 QB 116, [1966] 3 All ER 871; *Post Office v Estuary Radio Ltd* [1967] 3 All ER 663, 679, [1967] 1 WLR 847, 1396; *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616, [1969] 1 All ER 82.

6 [1981] AC 251, [1980] 2 All ER 696.

7 *The Norwhale, Owners of the Vessel Norwhale v Ministry of Defence* [1975] QB 589, [1975] 2 All ER 501.

8 See pp 104 et seq. ante.

9 *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226 at 1237-1238.

the Court of Appeal said that in construing an Act like the Carriage of Goods by Road Act 1965 the Court should apply the rules used by the courts of the countries which are parties to the treaty, not the traditional canons of English construction, such as the *ejusdem generis* rule[10].

(5) Prior and subsequent legislation may be resorted to where both are laws on the same subject, or *in pari materia*, as it is put, and the portion of the statute under consideration is 'fairly and equally open to diverse meanings', and the Act which is called in aid must itself be unambiguous[11]. Sometimes a statute may provide that a provision or provisions in it shall be construed as part of some other statute. In such a case the two parts must be construed as if they are contained in a single Act, but even so the later Act may not be used to interpret the clear terms of the earlier Act[12].

(6) The Judicial Committee of the Privy Council has referred to extraneous matter more frequently than English tribunals. So in *British Coal Corpn v R*[13] it examined the resolutions of the Commonwealth Conference in order to interpret the Statute of Westminster 1931, and in *Edwards v A-G for Canada*[14] it consulted a report in Hansard of a Parliamentary debate. In *Patel v Comptroller of Customs*[15] it took account of the interpretation of similar legislation in other parts of the Commonwealth, and in *Dullewe v Dullewe*[16] it consulted the report of a commission on the mischief to be remedied.

It will thus be apparent that English courts have been on the whole reluctant to look outside the statute. This attitude is castigated by some writers as a needless fetter. There are, no doubt, occasions when a rigid attitude does lead to odd results. Nevertheless, the criticism can be overestimated. It may be contended that once extraneous considerations are allowed, there is no limit to the inquiry, but this is also an argument which can be carried too far. There is some evidence that the contrary practice elsewhere is not wholly satisfactory, and experience has shown that all such extrinsic material is less helpful than had been supposed. In America the suspected insertion by astute politicians of colouring matter into Congress debates and the proceedings of committees with a view to persuading the

10 *J Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1977] QB 208, [1977] 1 All ER 518; affd on other grounds [1978] AC 141, [1977] 3 All ER 1048. For the difficulty when there are conflicting foreign interpretations, see *Ulster-Swift Ltd and Pig Marketing Board (Northern Ireland) v Taunton Meat Haulage Ltd, Fransen Transport NV (Third Party)* [1977] 3 All ER 641, [1977] 1 WLR 625.

11 *Re Macmanaway* [1951] AC 161 at 177. For use of prior statutes, see *R v Titterton* [1895] 2 QB 61 at 67. For use of subsequent statutes, see *Rolle v Whyte* (1868) LR 3 QB 286 at 300; *Fendock Investment Trust Co Ltd v IRC* [1945] 2 All ER 140 at 144, *Kirkness (Inspector of Taxes) v John Hudson & Co Ltd* [1955] AC 696, [1955] 2 All ER 345; *Crowe (Valuation Officer) v Lloyds British Testing Co Ltd* [1960] 1 QB 592 [1960] 1 All ER 411; *Ealing London Borough Council v Race Relations Board* [1972] AC 342 at 362, [1972] 1 All ER 105 at 115.

12 *Scrderson v IRC* [1956] AC 491, [1956] 1 All ER 14; *Kirkness (Inspector of Taxes) v John Hudson & Co Ltd* [1955] AC 696, [1955] 2 All ER 345; *John Walsh Ltd v Sheffield City Council and Tranter* [1957] 3 All ER 353. Interpretation of consolidating statutes: *R v Heron* [1982] 1 All ER 993, [1982] 1 WLR 451; statutory code: *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1984] AC 132, [1984] 2 All ER 358.

13 [1935] AC 500.

14 [1930] AC 124 at 143.

15 [1966] AC 356, [1965] 3 All ER 593.

16 [1969] 2 AC 313, [1969] 2 WLR 811.

courts to take a certain view of a statute when it has been passed is proving to be something of an embarrassment, and, apart from that, matter can be extracted from preliminary discussions of legislation which could support almost any interpretation. It should also be borne in mind that the amorphous composition of a legislative body compels a tribunal to address itself to what the *enactment* means, not what particular persons may have meant Notwithstanding these factors, there is a residue of force in the criticisms. It is suspected that these are all ultimately directed at the attitude of the courts.

JUDICIAL ATTITUDE

It will have become evident that the vagaries of statutory interpretation reflect differences in the spirit of approach rather than in rules[17]. Much depends on whether judges read statutes in a restrictive or liberal spirit. The difference is vividly illustrated by contrasting the following utterances in the same case:

> 'We sit here' said Denning LJ (as he was then) 'to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis'[18].

When the case went up to the House of Lords, Viscount Simonds sharply disapproved of what Denning LJ had said.

> 'This proposition which re-states in a new form the view expressed by the lord justice in the earlier case of *Seaford Court Estates Ltd v Asher* (to which the lord justice himself refers), cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed. the remedy lies in an amending Act'[19].

Yet, in another case Viscount Simonds himself asserted in ringing tones the power, and indeed duty, of judges to ~~fill~~ in gaps in the common law without waiting for Parliament.

> 'When Lord Mansfield, speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the *custos morum* of the people and had the superintendence of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare ... But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society ... must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverance. But I say that

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17 See eg *Jones v Secretary of State for Social Services* [1972] AC 944 at 966, 996, 1024, [1972] 1 All ER 145 at 149, 174, 196, per Lords Reid, Pearson and Simon.

18 *Magor and St Mellons RDC v Newport Corpn* [1950] 2 All ER 1226 at 1236. See also *Escoigne Pties Ltd v IRC* [1958] AC 549 at 565, [1958] 1 All ER 406 at 414; *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223 at 264, [1970] 1 All ER 1009 at 1015.

19 [1952] AC 189 at 191, [1951] 2 All ER 839 at 841. For a suggestion that Denning LJ was referring to 'linguistic' gaps, not 'substantive' gaps, see Montrose 'The Treatment of Statutes by Lord Denning' in *Precedent in English Law* (ed Hanbury) ch 9.

her hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them'[20].

The reason for this difference in attitude seems obvious. Judicial sympathy is more likely to be forthcoming with enactments touching on 'common lawyers' law' than with those concerning welfare and other social schemes. Whereas judges have a complete understanding of the problems and background of the former, they are in the main unfamiliar with the latter, due partly to the legal training of lawyers, both at universities and professionally. In view of the present day increase in legislative activity, judges are more and more concerned with statute interpretation, which has overshadowed the slower process of judicial reform of the common law. Even common law reform has come mainly via statute, so it is not surprising that statutes reforming common law receive more imaginative treatment at the hands of the courts than social reform statutes. A good example is the contrast between the judicial interpretation of housing legislation and the property legislation of 1925, which is but an aspect of the broader fact that judges are on the whole less ready to handle social doctrines and policies in the same spirit as traditional common law material. The common law is, after all, the creature of the judges, which is why, as Lord Devlin admitted, 'Judges, I have accepted, have a responsibility for the common law, but in my opinion they have none for statute law; their duty is simply to interpret and apply it and not to obstruct'[1].

A restrictive attitude to statute does not always coincide with literal interpretation as opposed to broad construction, nor *vice versa*. A restrictive desire may, for example, induce a tribunal to place a construction upon the provision in question quite other than what the plain meaning of the words would suggest. In *Roberts v Hopwood*[2] statutory power had been conferred upon a local authority to pay such wages 'as they may think fit'. The plain meaning of these words, one would suppose, is that the widest discretion shall be conferred. Yet the House of Lords, in the interests of a more equitable distribution of the financial burden among the inhabitants of the locality, felt disposed to cut down the apparently unlimited scope of the discretion by interpreting 'as they may think fit' to mean 'as they may *reasonably* think fit', and so enabling itself to decide what was 'reasonable'. The wage itself and the equality of wages for men and women were held to be unreasonable and the scheme was pronounced void. In *Liversidge v Anderson*[3] the question turned on whether a regulation to the effect that the Home Secretary had to have 'reasonable cause to believe' meant 'reasonable' in his opinion or in the opinion of the court. The House of Lords here, unlike the previous case, decided that it was for the Home Secretary, and not the tribunal, to decide the reasonableness of the grounds. The change in the judicial attitude was no doubt prompted by the war emergency and a desire not to hinder executive action at such a time. After the war the Judicial Committee of the Privy Council in *Nakkuda Ali v Jayaratne*[4] returned to an interpretation similar to that in *Roberts v Hopwood*, while in *Prescott v Birmingham Corpn*[5], the Court

20 *Shaw v DPP* [1962] AC 220 at 268, [1961] 2 All ER 446 at 452–453.
1 Devlin 'Judges and Lawmakers' (1976) 39 MLR 1 at p 13.
2 [1925] AC 578.
3 [1942] AC 206, [1941] 3 All ER 338.
4 [1951] AC 66.
5 [1955] Ch 210, [1954] 3 All ER 698.

of Appeal declared unreasonable the provision of free travel facilities for elderly persons by the Corporation, which was acting under statutory power to charge such fares 'as they thought fit'. In *Ross-Clunis v Papadopoullos*[6] a regulation required that a local commissioner should 'satisfy himself' that the inhabitants of a local area had appreciated the nature of the inquiry that had to be held before the imposition of a collective fine. The Judicial Committee, while agreeing that it was sufficient for the commissioner to be satisfied in his own mind, nevertheless expressed the opinion that a court might, if there were no grounds, review the honesty or reasonableness of the view formed by the commissioner. Turning to another context, judicial dislike led to construction as well as interpretation of s 4 of the Statute of Frauds 1677. The attitude of the judges was generally approved and no regret was expressed when in 1954 the Law Reform (Enforcement of Contracts) Act dispatched the substantial portion of the section to history with no scruple or apology. These examples show that the method employed, whether of interpretation or construction, depends very much on the attitude of the court towards the legislative provision in question. The factors that influence, and have in the past influenced, its attitude have been discussed.

CONCLUSIONS

First, judges are reluctant to intrude into Parliament's job. With case law they create their own texts as they proceed (*rationes decidendi*) and play variations on their interpretation. With statutes they only play more limited variations on texts created by Parliament.

Secondly, an inescapable corollary of the demand that judges should be more helpful to Parliament in their treatment of statutes is that a measure of creativeness has to be conceded to them. As Lord Diplock said:

> 'By intervening to change the common law Parliament has relegated the courts within this field to the lesser role of interpreting the written law that Parliament has enacted; but the power to state authoritatively what the words that Parliament has used mean for the purpose of applying them to particular circumstances necessarily involves a power in the courts to make law even though this be, in the phrase of Justice O W Holmes, but interstitially'[7].

Thirdly, statutes should be thought of in a continuum, which would make functional considerations an integral part of the whole problem of their application.

Fourthly, such application requires that information should be provided about the context of the provision. Statutes are no longer the minor departures from common law that they used to be; they now inaugurate new policies and social experiments. It is not possible to give these sympathetic consideration without some appreciation of their background. Some statutes may have no single or readily discoverable policy; yet, the rigid exclusion of all extrinsic material does seem to be undesirable, however hard it might be to set limits to the kind of material that should be admitted. On the other hand, one should not overlook the problem confronting judges, nor the sobering experience of countries which have admitted such material. A rule

6 [1958] 2 All ER 23 especially at 32–33.

7 *Geelong Harbor Trust Comrs v Gibbs Bright & Co* [1974] AC 810 at 819, [1974] 2 WLR 507 at 513.

of inclusion might well be as hampering as a rule of exclusion, and the matter may be better left, after all, to judicial discretion. On the occasions when judges have exercised it their efforts have, on the whole, met with success. Objection is levelled at cases in which they might as easily have exercised a similar discretion, but did not.

The information that could be provided is two-fold, in the words of the Law Commission, descriptive and motivating. *Descriptive* information explains the problem. In this connection legislators might perhaps give some thought to attaching explanatory memoranda to statutes. An important example of this is the Commentary accompanying the highly successful Uniform Commercial Code in America, which cannot be understood fully without the Commentary. The experiment of the 'Brandeis Brief' in America is another device which should be considered. This consists of evidence as to the problem, derived from statistics, reports, practice, psychiatric and sociological analyses and the like. It was first employed by Mr Brandeis, later a judge of the Supreme Court, when he appeared as counsel[8], and has since become accepted practice in constitutional cases. There is the danger, however, of increasing costs and the question of whether an undue advantage might lie with the party who can afford to engage the best experts. *Motivating* information gives reasons for the measure, and in this connection the admission of the Parliamentary history of a measure had been a much discussed issue[9]. It has its dangers[10]. As pointed out, unscrupulous politicians might be tempted to introduce colouring matter into debates with a view to influencing the courts. Apart from that, a statute is the product of the *interplay* of several factors. The mere records of debates and such like do not indicate the effect of this interplay on the minds of the legislators. Also, parliamentary history presents its own problem. The older a statute is, the more outdated its context. Should courts interpret it according to its historical context, even if this no longer obtains, or according to modern needs? If it is the latter, then the Parliamentary history is useless[11].

Fifthly, it is submitted that the doctrine of *stare decisis* should not be applied to statute interpretation, and indeed judges themselves have occasionally deprecated it[12]. *Stare decisis* works with case law because the 'statement of facts-reasons-decision' combination lends itself to variation so that the *ratio decidendi* of a case can be adapted; the process is one of making different statements of fact out of some unique, non-verbal event. With statute this is not the case. No facts and reasons are given, and the question is what different interpretations can be placed upon a given statement. The *ratio* of

8 *Miller v Oregon* 208 US 412 (1907). See also Frankfurter's brief in *Bunting v Oregon* 243 US 426 (1916); *Adkins v Children's Hospital* 261 US 525 (1923) (overruled in *West Coast Hotel Co v Parrish* 300 US 379 (1937)); *Brown v Board of Education* 347 US 483 (1954).

9 *Sagnata Investments Ltd v Norwich Corpn* [1971] 2 QB 614 at 623, [1971] 2 All ER 1441 at 1444.

10 *Ealing London Borough Council v Race Relations Board* [1972] AC 342 at 361, [1972] 1 All ER 105 at 114; *Dockers Labour Club and Institute Ltd v Race Relations Board* [1974] 3 All ER 592 at 601.

11 In *R v Bow Road Justices, ex p Adedigba* [1968] 2 QB 572, [1968] 2 All ER 89, the court preferred the modern context. On Parliamentary history, see the Law Commission *The Interpretation of Statutes* pp 31–37.

12 Eg in *Wright v Walford* [1955] 1 QB 363 at 374–375, [1955] 1 All ER 207 at 210; *Paisner v Goodrich* [1955] 2 QB 353 at 358, [1955] 2 All ER 330 at 332 (revsd [1957] AC 65, [1956] 2 All ER 176); *Bewlay (Tobacconists) Ltd v British Bata Shoe Co Ltd* [1958] 3 All ER 652 at 655; *Ogden Industries Pty Ltd v Lucas* [1969] 1 All ER 121 at 126.

a decision concerning statute interpretation is thus totally different from that of a non-statute law decision[13].

Sixthly, drafting techniques are better than they used to be. Nothing can ease the despairing complexities caused by poor draftsmanship. It is, of course, unfair to hold legislators always at fault, but, on the other hand, judicial impatience with some choice pieces of legislative obscurity can well be understood. Criticism by judges could be of valuable assistance to Parliament, since they know best the practical shortcomings of the statutes which they have to apply[14]. Drafting technique has not only improved, but has changed. Statutes are not now drafted in as much detail as they used to be in the last century, a factor which gave an additional filip to the literal approach. The more generously worded provisions of modern statutes invite a more liberal approach.

A further point is that statutes are designed to control behaviour and, like every communication, involve an author, a medium and an audience[15]. They are not addressed solely, or even primarily, to judges. The task of the judge is to see whether or not X's actual behaviour came within the statutory prescription. Interpretation has thus to be performed, not only by judges, but also by those whose behaviour is being regulated. This requires that the language used should be graded to suit the type of audience that is likely to be primarily involved, eg the language of traffic laws should be graded to suit the driver in the street; but not the language of company laws, for here the ordinary person will normally seek professional advice, and it is sufficient if such laws contemplate an expert audience[16].

Seventhly, legislators might perhaps give more thought than they do to the remedy in relation to the mischief. In particular, it would be helpful if they provide examples of the sort of thing that is designed to be covered[17]. Arguing by analogy from such examples should have a powerful appeal to judges, who are well versed in this technique of reasoning.

Finally, a suggestion has been made that different methods of interpretation should be applied to different types of statutes[18]. This does not appear

13 In *R v Bow Road Justices, ex p Adedigba* (see n 11 supra) *stare decisis* was not applied and a decision 118 years old was rejected. Where there is conflicting interpretation of a statute, the preponderant interpretation should be followed in the interests of consistency: *Re Electrical Installations at Exeter Hospital Agreement* [1971] 1 All ER 347, [1970] 1 WLR 1391.

14 Eg *Trevillian v Exeter Corpn* (1854) 5 De GM & G 828; *Fell v Burchett* (1857) 7 E & B 537 at 539; *Wankie Colliery Co v IRC* [1922] 2 AC 51 at 71; *LCC v Lees* [1939] 1 All ER 191 at 194; *Langford Property Co Ltd v Batten* [1951] AC 223 at 231, [1950] 2 All ER 1079 at 1080; *Customs and Excise Comrs v Top Ten Promotions Ltd* [1969] 3 All ER 39 at 93, 95, [1969] 1 WLR 1163 at 1175, 1178; *Merkur Island Shipping Corpn v Laughton* [1983] 2 AC 570 at 612, [1983] 2 All ER 189 at 198-199. See also the First Report of the Statute Law Commissioners 1835. Denning LJ has put the case for both sides very fairly: *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481 at 499, [1949] 2 All ER 155 at 164 (on appeal [1950] AC 508, [1950] 1 All ER 1018); and in his Presidential Address to the Holdsworth Club 1950 p 10.

15 Dickerson *The Fundamentals of Legal Drafting* p 19.

16 'Modern statutes are drafted by professional legal draftsmen and intended to be read and understood by professional lawyers': per Lord Diplock in *Prestcold (Central) Ltd v Minister of Labour* [1969] 1 All ER 69 at 75, [1969] 1 WLR 89 at 96; and Lord Simon in *Maunsell v Olins* [1975] AC 373 at 391, [1975] 1 All ER 16 at 26. See also the remark by the Law Commission *The Interpretation of Statutes* p 3.

17 Lord Denning in *Escoign Properties Ltd v IRC* [1958] AC 549 at 565-566, [1958] 1 All ER 406 at 414. See also *London Transport Executive v Betts* [1959] AC 213 at 240, [1958] 2 All ER 636 at 651. Examples are incorporated into sections of the Consumer Credit Act 1974, and the Torts (Interference with Goods) Act 1977.

18 Friedmann *Law in a Changing Society* pp 34 et seq; 'Judge, Politics and the Law' (1951) 29 Can BR pp 825-834; *Legal Theory* pp 451-462.

to be workable, for difficulties are bound to arise as to how a particular statute is to be classified and how one should treat a statute of a hybrid character. Classification will help very little, for the heart of the matter rests in the attitude of the judges.

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CHAPTER 9

Custom

The term 'custom' is used in a variety of senses: local custom, usage (sometimes known as conventional custom), general custom and the custom of the courts. The first three will be considered here; the fourth relates to precedent and *stare decisis*, which have been dealt with. There are also allusions, especially in the early records, to the custom of the realm or general custom, which, on examination, appear to refer to the custom of the courts. For instance, it was said in one case that a man, who negligently failed to control his fire so that it spread to his neighbour's house, was answerable according to 'the law and custom of the realm'[1]. It is not easy to see which custom was being referred to. If it was the award of damages, then that would be more appropriately regarded as resting on the custom of the courts.

Customs are of slow growth. When a person has been doing a thing regularly over a substantial period of time, it is usual to say that he has grown accustomed to doing it. His habit may not concern anyone but himself, or at most only those within his immediate circle. When a large section of the populace are in the habit of doing a thing over a very much longer period, it may become necessary for courts to take notice of it. The reaction of people themselves may manifest itself in mere unthinking adherence to a practice which they follow simply because it is done. Indeed, M Tarde found in sheer imitation the drive behind the evolution of all practices, from passing fashions to abiding customs[2]. People's reaction may go further and develop into a conviction that a practice should continue to be observed, because they approve of it as a model of behaviour. It is the latter that is of interest, since it raises the question of how factual occurrences develop into prescriptive models of behaviour, which was dealt with earlier[3]. Many such models spring up in society, but not all of them are 'laws', eg that of wearing black at funerals. The question is when and in what circumstances the label 'law' comes to be attached to an 'ought' resting on practices. Historical and anthropological inquiries into the influence of custom on social and legal development will be considered later[4]. In considering the law-constitutive character of practices, it is necessary to distinguish between local customs, usages and general custom.

LOCAL CUSTOMS

Customs of particular localities are capable of being recognised as laws in derogation of the common law[5]. Their acceptance by the courts is hedged

1 *Beaulieu v Finglam* (1401) YB 2 Hen 4, f 18, pl 6.
2 Tarde *Les Lois de l'Imitation* (trans E C Parsons).
3 See pp 58-59 ante.
4 See ch 18 post.
5 This seems to be the sense in which Coke referred to custom: *Co Litt* 110b.

by a number of conditions which have been evolved by the judiciary. The geographical limits, too, within which they are allowed to operate need precise definition. To make sense of these conditions it is essential that they should be considered in the perspective of time. The traditional presentation of them on a flat canvas as if they were co-eval produces a contra dictory and confusing picture, which has raised unnecessary problems. Classic accounts will be found in Blackstone's *Commentaries*[6], and in more modern investigations by Sir Carleton Allen and Mr Salt[7].

When custom is considered as an evolutionary phenomenon, the first question is why it came to be accepted by courts as a law-constitutive medium in the first place. There are two answers. Before the common law had filled out, the itinerant justices had to find the law somehow. In the absence of a code, local customs usually were the only available guides and the justices were glad to avail themselves of these. By doing this they also helped to win local confidence in the Royal system of justice. For local people had built up expectations based on local practices and to have ignored these would have caused injustice. The only question with which the judges of old were concerned was whether a practice exerted sufficient local pressure to be acceptable to them. At that date the necessary conditions, which had to be fulfilled, were obvious.

(1) The custom had to possess a sufficient measure of antiquity. 'Sufficient' means today that it must have existed since before 1189[8], but this was by no means the original interpretation. For instance, Professor Plucknett quotes Azo (d 1230) who said

> 'A custom can be called *long* if it was introduced within ten or twenty years, *very long* if it dates from thirty years, and *ancient* if it dates from forty years'[9].

The way this requirement works now is that the onus of proving antiquity is upon the person who sets up the custom, but his task is helped by a presumption of existence since before 1189 on proof of the existence of the custom for a substantial period. The burden of rebutting it then lies on the other party[10].

(2) The custom must have been enjoyed continuously. This refers, not to the active exercise of the custom, but rather to its assertion[11].

(3) The custom must have been enjoyed 'as of right', *nec vi nec clam nec precario*[12]. For without this there is no evidence that it exerts obligatory pressure to conform.

(4) The custom must be certain and precise[13].

6 BI Com I pp 74–79.

7 Allen *Law in the Making* chs 1–2; Salt 'Local Ambit of a Custom' in *Cambridge Legal Essays* p 279.

8 The first year of the reign of Richard I and the start of the Plea Rolls. The date was established to accord with the period of limitation set by the Statute of Westminster 1275, for the bringing of writs of right.

9 Plucknett *A Concise History of the Common Law* p 308.

10 *Simpson v Wells* (1872) LR 7 QB 214; *Bryant v Foot* (1868) LR 3 QB 497; *Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668; *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689.

11 *Mercer v Denne* [1904] 2 Ch 534; *Wyld v Silver* [1963] Ch 243, [1962] 3 All ER 309; *Estler v Murrells* (1959) 173 Estates Gazette 393; *New Windsor Corpn v Mellor* [1975] Ch 380, [1975] 3 All ER 44.

12 *Mills v Colchester Corpn* (1867) LR 2 CP 476; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, 839.

13 *Broadbent v Wilks* (1742) Willes 360; *Wilson v Willes* (1806) 7 East 121.

(5) The custom had to be consistent with other customs in the same area. The fact that it conflicted with local customs elsewhere did not matter. For if a custom was a departure from the common law itself, it could equally well diverge from some other local departure.

It is not enough to stop with the original acceptance of local customs; it is necessary also to investigate under what conditions they continued to be accepted. As time went on the original reasons disappeared and the altered state of affairs introduced even more restrictive conditions.

1. The common law filled out and more and more statutes appeared on the statute book. There was then no longer the same need as before to seek guidance in local customs, and so arose the limiting condition that custom should not infringe 'fundamental rules of the common law'[14], or conflict with statute. Who decides what is a 'fundamental rule'? The answer is: the court. It is in the very nature of local custom to derogate from the common law, but the condition is that it should not contravene a 'fundamental rule'. The distinction between what is an ordinary and what is a fundamental rule is clearly of such vagueness that it gives courts considerable discretion over the admission of local customs. Even in the earliest times, although they used to find much of the law locally, they were also concerned to give effect to the Royal policy of centralising its development and administration. Therefore, side by side with their readiness to accept local customs, they also kept an eye on securing a measure of overall consistency. The latter aim only began to inhibit the acceptance of local customs when the overall picture filled out, and it is at this stage that the vague condition under consideration came to be articulated.

2. With the development of travel and communication local areas ceased to be isolated, which led to a progressive shrinking of what was understood to be 'local'. According to Mr Salt, this means that 'it has for its scope a class of persons limited by inhabitancy and a right whose subject matter lies in the same defined district'[15]. If the ambit of the rule is widened in respect of either the class of persons or the subject matter of the claim, it cannot exist as a local custom but must be a rule of common law, or not law at all.

3. Finally, as pointed out before, an essential condition of the continued acceptance of any criterion of validity is that it should be adaptable to changing ideas. The introduction of reasonableness as a condition of the acceptability of local customs has virtually sapped them of vitality, for it is the courts who pronounce on what is reasonable.[16] Theoretically, they should decide the question according to the standards of 1189, and this is indeed the test sometimes adopted. More often, however, it would appear that they judge reasonableness by the contemporary standards of the time when the case comes to be heard[17]. The point is that, if the courts adopt a contemporary standard for reasonableness, they are largely undermining the assertion that the custom is binding on them and that they are bound to enforce

14 *Tanistry Case* (1608) Dav IR 28; *Johnson v Clark* [1908] 1 Ch 303.

15 *Salt* p 279, after an examination of the cases; *New Windsor Corpn v Mellor* [1975] Ch 380, [1975] 3 All ER 44.

16 Cross does not think that the discretion is unlimited: *Precedent in English Law* pp 158-159.

17 *Bryant v Foot* (1868) LR 3 QB 497; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, 839 (unreasonable in 1189). Cf *Lawrence v Hitch* (1868) LR 3 QB 521. See also *Tanistry Case* (1608) Dav IR 28.

it, and are in effect subordinating it to judicial discretion. If reasonableness is judged by the standards of 1189, then it can be argued with some force that the test of reasonableness is only evidential of the existence of the custom from time immemorial, for if it was not reasonable in 1189, it probably did not exist then. According to this view, the courts do not exercise any vital discretion over the admission of a custom on grounds of reasonableness, but only use that test to help in deciding whether was in existence in 1189. *Dicta* can be found to support both sides.

LOCAL CUSTOM AS 'LAW'

Customs are undeniably a 'source' of law in the sense that they have provided material for other law-constitutive agencies, such as legislation and precedent. Whether they are of themselves law-constitutive has been debated; in other words, is a practice 'law' only when statute or precedent stamps it as such, or is it able to stamp itself when the necessary conditions are satisfied? It is submitted that the failure to separate the two time-frames of thought has led to a fruitless controversy in this regard. For the changing attitudes of the judges over centuries present an irreconcilable picture if they are all viewed as something given at any particular moment of time, and pose a problem which is incapable of a tidy solution. On the one hand, judges say that they are bound by custom, and this derives support from the fact that local customs are essentially derogations from the common law, from which they will not deviate unless compelled to do so. On the other hand, their liberty to throw out customs, which they regard as unreasonable or as contravening some fundamental principle of the common law, appears to belie their words. It is impossible to say beforehand whether a judge will follow a given custom or not, yet once he has decided to follow it he says that he does so because he is bound by it. This point was perceived by Jethro Brown, who observed that

> 'What judges do, and what they profess to do, are not always the same, and the latter is only evidence of the former—often very misleading evidence'[18].

Austin approached the matter *a priori* on the basis of his definition of a law as the command of a sovereign backed by sanction. Custom accordingly cannot be law of itself, but only by virtue of sovereign command, which might be express, as in the form of a statute, or 'tacit', which can be seen when a judicial decision recognising a custom is carried out[19]. If this were so, later courts should not be concerned with the custom at all but only with the precedent. Yet they do continue to interest themselves in the custom itself. Allen took the opposite view. Custom is law of itself because a court will recognise and accept it as such[20]. Moreover, a local custom is a variation of the common law, and a judge does not depart from the common law unless constrained by law to do so. Against this, there is the substantial discretion which judges exercise in accepting or rejecting custom, which makes it difficult to maintain that they are bound to accept as law something over which they exercise such extensive control. Buckland proffered the solution that the position is analogous to the law of contract. Here, what is law is not a particular contract, but the statement of the characteristics

18 Brown *The Austinian Theories of Law* p 310.
19 Austin *Lectures on Jurisprudence* I, pp 101–103.
20 Allen *Law in the Making* pp 152 et seq.

which a contract should possess before it will be accepted. So, too, in the case of custom 'what is law is not the custom but the statement of the characteristics which it must have'[1]. The analogy, it is submitted is false. For, even if it is usual to *say* that the terms of a particular contract are not 'law', it is certainly usual to say that a particular custom is 'law' for those who come within its ambit. The phrase 'law of contract' undoubtedly refers to the statement of the characteristics which contracts should possess and not to particular contracts as law-constitutive in themselves, whereas with custom the question is precisely whether a given custom is itself law-constitutive. In short, it is not the 'law of custom' that is under review, but customs as 'laws'[2].

When customs are considered as the products of development over time the problem disappears. There is no doubt that in the early days customs were accepted as law-constitutive because, in the absence of other guidance, judges were glad to avail themselves of them. With the expansion of the common law and legislation, there was less and less need to turn to them, and judicial control over their admission became tighter, thereby reducing their law-constitutive potentiality to vanishing point. Indeed, one might say squarely that as the original reasons for accepting them no longer obtain, they should now cease to be regarded as law-constitutive. Courts, however, still pay lip-service to their force even while exercising such extensive control. The question, therefore, is why they do this. Judges say that they are bound because they *feel* bound, and this feeling is preserved through the language of bygone times when they used to say they were bound because they had little or no choice in the matter. So gradual was the process by which they came to acquire their control that at no point of time in all that development were they themselves conscious of the change. So they continued to talk, and still talk, the language of the past, and it is this that perpetuates the feeling of being bound. In the result, it might be said that local custom was a law-constitutive agency in the past and remains potentially so today, but that the likelihood of its operation is now very small. When looked at in this way, the controversy whether or not custom is 'law' *ex proprio vigore* does not arise[3].

USAGES

Society is never still. As it develops it moves away from the letter of the law by evolving practices that may influence or simply by-pass existing rules. Such practices only acquire the label 'laws' when incorporated into statute or precedent, but they have immeasurably greater significance and operation apart from this.

One sphere is in contract. If transactions in a particular trade, or of a particular kind in a particular locality, have long been carried on subject to a certain understanding between the parties, it is but natural that in the course of time everyone in the trade, or in the locality, who carries on such transactions, will assume that they will be done in the light of this understanding, if nothing is said to the contrary. Since one of the purposes of law

1 Buckland *Some Reflections on Jurisprudence* p 55.
2 For other objections, see Cross *Precedent in English Law* pp 159–160.
3 It may be useful at this point to turn to the theory of Savigny, who based all law on custom as the expression of the spirit of the people: see ch 18 post.

is to uphold the settled expectations of men, courts sometimes incorporate these settled conventions as terms of the contract[4].

The following conditions have to be satisfied before they will do so:

(1) The usage must be so well established as to be notorious. No particular period of longevity, however, is necessary to satisfy this requirement of notoriety[5].
(2) The usage cannot alter the general law of the land, whether statutory or common law. Usage derives its force from its incorporation into an agreement and, therefore, can have no more power to alter the law than express agreement.
(3) The usage will have to be a reasonable one[6].
(4) It need have no particular scope. Usages may be, and usually are, limited to a trade or locality, but they may be common to the whole country, or even be international.
(5) The usage will not be enforced in a particular case if it purports to nullify or vary the express terms of the contract. Its sole function is to imply a term when the contract is silent. The parties cannot be understood to have contracted in the light of a usage which they have expressly contradicted[7].

The operation of such conventional usages is also an illustration of the potency of practice in influencing other law-constitutive processes. At first courts insist on specific proof of some usage, then when it becomes notorious they may take judicial notice of it, and finally it may be embodied in statute. Usages are thus not 'laws' *ex proprio vigore*. Buckland's suggestion, which was considered in the previous context, seems more appropriate here: what is 'law' is not usage, but the statement of the characteristics which it should possess.

Besides commercial usages, there are other kinds of practices that produce divergences from the norms prescribed by laws. For instance, developing skills and techniques, or the introduction of some new kind of machinery, may induce workmen to ignore some pre-existing safety regulation, which in time becomes a dead letter. Behavioural study of what Ehrlich called the 'living law', ie norms of conduct that actually govern behaviour, is of the profoundest importance in keeping 'formal law' abreast of the times and in understanding how it operates, or fails to operate, in society[8].

GENERAL CUSTOM

It has long been commonplace in English judicial pronouncements that a custom prevailing throughout the land and existing since before 1189, is part of the common law[9]. This identity between general custom and the common

4 *Hutton v Warren* (1836) 1 M & W 466.
5 *Eastern Counties Building Society v Russell* [1947] 2 All ER 734. See also the speech of Lord O'Hagan in *Tucker v Linger* (1883) 8 App Cas 508.
6 *Tucker v Linger* (1883) 8 App Cas 508.
7 *Les Affréteurs Réunis Société Anonyme v Walford* [1919] AC 801.
8 Ehrlich's views might be considered at this point, for which see pp. 425-427 post.
9 Eg Tindal CJ in *Veley v Burder* (1841) 12 Ad & El 265 at 302, 'Such a custom existing beyond the time of legal memory and extending over the whole realm, is no other than the common law of England'; Best J in *Blundell v Catterall* (1821) 5 B & Ald 268 at 279; Blackstone *Commentaries* I, 63.

law was a matter of historical development, for the common law from its earliest days was no more than the creation of the judges. The reliance by Royal justices on decisions given in one part of the realm, based on local customs, as precedents for decisions in other parts gradually produced principles of general application, which came to be known as the 'common custom of the realm' or the 'common law'. It was part of the process of acquiring a monopoly for the Royal administration of justice. It was also usual for judges to buttress the ideas which they drew from civil and canon law and good sense with the impressive assertion that these were the 'general custom of the realm'. Since only the judges were in a position to declare what was the general custom of the realm, such custom and judge-made law signified one and the same thing[10].

The question that remains open is whether a custom of the realm, which has come into existence after 1189 and contrary to doctrines established by case law, can be law *ex proprio vigore*. The instance where this has occurred is that of negotiable instruments, as to which there was a conflict of judicial opinion[11], but no proposition should be founded on a single instance. The answer should be that general custom now has no law-constitutive effect of its own.

10 A W B Simpson, in his treatment of common law as general custom, puts the matter as follows: 'Just as the statement of a particular custom is not to be identified with the practice itself, so too common law rule-statements are not identical with 'the common law'; which consists of the acceptance as more or less correct by a specialist profession of statements in rule form of received ideas and practices. This, in his view, explains why there is no one authentic text of a common law rule, and why decisions were long treated as illustrative of 'the common law': 'The Common Law and Legal Theory' in *Oxford Essays in Jurisprudence* (2nd Series, ed Simpson) ch 4.

11 *Gooduin v Robarts* (1875) LR 10 Exch 337. Cf *Crouch v Credit Foncier of England* (1873) LR 8 QB 374. See also Salmond on *Jurisprudence* pp 205–212.

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H E Salt 'Local Ambit of a Custom' in *Cambridge Legal Essays* (eds P H Winfield and A D McNair) 279.
A W B Simpson 'The Common Law and Legal Theory' in *Oxford Essays in Jurisprudence* (ed A W B Simpson) ch 4.
P Vinogradoff 'Customary Law' in *The Legacy of the Middle Ages* (ed C G Crump and E F Jacob) 287.

CHAPTER 10

Values

The foregoing Chapters will have shown the element of discretion that is necessarily involved in the interpretation and application of precedents, statutes and customs. This is why it can be said that valid rules do not decide disputes. As Holmes J put it 'General propositions do not decide concrete cases'[1]. The judicial oath does not enjoin a judge simply to do justice, nor simply to apply law; it requires him to do justice according to law. Allen said 'one of the most important interpretative factors is a trained sense of *discretionary* justice'[2]. It is here that the third kind of knowledge involved in the decisional process comes in, namely, knowing the just way of applying the law to the facts. The drive behind doing 'justice according to law' is provided by values, which constitute what Holmes J described as 'the inarticulate major premise of judicial reasoning'[3]; 'inarticulate' because there is seldom an openavowal of their influence. Yet, although courts have frequently disclaimed to dispense justice pure and simple[4], there are occasions when they do and say so.

> 'If I thought that injustice has been done to him' said Lindley LJ 'I should have found some method, I have no doubt, of getting rid of the technical objection'[5].

Justice may also help to decide between alternative rules or interpretations. As Lord Reid said 'If a decision in one sense will on the whole lead to much more just and reasonable results, that appears to me to be a strong argument in its favour'[6]. Where there is no authority, the decision may well rest on justice.

1 *Lochner v New New York* 198 US 45 at 76 (1905). So, too, Lord Reid: 'Legal principles cannot solve the problem': *British Railways Board v Herrington* [1972] AC 877 at 897, [1972] 1 All ER 749 at 756; Lord Macmillan: 'In almost every case, except the very plainest, it would be possible to decide the issue either way with reasonable legal justification': *Law and Other Things* p 48; Lord Wright: 'Notwithstanding all the apparatus of authority, the judge has nearly always some degree of choice': *Legal Essays and Addresses* p xxv. See also Holmes *The Common Law* pp 35-36; Cardozo *The Nature of the Judicial Process* pp 10-11; Ungoed-Thomas J in *Duchess of Argyll* [1967] Ch 302 at 317, [1865] 1 All ER 611 at 616; Lord Morris in *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 at 644, [1967] 3 All ER 523 at 538.

2 Allen *Law in the Making* p 415.

3 *Lochner v US* 118 US 45 at 74 (1905).

4 *Baylis v Bishop of London* [1913] 1 Ch 127 at 140, CA.

5 *Re Scowby, Scowby v Scowby* [1897] 1 Ch 741 at 751, CA. See also *Millar v Taylor* (1769), 4 Burr 2303 at 2312, 2398; *Gardiner v Heading* [1928] 2 KB 284 at 290; *Heap v Ind Coope and Allsopp Ltd* [1940] 2 KB 476 at 483, [1940] 3 All ER 634 at 636-637, CA; *Falmouth Boat Construction Ltd v Howell* [1950] 2 KB 16 at 23, [1950] 1 All ER 538 at 541, CA (affd sub nom *Howell v Falmouth Boat Construction Ltd* [1951] AC 837, [1951] 2 All ER 278, HL); *Kitchen v RAF Association* [1958] 2 All ER 241, [1958] 1 WLR 563 at 568, CA; *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 487, [1962] 1 All ER 1 at 19, HL.

6 *Starkowski v A-G* [1954] AC 155 at 170, [1953] 2 All ER 1272 at 1274, HL.

> 'In the end and in the absence of authority binding on this House' said Viscount Simonds 'the question is simply: What does justice demand in such a case as this? ... If I have to base my opinion on any principle, I would venture to say it was the principle of rational justice'[7].

The meaning of legal concepts may vary in different contexts according to the demands of justice. In *Dodworth v Dale*[8], A married B in 1927 and was allowed a deduction in income tax. The marriage was later declared null and void. When the Inland Revenue authorities claimed to re-assess the tax payable by him, it was held that he had been 'married' during that period and their claim therefore failed. On the other hand, in *Re Dewhirst, Flower v Dewhirst*[9], A left money to his widow for as long as she did not re-marry. She did re-marry, but the marriage was declared void. It was held that this was not 'marriage' and she accordingly kept the money. Entire new doctrines owe their origin to broad sentiments of justice, eg equity, quasi-contract and various other special rules[10]. Denning LJ once remarked 'If the rules of equity have become so rigid that they cannot remedy such an injustice, it is time we had a new equity to make good the omissions of the old'[11]. Sometimes discretion is conferred on courts to refuse to apply foreign law if it is unjust[12]; and statute used to empower them to refuse the extradition of fugitive offenders to other parts of the Commonwealth if it would be unjust or oppressive to do so[13].

The reason why, apart from the above, courts prefer not to stress the influence of justice is that popular confidence stems from the belief that 'law is law' and that judges have only to apply it[14]. The very nature of the judicial process shows that this is intrinsically impossible. On the other hand, respect for law would be impaired if it were felt that cases were decided on personal whims, which again is not the case. There is indeed a personal element, but it is far from capricious; judges do have to administer laws as they find them, but there is more discretion in the process than is popularly supposed. This discretion, however, is controlled by a sense of values, which constitute a consensual domain that keeps prejudice in check. Distinctions should here be made between the existence of a particular value, an individual's knowledge of its existence, and his approval or disapproval of it. His knowledge of its existence is akin to his knowledge of 'objective reality'[15]; his approval or disapproval is an additional response. Consensual domains 'exist' apart from an individual's knowledge of it and his approval or disapproval. It is in this way that they operate as checks on personal quirks and go towards preserving public confidence in the judicial settlement of disputes. The inspiration for

7 *National Bank of Greece and Athens SA v Metliss* [1958] AC 509 at 525, [1957] 3 All ER 608 at 612-613, HL.

8 [1936] 2 KB 503, [1936] 2 All ER 440.

9 [1948] Ch 198, [1948] 1 All ER 147.

10 Eg *Moses v Macferlan* (1760) 2 Burr 1005 at 1012; *Wilson v Glossop* (1888) 20 QBD 354, CA.

11 *Solle v Butcher* [1950] 1 KB 671 at 695, [1949] 2 All ER 1107 at 1121, CA; cf *Campbell Discount Co Ltd v Bridge* [1961] 1 QB 445 at 459, [1961] 2 All ER 97 at 103, CA (revsd *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385 sub nom). See also *Sinclair v Brougham* [1914] AC 398 at 458, HL.

12 *Kaufman v Gerson* [1904] 1 KB 591, CA; *Short v A-G of Sierra Leone* [1964] 1 All ER 125, [1963] 1 WLR 1427; *Oppenheimer v Cattermole* [1976] AC 249, [1975] 1 All ER 538, HL.

13 Fugitive Offenders Act 1881, s 10 (repealed). See now the Fugutive Offenders Act 1967, s 4.

14 Scrutton LJ in *Hill v Aldershot Corpn* [1933] 1 KB 259 at 263-264; Lord Radcliffe *Law and its Compass* p 39.

15 See pp 5-6 ante.

'doing justice according to law' derives from the consensual domain of shared values. Judicial reflection of these in turn sets a kind of official seal on standards, which then act as a brake on social fragmentation.

Every decision reflects a value-judgment on conflicting interests. If interests did not conflict there would be no disputes. 'Values' for present purposes consist of those considerations, which are viewed as objectives of the legal order and which shape, provisionally at least, the decisions of courts and guide their handling of the law by providing yardsticks for measuring the conflicting interests that are involved. By 'value-judgment' is signified the choice of a particular yardstick of valuation as well as the result of measuring interests with reference to the chosen value. A case is important when it introduces something new. The very word 'new' implies that there is nothing in the existing law to cover the precise situation, so the inspiration for such new element has to come from outside. There are, of course, degrees of importance. Case law develops imperceptibly over a period and the new element introduced by a particular decision may be small. In the majority of cases disposed of by lower courts the new element may be non-existent because they allow little scope for discretion. Such cases give the appearance of being straightforward applications of rules to fact[16]. Yet, even in these the possibility of exercising some discretion is there, however minimal. At the other end of the scale, decisions which create or extinguish some rule, or play some tangential variation thereon, are very important, although they are numerically fewer[17].

The extent to which value-judgments may be given effect depends upon the texture of the law. (a) It is always possible to make different statements of facts in the case before the court; or (b) different statements of law, as where the *ratio decidendi* is open to diverse formulations, or a statutory rule is capable of more than one construction. (c) Some rules are stated in terms of ill-defined content, eg 'negligence', 'possession', the meanings of which in different contexts are governed by values. (d) There may be alternative or conflicting rules, eg where there are conflicting authorities[18]; or (e) there may be no rule at all; and here judicial latitude is at its widest. (f) An authoritative case might be reversed on appeal, overruled, or simply put to one side[19]. (g) Some rules deliberately confer a discretion on the court[20].

'Doing justice according to law' is thus a continuous operation and the process reveals the whole system of norms that hold society together. Values concern the functioning of laws in society. Therefore, they need to be studied with reference to those cases which introduce some new rule, or else play some variation on an existing rule. Speculation about law in society is useful only in proportion to one's appreciation of how it actually operates. For this reason the foundation for any such speculation should be laid, among other things, in actual cases. It follows from this that cases should be thought of in

16 MacCormick *Legal Reasoning and Legal Theory*.

17 Diplock 'The Courts as Legislators' in *Presidential Address to the Holdsworth Club* 1965 p 1. See also his remarks on policy behind principle in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1124, 1129, [1972] 1 All ER 801 at 869, 873; and on changing society and law [1972] AC at 1128, [1972] 1 All ER at 872.

18 Eg *Thorne v Motor Trade Association* [1937] AC 797, [1937] 3 All ER 157; *Fisher v Taylors Furnishing Stores Ltd* [1956] 2 QB 78,]1956] 2 All ER 78. Cf *R v Immigration Appeal Tribunal, ex p Martin* (1972) 116 Sol Jo 697.

19 *Matthews v Kuwait Bechtel Corpn* [1959] 2 QB 57, [1959] 2 All ER 345.

20 Eg Fugitive Offenders Act 1881, s 10. (repealed) See now the Fugutive Offenders Act 1967, s4.

series, since it is from a series that it becomes possible to discern the consensual domain of the values being invoked. There will no doubt be individual variations in interpretation, so the most that can be said is in terms of tendencies.

The principal yardsticks by which conflicting interests are evaluated may tentatively be listed as national and social safety; sanctity of the person; sanctity of property; social welfare; equality; consistency and fidelity to rules, principle, doctrine and tradition; morality; administrative convenience; and international comity. A case may involve any one but not others, or a judge may not take a possible consideration into account. The above list represents some at least of the criteria to which appeal is usually made. Moreover, no judge should be pictured, even remotely, as measuring the activities in the dispute before him against each standard in turn.

Finally, when yardsticks compete the judge has to choose between them, and it is only by collating such cases that it becomes possible to see whether there is a hierarchy of values. It is submitted that national and social safety override all other considerations and sanctity of the person is superior to sanctity of property, but beyond this the pattern is kaleidoscopic, not hierarchical. Every social twist alters the balance and settles the values in a new pattern; the position today is different from what it was five years ago, and vastly different from what it was thirty years ago[1].

SANCTITY OF THE PERSON

The choice between personal liberty and property sometimes presents difficulty, but there is a discernible tilt in favour of the former. In the pioneer decision in *Sommersett's Case*[2] the assertion of ownership by a slave-owner over his slave was rejected. There was no authority, so there was no question of deciding according to a rule of law. Lord Mansfield made short work of the point, saying that slavery was so repugnant to English ideas that Sommersett should go free. In *Horwood v Millar's Timber and Trading Co Ltd*[3] the court rejected as unreasonable a contract which would have reduced a person to a condition of virtual slavery; and in *Eastham v Newcastle United Football Club Ltd*[4] Wilberforce J avoided a form of contract whereby it was sought to operate the retention and transfer system of engaging professional footballers. In both cases the courts might have upheld the contracts by invoking the doctrine of the sanctity of contract, but they found it as easy to invalidate them on grounds of unreasonable restraint of trade. The point is that either doctrine could have been applied, and the question which was to be preferred did not rest on law. Again, there was an ancient rule that a husband could sue another for depriving him of his wife's consortium. In *Best v Samuel Fox & Co Ltd*[5] the House of Lords reluctantly refused to allow a wife a corresponding action in respect of the loss of her husband's consortium. It would seem that equality and justice demanded the same power of action for a wife as for a husband; but since the action was historically based on the idea of

1 The author has relied on his paper 'The Value of a Value-study of Law' (1965) 28 MLR 397, and is indebted to the Editor for permission to make use of it.

2 (1772) 20 State Tr 1. See also *Chamberline v Harvey* (1696) 5 Mod 186; *Forbes v Cochrane* (1824), 2 B & C 448. For a re-appraisal of *Sommersett's Case*, see Shyllon *Black Slaves in Britain*.

3 [1917] 1 KB 305.

4 [1964] Ch 413, [1963] 3 All ER 139.

5 [1952] AC 716, [1952] 2 All ER 394.

a husband owning his wife as a quasi-chattel, the court preferred to perpetuate a very minor inequality between spouses rather than extend so antiquated and repugnant a rule. As Lord Porter put it,

> 'a husband's right of action for loss of his wife's consortium is an anomaly and [I] see no good reason for extending it. If a change is to be made I should prefer to abolish the husband's right rather than to grant the like remedy to the wife'[6].

Not only are courts averse to treating an individual as property, but they are also averse to allowing an individual's labour to be treated as property[7]. The superior weight attaching to personal safety rather than to sanctity of property induced the House of Lords in *British Railways Board v Herrington*[8] to get rid of a previous decision of its own disallowing trespassers to sue in negligence. Also, in judging the reasonableness of a decision taken in a dilemma the House of Lords held it to be reasonable to run the risk of damaging property rather than injuring people[9].

These examples reveal two things. In *Sommersett* there was no rule, in *Horwood* and *Eastham* the question was which of two competing doctrines should be invoked, in *Best* the question was whether an existing rule should be extended, and in *Herrington* the question was whether an existing rule should be abolished. None of these could have been decided simply by applying a rule; the decisions had to rest on value considerations. They also reveal that a basic liberty of the person ranks superior to property and contract.

Two different kinds of cases illustrate the sanctity of life generally. In *Re B (a minor) (wardship: medical treatment)*[10] the parents of a mongol child refused to give their consent to an operation, which might give it a probable life-span of 20 to 30 years, on the ground that it was kinder to let the child die rather than live handicapped. The Court of Appeal ordered that the operation be performed. In *McKay v Essex Area Health Authority*[11] the Court of Appeal held that a child born deformed as a result of its mother having contracted rubella during pregnancy had no claim against a doctor for not having aborted it. To allow such an action would be contrary to public policy and a violation of the sanctity of life.

SANCTITY OF PROPERTY

This is important in itself. *Entick v Carrington*[12] emphasised that a general warrant is no justification for the seizure of private papers. Pratt CJ basing his view on the contemporary social contract theory said:

6 [1952] AC 716 at 728, [1952] 2 All ER 394 at 396. The rule was abolished by the Administration of Justice Act 1972, s 2(a).

7 *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, [1940] 3 All ER 549.

8 [1972] AC 877, [1972] 1 All ER 749. The Court of Appeal, though bound by the earlier House of Lords decision, condemned it nevertheless, and Salmon LJ ascribed the rule of non-liability to trespassers to a time 'when rights of property, particularly in land, were regarded as perhaps more sacrosanct than any other human right': [1971] 2 QB 107 at 120, [1971] 1 All ER 897 at 901.

9 *Ketch Frances v Highland Loch* [1912] AC 312.

10 [1981] 1 WLR 1421, CA.

11 [1982] QB 1166, [1982] 2 All ER 771, CA.

12 (1765) 19 State Tr 1029. It is noteworthy that the trial was engineered so as to come before Pratt CJ, a liberal, rather than before Lord Mansfield, who was a supporter of the government.

> 'The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole'[13].

The plea of state necessity was brushed aside with the remark that 'the common law does not understand that kind of reasoning'. In the group of 'General Warrant' cases, to which this case belongs, sanctity of the person and sanctity of property went hand in hand and there was no question of priority. In *Ghani v Jones*[14] the court refused to allow the police to retain passports and letters when no one has been arrested or charged unless certain conditions were fulfilled.

Respect for property has given rise to the rule that there should be no deprivation without compensation. *Attorney General v De Keyser's Royal Hotel Ltd*[15] shows that a prerogative power in the Crown to expropriate private property without compensation has to give way to a statutory power of expropriation subject to compensation. The House of Lords could have decided either way, but they made their creative choice in pursuance of the ideal under consideration. *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate*[16] concerned only the prerogative power to destroy property without compensation in time of war. By restricting it to a situation where hostilities are actually in progress, as distinct from their imminence, the House of Lords insisted on compensation being paid.

NATIONAL AND SOCIAL SAFETY

Both sanctity of the person and of property yield to the safety of the nation or society. Thus, in *Liversidge v Anderson*[17] the validity of the Home Secretary's order for Liversidge's incarceration was in question. The authority under which he acted, namely, the words of the regulation, 'if the Secretary of State has reasonable cause to believe' that a person's continued freedom was prejudicial to the safety of the realm, was ambiguous. It could, on the one hand, have been given the objective interpretation that 'reasonable cause' meant 'reasonable' in the opinion of the court, and, on the other, the subjective interpretation that as long as the Home Secretary was satisfied in his own mind no more was required. The majority of the House of Lords adopted the subjective interpretation[18]. The point is that the choice between

13 (1765) 19 State Tr 1029 at 1060.

14 [1970] 1 QB 693, [1969] 3 All ER 1700. Cf *Garfinkel v Metropolitan Police Comr* [1972] Crim LR 44, where the conditions were fulfilled. Contra, *MacFarlane v Sharp* [1972] NZLR 64: no seizure of documents without an arrest; and *Jeffrey v Black* [1978] QB 490, [1978] 1 All ER 555: no search of premises without a warrant for evidence unconnected with the offence for which a person has been lawfully arrested.

15 [1920] AC 508. See also *Re Petition of Right* [1915] 3 KB 649; *Universities of Oxford and Cambridge v Eyre & Spottiswood* [1964] Ch 736, [1963] 3 All ER 289; *Minister of Housing and Local Government v Hartnell* [1965] AC 1134, [1965] 1 All ER 490. In *IRC v Rossminster Ltd* [1980] AC 952, [1980] 1 All ER 80, the House of Lords allowed seizure according to the wording of a statute.

16 [1965] AC 75, [1964] 2 All ER 348 (the decision was nullified by the War Damage Act 1965).

17 [1942] AC 206, [1941] 3 All ER 338. See the parallel case of the First World War *R v Halliday*, [1917] AC 260.

18 It is interesting to contrast *Liversidge*'s case with *Roberts v Hopwood* [1925] AC 578, where also the ultimate question was whether a reasonable wage was to be determined objectively, ie what the court thought to be reasonable, or subjectively, ie what the local authority that fixed it thought to be reasonable. Here the court, for wholly different considerations, adopted

the two interpretations was not determined by logic or law. In his dissenting speech Lord Atkin was concerned to uphold individual liberty and he was not prepared to allow the courts to surrender their supervisory power in this regard[19]. By contrast, the attitude of the majority is to be explained on the ground that at the time when the situation arose, a most critical phase of the 1939–45 war, the courts were not going to hamper the executive, and every consideration, including that of freedom from arbitrary arrest, was made to yield to the national interest[20].

Even in time of peace the sanctity of the individual may have to yield before national security. In *R v Secretary of State for the Home Department, ex p Hosenball*[1] the principles of natural justice were modified in the national interest and the Court of Appeal held that in the interests of security the Secretary of State did not have to disclose the source of highly confidential information on which he made a deportation order. In *Council of Civil Service Unions v Minister for the Civil Service*[2] the House of Lords held that courts will not inquire into the exercise of the prerogative if this was in the interest of national security. In *Francis v Chief of Police*[3] the Privy Council held that the use of a loudspeaker without obtaining police permission as required by a statute was illegal despite the Constitution, which guaranteed a fundamental freedom of communication. Public order required that the public should be protected from excessive noise and that the statute was not contrary to the Constitution, since everything depended on how the power to withhold permission was exercised. The European Court of Justice has ruled that restrictions on the freedom of movement of individuals within the European Economic Community, allowed by art 48(3) of the Treaty of Rome and Directive No 64/221, art 3, for reasons of public policy may be justified by a genuine and serious threat to a fundamental interest of the state[4].

When no such emergency prevails the courts will not relinquish so readily their power to review executive action, and may well be astute in interpreting regulations in such a way as to preserve at least some measure of control. So, the Judicial Committee of the Privy Council in *Ross-Clunis v Papadopoullos*[5] observed *obiter* that the form of words, 'the commissioner shall satisfy himself', which may well have been devised with the *Liversidge* ambiguity in mind, did not import a wholly subjective test and that a court could still inquire into whether there were any grounds at all on which a reasonable commissioner might have satisfied himself. In *A-G of St Christopher, Nevis and Anguilla v Reynolds*[6] the Emergency Powers Regulations 1967, reg 3(1), ran: 'If the Governor is satisfied that any person has recently been concerned in acts

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the objective interpretation. A purely formal comparison of the two cases is pointless; they are intelligible only on the basis of value-judgments.

19 [1942] AC 206 at 244, [1941] 3 All ER 338 at 361. Cf the dissenting speech of Lord Shaw in *R v Halliday [1917] AC 260*.

20 A vivid American illustration in point is *Korematsu v US* 323 US 214 (1944) where the forcible removal of some 112,000 persons from their homes along the western seaboard merely because of Japanese ancestry was upheld. For criticism on Kelsenian grounds, see Paulson 'Material and Formal Authorisation in Kelsen's Pure Theory' (1980) 39 CLJ 172, 180 et seq.

1 [1977] 3 All ER 452, [1977] 1 WLR 766, CA.

2 [1984] 3 All ER 935, [1984] 3 WLR 1174, HL.

3 [1973] AC 761, [1973] 2 All ER 251, PC.

4 Case 30/77 *R v Bouchereau* [1978] QB 732, [1981] 2 All ER 924n.

5 [1958] 2 All ER 23, [1958] 1 WLR 546. See also *Reade v Smith* [1959] NZLR 996.

6 [1980] AC 637, [1979] 3 All ER 129, PC.

prejudicial to the public safety ...'. The Privy Council held that since the statement made to the plaintiff in the case gave no details of any reasonable grounds for his detention and since, on the facts, there was no other evidence of reasonable grounds, his detention was invalid.

Likewise with regard to the seizure of property, the national interest in times of peril might be held to justify it[7]. An interesting contrast is to be found between *Entick v Carrington* (1765)[8] and *Elias v Pasmore* (1934)[9]. The former decided that the seizure of private papers, not specified in a warrant, was illegal and the argument of state necessity was rejected. This case was decided at a time when the courts were anxious to protect the individual against arbitrary action by the executive. In the other case the seizure by the police of documents, not specified in a warrant and which they retained for the purpose of a prosecution, was held to be justified on grounds of state necessity[10]. *Entick*'s case, though cited, appears to have been ignored. This case, too, should be interpreted in the light of the times. In 1934 the country was confronting a social danger in the form of subversive political organisations of a quasi-military character. A deeper question than that of protecting the individual against executive action was involved, namely, that of protecting society against a formidable peril. Little wonder that the common law was by then ready to admit a plea of state necessity. It is also of interest to note that in 1936 Parliament enacted the Public Order Act, one of the most drastic enactments in force, conferring extensive powers to deal with quasi-military organisations and their property. What happened in 1934 was that the judiciary reacted ahead of the legislature to the needs of society. Reminiscent of the wording of the regulation in *Liversidge*'s case is a statutory provision, which reads 'If the appropriate judicial authority is satisfied on oath given by an officer of the board that—(a) there is reasonable ground for suspecting that an offence ... has been committed'. In *IRC v Rossminster Ltd*[11] The House of Lords held that these words justified entry and search of premises and seizure of documents. In *Southwark London Borough Council v Williams*[12] the need to circumscribe the defence of necessity in the interests of law and order was explained in these words by Lord Denning MR:

> 'Necessity would open a door which no man could shut ... So the Courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless; and trust that their distress will be relieved by the charitable and the good'.

The growing crime rate is another factor which induces the courts to countenance interference with property more than they used to. In *Chic Fashions (West Wales) Ltd v Jones*[13], Lord Denning MR said:

7 *King's Prerogative in Saltpetre* (1606) 12 Co Rep 12; *R v Hampden, Ship Money Case* (1637) 3 State Tr 826. See also Dyer 36b. If it is possible to accommodate both the national and individual interests, the courts will adopt that course, eg *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508.

8 (1765) 19 State Tr 1029.

9 [1934] 2 KB 164; but see *Reynolds v Metropolitan Police Comr* [1984] 3 All ER 649, [1985] 2 WLR 93, CA.

10 So, too, in *McPherson v HM Advocate* 1972 SLT (Notes) 71. Cf *Ghani v Jones* [1970] 1 QB 693, [1969] 3 All ER 1700; *Garfinkel v Metropolitan Police Comr* [1972] Crim LR 44; contra, *McFarlane v Sharp* [1972] NZLR 64. Seizure under a search warrant of a forged power of attorney in the hands of a solicitor: *R v Peterborough Justices, ex p Hicks* [1978] 1 All ER 225, [1977] 1 WLR 1371.

11 [1980] AC 952, [1980] 1 All ER 80, HL.

12 [1971] Ch 734 at 744, [1971] 2 All ER 175 at 179.

13 [1968] 2 QB 299, [1968] 1 All ER 229.

> 'The society in which we live is not static, nor is the common law, since it comprises those rules which govern men's conduct in contemporary society on matters not expressly regulated by legislation ... The balance between the inviolability of personal liberty and the pursuit of public weal in this case [felony] came down upon the side of him who acted reasonably in intended performance of what right-minded men would deem a duty to their fellow men; the prevention and detection of crime'[14].

Public safety influences the law in many other ways. Thus, if a mental defective is harmless the courts are vigilant to see that the conditions, which have to be complied with before he or she can be restrained, are fulfilled to the letter, but where a person is dangerous they will not allow technicalities to stand in the way of protecting the public[15]. Again, in shaping the defence of automatism considerations of public safety have played a big part. At first the traditional line was adopted that if there was no conscious action on the part of the accused he was not guilty, since one of the ingredients of criminal responsibility was lacking[16]. It then came to be appreciated that if the absence of mental control was due to causes likely to recur, eg brain tumours, it is incumbent on the courts to ensure the safety of others from future attack. This consideration led, on the one hand, to the development in criminal law that all such cases should be regarded as cases of insanity so that sufferers can be isolated for appropriate treatment; and, on the other, to the emphasis laid in civil law on the need for such persons, if they know of their disabilities, to take due precautions in advance[17]. In these ways value-considerations are constantly giving the law new dimensions, as the defence of insanity bears witness. Lord Denning went so far as to say: 'The old notion that only the defence can raise a defence of insanity is now gone. The prosecution are entitled to raise it and it is their duty to do so rather than allow a dangerous person to be at large'[18]. The state of the law did not warrant so sweeping a proposition as this, but statute has since taken a step in this very direction[19], which means that the courts should be given credit once more for having reacted ahead of Parliament to a social need.

Where public interest other than safety, eg the health of the race, is in

14 [1968] 2 QB 299 at 315-316, [1968] 1 All ER 229 at 237-238. See also Salmon LJ at 319, and at 240. See also *Butler v Board of Trade* [1971] Ch 680, [1970] 3 All ER 593; *P S Jennings v W P Quinn & F Dooris* [1968] IR 305; *R v Lewes Justices, ex p Home Secretary* [1972] 1 QB 232, [1971] 2 All ER 1126; *McPherson v HM Advocate* 1972 SLT (Notes) 71. For the need for reasonable grounds of suspicion and for not detaining property longer than is necessary, see *Ghani v Jones* [1970] 1 QB 693, [1969] 3 All ER 1700; *Garfinkel v Metropolitan Police Comr* [1972] Crim LR 44; *Jeffrey v Black* [1978] QB 490, [1978] 1 All ER 555. *Ghani* was not followed in *McFarlane v Sharp* [1972] NZLR 64; nor does it apply where it would hamper the administration of justice: *Malone v Metropolitan Police Comr* [1980] QB 49, [1979] 1 All ER 256. See also *Frank Truman Export Ltd v Metropolitan Police Comr* [1977] QB 952, [1977] 3 All ER 431.

15 Cf *R v Board of Control, ex p Rutty* [1956] 2 QB 109, [1956] 1 All ER 769, and *R v Board of Control, ex p Winterflood* [1938] 2 KB 366, [1938] 2 All ER 463, CA, with *Richardson v London County Council* [1957] 2 All ER 330, [1957] 1 WLR 751, CA, and *Re Shuter (No 2)* [1960] 1 QB 142, [1959] 3 All ER 481.

16 *R v Harrison-Owen* [1951] 2 All ER 726; *R v Charlson* [1955] 1 All ER 859; *Hill v Baxter* [1958] 1 QB 277, [1958] 1 All ER 193; and see pp 310-312 post.

17 *Green v Hills* (1969) 113 Sol Jo 385; *Boomer v Penn* (1965) 52 DLR (2d) 673.

18 *Bratty v A-G for Northern Ireland* [1963] AC 386 at 411, [1961] 3 All ER 523 at 534. See also *R v Kemp* [1957] 1 QB 399, [1956] 3 All ER 249; *R v Russell* [1964] 2 QB 596, [1963] 3 All ER 603.

19 Criminal Procedure (Insanity) Act 1964, s 6; Criminal Justice (Northern Ireland) Act 1966, s 2.

opposition to the interests of the individual, the balance comes down on the side of the latter. Such an issue arose in *Re D (a minor)*[20], where an application was made to court to sterilise a mentally retarded girl, aged eleven, who was a ward of court. Heilbron J refused it on the ground that to do so would deprive her of a basic human right. Similarly the courts have to balance opposing considerations when deciding whether documents are privileged against discovery. Such protection is given to government departments, statutory bodies and even other independent bodies whenever public interest is involved[1].

The law of torts furnishes many illustrations of the influence of social and individual values. In the earliest times the principle was one of strict responsibility, that is, a *prima facie* case did not require actual proof of fault. This arose out of the need to suppress private vengeance and self-help, which were incompatible with any kind of social order. The nascent authority was not strong enough to stamp them out and the most it could do was to regulate their exercise. In this way state-regulation of self-help came to be the beginning of litigation. Vengeance was regulated in due proportion to the injury: an eye for an eye (only one eye, not two)[2]. In order to appease victims of wrongdoing and to encourage them not to resort to blood-feuds and the like, early law adopted their point of view. The emphasis was on the *deed*, not the character of the *doing*: if the defendant was shown to have caused the harm, fault was presumed and rebutting defences were allowed only sparingly. It is therefore arguable that this strict principle in favour of plaintiffs was the product of the need to preserve social stability. In the course of time state power became established, and changing ideas insisted more on moral fault as the basis of responsibility. The emphasis then shifted away from the plaintiff's to the defendant's point of view, from presumption of fault to actual proof of fault, and the principle took root that there was not to be even a *prima facie* case without this. In more recent times, however, the pendulum has swung back towards the re-introduction of the strict principle in the social interest[3]. The need today is to accommodate both the plaintiff's and the defendant's points of view, which is leading towards automatic insurance[4].

As the law stands, the existence of a duty-situation, whether of fault or strict responsibility, is determined by the balance between the many complex and conflicting interests that make up modern society. Until the 1970s the question whether the law, on grounds of policy, saw fit to give a remedy depended on the kind of harm complained of, the manner of its infliction and with reference to the categories of person to which the plaintiff and defendant respectively belonged[5]. Thus, any decision to extend or not to extend

20 [1976] Fam 185, [1976] 1 All ER 326.

1 *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL, not followed in *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL; independent body: *D v NSPCC* [1978] AC 171, [1977] 1 All ER 589, HL.

2 For general examples, see XII Tables, 8.2, 8.3, 8.4; *Exodus* 21.24-25; *Leviticus* 24.20; *Deuteronomy* 19.21; *Leges Henrici Primi* 90.7 (on which see Holdsworth *History of English Law* ii, 47; contra, Pollock and Maitland *History of English Law* i, 46).

3 Eg *Rylands v Fletcher* (1868) LR 3 HL 330; and there has been an enormous increase in strict statutory duties.

4 See Accident Compensation Act 1972, and the Amendment (No 2) Act 1973 (NZ); Royal Commission *On Civil Liability and Compensation for Personal Injury* (Cmnd 7054-I).

5 See eg *Clerk & Lindsell on Torts* §§10-06 et seq.

the ambit of duty-situations was not based on law, but on a value-judgment[6]. The position now is that whenever harm is foreseeable to another, there will prima facie be liability unless policy considerations dictate otherwise[7].

The law of negligence, in particular, is a standing illustration of the fluctuating balance of value-considerations. Whether conduct is careless or not depends on the degree of likelihood that harm will occur, the cost and practicability of measures to avoid the risk, the gravity of the consequences, the importance and social utility of the end to be achieved and the demands of emergencies, dilemmas or sport[8]. Moreover, it is also in the social interest to prevent harm rather than to award damages thereafter, and with that in view the courts do try to improve the prevailing standards of careful behaviour by making the criteria of what constitutes negligence stricter[9].

On the other hand, factors other than those of safety may lead to a relaxation of the legal attitude. For instance, although the highest standards of care are to be expected of the medical profession, there are factors which make it undesirable for the courts to take too strict a view of negligence. For one thing, to do so may inhibit initiative, which would not enure to social advantage; and, for another, the profession itself is so vigilant in maintaining the highest standards that there is no danger of these being lowered.[10] Again, where personal danger was not involved, it was said of a local authority that its varied activities and limited financial resources should 'lead to the application of a somewhat less exacting standard than ordinarily prevails'[11].

SOCIAL WELFARE

There is a detectable priority at least as between national and social safety, sanctity of the person and property in that order. Beyond this no hierarchy is discernible. It is difficult, for instance, to foretell in any given case, whether property rights or social welfare will be preferred, and the most that can be said is that there has been increasing awareness of the interests of society, especially within the past fifty years. The words of Bean J indicate the present tendency:

6 See MacDonald J in *Nova Mink Ltd v Trans-Canada Airlines* [1951] 2 DLR 241 at 254; Lord Pearce in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 536, [1963] 2 All ER 575 at 615. A classic instance of the widening of a manufacturer's responsibility, in the social interest, towards the ultimate consumer is *Donoghue v Stevenson* [1932] AC 562. See also *Dorset Yacht Co Ltd v Home Office* [1969] 2 QB 412 at 426, [1969] 2 All ER 564 at 567, affd [1970] AC 1004, and see especially at 1034, 1059; [1970] 2 All ER 294 at 304, 324-325. See also *Dutton v Bognor Regis UDC* [1972] 1 QB 373 at 397-398, 400, 406-408, [1972] 1 All ER 462 at 475-476, 478, 482-485. Note also Lord Reid: 'Legal principles cannot solve the problem. How far occupiers are to be required by law to take steps to safeguard such children must be a matter of public policy': *British Railways Board v Herrington* [1972] AC 877 at 897, [1972] 1 All ER 749 at 756-757.

7 *Anns v Merton London Borough Council* [1978] AC 728, [1977] 2 All ER 492, HL; *Ross v Caunters* [1980] Ch 297, [1979] 3 All ER 480; *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, [1982] 3 All ER 201, HL; but see *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd* [1985] 2 All ER 44, [1985] 2 WLR 289, CA.

8 *Clerk & Lindsell on Torts* §§10-32 et seq.

9 *Clerk & Lindsell on Torts*, §§10-41 et seq.

10 These opposing considerations may account for the contrast in spirit between *Cassidy v MOH*, [1951] 2 KB 343, [1951] 1 All ER 574, and *Roe v MOH*, [1954] 2 QB 66, [1954] 2 All ER 131; on which see the comment of Denning LJ who was a judge in both cases, 'Law in a Developing Community' (1955) 33 Pub Ad, pp 1, 4-6.

11 Per Lord Thankerton in *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 at 95-96, [1940] 4 All ER 527 at 539.

> 'It is another example of the inroad often made into individual rights in the interests of the wider community. In a modern civilised society, there must always be a delicate balance between the right of the individual and the need of the community at large. Authorities who act on behalf of the community are often given powers which, so long as they exercise them reasonably, do entitle the authority to encroach, usually with compensation to be paid, on the rights of the individual'[12].

This vast field can only be touched on with the aid of a few random examples. Thus, in deciding whether statutory authority to exercise a power justifies interference with private rights the old criterion was whether interference was the inevitable consequence of the act which Parliament had authorised. If so, no action lay. Where power had been given to run a railway, it was held that this inevitably implied some interference with the comfort of individuals by way of noise, vibration and smoke[13]; but the power to erect a smallpox hospital was held not to imply authority to erect it in such a place as to interfere with the amenities of individuals[14]. In more recent years there has been a tendency to take account of the social utility of an operation. For instance, it has been held that the utility of a public shelter outweighed the degree of interference with private rights that it caused[15], and the Judicial Committee of the Privy Council has held that a statute, which empowered a local authority to supply 'pure water', should be given a liberal construction so that the addition of fluoride was permissible as this was conducive to improved dental health[16]. Again, efficient farming is now a matter of public importance and since a farmer cannot farm efficiently without a telephone on the premises, a landowner, who refused to consent to the installation of a telephone over and across her land, was held to have acted contrary to the public interest[17]. On the other hand, even the social utility of an authorised activity will not justify causing widespread inconvenience[18].

In connection with the exercise of planning powers, the considerations involved were described by Holmes J as follows:

> 'The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking'[19].

Particular interest has attached to the relaxation of judicial control over executive action in this matter by a narrowing of the concept of

12 *Pattinson v Finningley Internal Drainage Board* [1970] 2 QB 33 at 39-40, [1970] 1 All ER 790 at 793-794.

13 *Vaughan v Taff Vale Rly Co* (1860) 5 H & N 679.

14 *Metropolitan Asylum District Managers v Hill* (1881) 6 App Cas 193; *BC Pea Growers v City of Portage La Prairie* (1965) 49 DLR (2d) 91.

15 *Edgington, Bishop and Withy v Swindon Borough Council* [1939] 1 KB 86, [1938] 4 All ER 57. See also *Oakes v Minister of War Transport* (1944), 60 TLR 319; *Ching Garage Ltd v Chingford Corpn* [1961] 1 All ER 671, [1961] 1 WLR 470.

16 *A-G of New Zealand v Lower Hutt Corpn* [1964] AC 1469, [1964] 3 All ER 179.

17 *Cartwright v PO*, [1969] 2 QB 62, [1969] 1 All ER 421.

18 *Birmingham and Midland Motor Omnibus Co Ltd v Worcestershire County Council* [1967] 1 All ER 544, [1967] 1 WLR 409.

19 *Pennsylvania Coal Co v Mahon* 260 US 393 at 415 (1922), quoted by Viscount Simonds in *Belfast Corpn v OD Cars Ltd* [1960] AC 490 at 519, [1960] 1 All ER 65 at 70. See important dicta by Denning J in *Green & Sons v Minister of Health* [1948] 1 KB 34 at 38, [1947] 2 All ER 469 at 470-471; Lord Evershed MR in *A-G v Crayford UDC* [1962] Ch 575 at 589, [1962] 2 All ER 147 at 153. See also *Ransom and Luck v Surbiton Borough Council* [1949] Ch 180, [1949] 1 All ER 185; *Government of Malaysia v Selangor Pilot Association* [1964] AC

'quasi-judicial'[20]. With regard to taxation, too, it is interesting to contrast the old attitude that taxation is an interference with the wealth of individuals and that evasions should be benevolently regarded with the modern attitude that takes account of the social need for taxation. Viscount Sumner represented the old attitude when he said:

> 'It is trite law that His Majesty's subjects are free, if they can, to make their own arrangements, so that their cases may fall outside the scope of the taxing Acts. They incur no legal penalties and, strictly speaking, no moral censure if, having considered the lines drawn by the legislature for the imposition of taxes, they make it their business to walk outside them'[1].

With this should be contrasted the changed attitude expressed by Lord Greene:

> 'For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. In that battle the legislature has often been worsted by the skill, determination and resourcefulness of its opponents of whom the present appellant has not been the least successful. It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers'[2].

The above are instances of what might be described as forms of official action; but social considerations also come in when taking account of the interests of individuals. A case in which the court had to balance publicity and the freedom of the press against the interest of the individual was *Re X (a minor)*[3], where freedom to publish discreditable details about a deceased person was held to outweigh the possibility of harm to his child through the latter getting to know of them. On the other hand, *Medway v Doublelock Ltd*[4] was a case where two public interests came into conflict, namely, the disclosure of a person's means in a matrimonial suit, which being done under compulsion needed to be kept confidential, and the disclosure of the same information for the purpose of litigation in another suit. The court held that the purpose for which the information was required in the latter was giving security for costs and that this was of lesser importance than the former; so the confidentiality attaching to the former should also attach to the latter. In *Waugh v British Railways Board*[5] there was conflict between the principle that all relevant evidence should be placed before a court and the principle that communications between lawyer and client should be confidential. This was resolved by appeal to public interest, which was best served by confining the professional privilege within narrow limits. In *Trapp v Mackie*[6] Lord

20 *R v Electricity Comrs.* [1924] 1 KB 171. Cf *Franklin v Minister of Town and Country Planning* [1948] AC 87, [1947] 2 All ER 289.

1 *Levene v IRC* [1928] AC 217 at 227. See also *Partington v A-G* (1869) LR 4 HL 100 at 122.

2 *Howard de Walden v IRC* [1942] 1 KB 389 at 397, [1942] 1 All ER 287 at 289. Cf Lord Denning MR in *Ionian Bank Ltd v Couvreur* [1969] 2 All ER 651 at 655-656, [1969] 1 WLR 781 at 787.

3 [1975] Fam 47, [1975] 1 All ER 697. See also *Re R (MJ) (an infant) (proceedings transcripts: publication)* [1975] Fam 89, [1975] 2 All ER 749, where public interest in the administration of justice was held to outweigh the interest of the infant.

4 [1978] 1 All ER 1261, [1978] 1 WLR 710.

5 [1980] AC 521, [1979] 2 All ER 1169, HL. Public interest also prevailed in *London and County Securities Ltd v Nicholson* [1980] 3 All ER 861, [1980] 1 WLR 948. See also *Williams v Home Office* [1981] 1 All ER 1151.

6 [1979] 1 All ER 489 at 494-495, [1979] 1 WLR 377 at 383, HL.

Diplock pointed out that the privilege of a witness with regard to evidence given before a court or tribunal rests on a balance between the interest of the individual, whose good name has been traduced, and the interest in ensuring that witnesses should feel free to give evidence without fear of legal proceedings.

The law of nuisance is governed by the consideration that there has to be a measure of give and take between persons. As long as interference is reasonable it is protected, but when it becomes unreasonable the protection is withdrawn. The concept of 'reasonableness' depends on value-judgments. Thus, in *Lyons Son & Co v Gulliver*[7] it was held that theatre queues, which hampered access to and from the plaintiff's premises, constituted a nuisance; but in *Dwyer v Mansfield*[8] it was held not to be a nuisance to allow queues to obstruct access to the plaintiff's shop. The defendant in this case was a greengrocer dealing in commodities that were in short supply during the 1939–45 war. His activity was vital to the community. In *Miller v Jackson*[9] a cricket club had played on their cricket field for over 70 years and when some private houses were recently built adjoining it, householders were disturbed by cricket balls being hit occasionally into their premises. The public interest in having a sporting facility had to yield to the individual interest in non-interference and the disturbance was held to be a nuisance. Much might also be said of the part played by the concept of 'public policy' in the law of contract into which it is not possible to enter. As is well known, the courts may interfere with contracts on this ground[10].

Social considerations have also influenced the interpretation of statutory obligations attaching to contracts. Thus, of a landlord's duty to keep his house 'in all respects reasonably fit for human habitation' Lord Wright said:

> 'The sub-section must, I think, be construed with due regard to its apparent object and to the character of the legislation to which it belongs. The provision was to reduce the evils of bad housing accommodation and to protect working people by a compulsory provision out of which they cannot contract against accepting improper conditions. Its scheme is analogous to that of the Factory Acts. It is a measure aimed at social amelioration, no doubt in a small and limited way. It must be construed so as to give proper effect to that object'[11].

Appeal to the social interest might also have been used by the courts in restraining anti-social monopolies[12], but unfortunately in the sphere of trade

7 [1914] 1 Ch 631.

8 [1946] KB 437, [1946] 2 All ER 247.

9 [1977] QB 966, [1977] 3 All ER 338, CA. Two of the three judges refused to grant an injunction, but the third judge was prepared to grant one and suspend its operation for a year. In *Kennaway v Thompson* [1981] QB 88, [1980] 3 All ER 329, the public interest in a recreational activity did not override interference with private rights and here an injunction was granted.

10 Lord Truro in *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 196; *Beresford v Royal Insurance Co Ltd* [1938] AC 586, [1938] 2 All ER 602; *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch 108, [1958] 2 All ER 65. For an extreme instance, see *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793.

11 *Summers v Salford Corpn* [1943] AC 283 at 293, [1943] 1 All ER 68 at 72. Cf the earlier attitude: *Jones v Green* [1925] 1 KB 659 at 668, where Salter J said 'the standard of repair required by those Acts is naturally ... a humble standard'; and *Morgan v Liverpool Corpn* [1927] 2 KB 131.

12 Eg *R v Waddington* (1801) 1 East 143 at 155, where cornering a market was described as 'a most heinous offence'. See also *J H Pigott & Son v Docks and Inland Waterways Executive* [1953] 1 QB 338, [1953] 1 All ER 22.

and industry they proceeded instead on the narrower criteria of conspiracy and blackmail[13]. In the result, Parliament had to step in[14]. However, they have not shown themselves to be altogether impotent, for the Court of Appeal has declared that the refusal by the Jockey Club to grant a trainer's licence to a woman was an unreasonable exercise of discretion by a monopolistic concern[15].

EQUALITY

The popular notion of 'justice' is based, however vaguely, on a sense of equality, either distributive or corrective[16]. Of more specific manifestations of justice in the sense of distributive and corrective equality the following may be mentioned.

1. Redress for wrongdoing, whether in the form of punishment or payment of compensation, has to be proportionate to the injury. This has been the concern of law from primitive regulation of self-help[17] down to contemporary versions of making the punishment fit the crime.
2. In the exercise of judicial or quasi-judicial powers the rules of natural justice should be observed. 'Justice' said Lord Hewart CJ 'should not only be done, but should manifestly and undoubtedly be seen to be done'[18]; and speaking of natural justice in rather wide terms, the Judicial Committee of the Privy Council spoke of this as incorporated into the common law.[19] In a narrower sense, the first rule of 'natural justice' is that no one shall be judge in his own cause[20]. Secondly, no one may be condemned unheard, the corollary of which is that he or she should be given reasonable notice of the nature of the case to be met[1]. The remaining rules are not directly concerned with the principle of equality, but may be mentioned all the same. The tribunal must act in good faith[2]. The Report of the Committee on Ministers' Powers added two more doubtful rules. One is that a party is entitled to know the reasons for a decision, but this is not necessarily accepted even in

13 Eg *Thorne v Motor Trade Association* [1937] AC 797, [1937] 3 All ER 157.
14 Restrictive Practices Act 1956.
15 *Nagle v Feilden* [1966] 2 QB 633, [1965] 1 All ER 689, especially Lord Denning MR at 644-645 and at 693; and Danckwerts LJ at 651 and at 697.
16 Aristotle *Nicomachean Ethics V*: see p 65 ante.
17 As to which, see p 203 ante.
18 *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at 259. The test is applied objectively: *Lake District Special Planning Board v Secretary of State for Environment* (1975) 119 Sol Jo 187.
19 *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 670, [1980] 3 WLR 855 at 965, PC.
20 *Dimes v Grand Junction Canal (Proprietary)* (1852) 3 HL Cas 759; *R v Sussex Justices, ex p McCarthy* cfl *supra; R v Hendon RDC, ex p Chorley* [1933] 2 KB 696.
1 *Errington v Minister of Health* [1935] 1 KB 249. For limits on its application, see *Local Government Board v Arlidge* [1915] AC 120; *Franklin v Minister of Town and Country Planning* [1948] AC 87, [1947] 2 All ER 289; *Pillai v City Council of Singapore* [1968] 1 WLR 1278; *John v Rees* [1970] Ch 345, [1969] 2 All ER 274; *R v Aston University Senate, ex p Roffey* [1969] 2 QB 538, [1969] 2 All ER 964. Not applicable to binding over: *R v Woking Justices, ex p Gossage* [1973] QB 448, [1973] 2 All ER 621; *R v North London Metropolitan Magistrate, ex p Haywood* [1973] 3 All ER 50, [1973] 1 WLR 965; *Herring v Templeman* [1973] 3 All ER 569. Prohibition of legal representation: *Enderby Town Football Club, Ltd v Football Association, Ltd* [1971] Ch 591, [1971] 1 All ER 215; *Fraser v Mudge* [1975] 3 All ER 78, [1975] 1 WLR 1132.
2 *Byrne v Kinematograph Renters Society Ltd* [1958] 2 All ER 579 at 599, [1958] 1 WLR 762 at 784.

judicial decisions[3]. The other is that in a public inquiry held by an inspector to guide a Minister in reaching a decision, the inspector's report should be available to the parties, but this is not accepted either[4]. The House of Lords has stated that the rules of natural justice apply equally to final and preliminary hearings[5].

3. Distributive justice requires equal distribution of benefits among equals[6], and it was in accordance with this principle that the Court of Appeal insisted in *Nagle v Feilden*[7] that the refusal by the Jockey Club to grant a trainer's licence to a woman was contrary to public policy. On the other hand, a superior principle may prevail over that of equality, as in *Best v Fox*[8], where the House of Lords reluctantly decided to perpetuate an inequality between the sexes in the entitlement to sue for loss of consortium, because to have done otherwise would have extended an anachronism based on an ancient quasi-proprietary right of husbands over wives.

4. Distributive justice also requires equality of burdens as of benefits. Thus, in *Roberts v Hopwood*[9] the House of Lords invalidated a welfare scheme introduced by a local authority on the ground that expensive social experiments should not be introduced by local authorities at the expense of one section only of the local community without Parliamentary authority.

5. The need to ensure equality of treatment for all persons is a justification for the doctrine of precedent, though not necessarily of *stare decisis*. It is, incidentally, interesting to note that while justice in one sense demands certainty in the law through reliance on precedents[10], justice in another sense demands the rejection of erroneous or outdated precedents. 'Certainty in law must not become certainty of injustice', said Maitland[11]. The conflict here is between distributive equality of treatment and corrective equality requiring redress in the individual case. To meet this difficulty some limited departures from *stare decisis* have been evolved, principally the change in practice by the House of Lords that they will no longer be bound by their own decisions, as well as the established techniques of overruling, not following and distinguishing[12]. It is not easy to predict how a court is likely to resolve conflict on any given occasion.

6. The removal of special advantages and disadvantages of certain individuals and bodies is another example of the leaning towards distributive

3 *Giles v Walker* (1890) 24 QBD 656; *William Denby & Sons Ltd v Minister of Health* [1936] KB 337; *Automatic Wood Turning Co Ltd v Stringer* [1957] AC 544 at 550, [1957] 1 All ER 90 at 93; *R v Gaming Board of Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417, [1970] 2 All ER 528. Giving clear reasons was, however, required in *French Kier Developments Ltd v Secretary of State for the Environment* [1977] 1 All ER 296.

4 *Local Government Board v Arlidge* [1915] AC 120.

5 *Wiseman v Borneman* [1971] AC 197, [1969] 3 All ER 275, disapproving *Parry-Jones v Law Society* [1968] Ch 1, [1968] 1 All ER 177.

6 See ch 4 ante.

7 [1966] 2 QB 633, [1966] 1 All ER 689. See the Sex Discrimination Act 1975, and the EEC Treaty, art 119.

8 [1952] AC 716, [1952] 2 All ER 394; doctrine now abolished by the Administration of Justice Act 1982, s 2(a).

9 [1925] AC 578. See also *Prescott v Birmingham Corpn* [1955] Ch 210, [1954] 3 All ER 698; *Taylor v Munrow* [1960] 1 All ER 455, [1960] 1 WLR 151. Cf *Re Walker's Decision* [1944] KB 644, [1944] 1 All ER 614.

10 *Mirehouse v Rennell* (1833) 1 Cl & Fin 527 at 546.

11 *Collected Papers* III, pp 486-487. See also Cardozo *The Nature of the Judicial Process* p 51.

12 See pp 127 et seq. ante. See also the unanimous utterances in the Supreme Court of Pakistan in *Jilani v Government of Punjab*, Pak. LD (1972) SC 139 at 168-169, 249, 259, 260

equality, eg the Crown, husband and wife, certain religious and non-religious groups[13].

7. In order to achieve as well as preserve equality the courts tend to lean on the side of the underdog, and it is their shifting attitude that makes it impossible to discern a hierarchy of values beyond the first three that were mentioned. For instance, as between government and the individual, there was a time when the monarch, by virtue of his prerogative, sought to oppress the subject, and the judiciary came to the latter's rescue. Today, after the evolution of representative government, there is no longer quite the same menace to the individual, though when occasion arises the courts will still intervene on his behalf[14]. The attitude has now changed to an appreciation of the fact that government is not out to oppress and has an enormously difficult task. The courts, therefore, no longer consider themselves the watch-dogs on government, but are ready to assist. The more complex and diverse society becomes, the more its cohesion has to be considered, which means that courts are readier than before to apply 'social' yardsticks of evaluation in preference to 'individual' yardsticks. As Lord Parker CJ put it:

> 'The traditional function of the judiciary has always been to supervise and overlook duties exercised under the law by administrative tribunals and authorities. Accordingly, there is a natural tendency to identify judicial action with the control of abuses of governmental power, and to identify "government under law" with judicial intervention against executive action. But, to regard the sole concern of the courts in their supervisory capacity as the restraining of abuses is, I think, to misconceive their proper role. In addition to this negative task, there is a positive responsibility to be the handmaiden of administration rather than its governor. This positive task involves, first, the recognition that national policy requires a measure of administrative freedom; second, the affirmation by the courts of their responsibility in facilitating the objectives of administrative action as approved and authorised by Parliament; and third, the appreciation by the judiciary that the methods of judicial control and action are not always appropriate to the solution of disputes between the individual and the State'[15].

The law of contract, too, provides some interesting examples. The axiom upon which its rules traditionally developed is that there should be equality in the bargaining positions of the parties[16], and when that is lost the courts attempt to restore it. Thus, the public are at a disadvantage as against commercial concerns when contracts for services are in 'standard form'. There is no freedom to bargain; one has either to accept the terms set out or do without the service. Such a situation lends itself to abuse and, although the courts can do little once the customer has appended his signature to the document, they have striven to give such relief as they can[17].

13 Crown Proceedings Act 1947; Law Reform (Husband and Wife) Act 1962: *Bowman v Secular Society Ltd* [1917] AC 406; *Bourne v Keen* [1919] AC 815. In connection with public corporations, see *Tamlin v Hannaford* [1950] 1 KB 18, [1949] 2 All ER 327. What is contrary to this tendency is the increase in special immunities and liberties of trade unions, which were curtailed somewhat by the 1980's legislation.

14 *Congreve v Home Office* [1976] QB 629, [1976] 1 All ER 697.

15 Parker (1959) *Lionel Cohen Lectures* V, 25. For an example of judicial control of executive action, see *Bradbury v Enfield London Borough Council* [1967] 3 All ER 434, [1967] 1 WLR 1311.

16 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

17 By means of the doctrine of notice, reasonableness and the *contra proferentem* rule, though older in origin. On the use of the doctrine of fundamental term in this connection, see Lord Denning MR in *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69 at 80-81, [1977] 3 All ER 498 at 504, but the doctrine was rejected by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL.

The best examples are to be found in the sphere of employment. There used to be no equality in the bargaining position between employer and employee and accordingly the courts leaned on the side of the latter. Lord Denning MR has commented on inequality of bargaining power and has said that the strong should not be allowed to push the weak[18]. Thus, courts have always been less ready to countenance covenants in restraint of trade between employer and employee than between vendors and purchasers, who are on a more equal footing. As Scrutton LJ said:

> 'It is now well established that the Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties with more favour than they will regard contracts between master and servant in unequal positions of bargaining'[19].

In the law of torts, the defence of consent was all but eliminated[20]; the unpopular defence of 'common employment' was whittled away to vanishing point before its abolition by statute[1]; conformity with standard practice in providing safety measures will not always absolve an employer from negligence[2]; and employers are required to take precautions suited to the known frailties of individual workmen[3]. Statutory provisions for safety are likewise construed strictly against employers. As Lord Wright said:

> 'It has been established by a series of decisions of this House that the employer's obligation to comply with statutory provisions for the safety of his employees is generally absolute ... If the duty is not fulfilled, the employer is liable for the consequences to his workmen, however blameless he may be, at least in the absence of some qualifying words in the Act or regulation. Even then the onus is on the employer to prove that he is entitled to rely on the qualification'[4].

The trade union movement developed to redress the unequal bargaining position between employer and employee, and the fact that a union is entitled to intervene on behalf of one of its members is recognised[5]. The result now of the established power of trade unions, coupled with the increase in statutory protection and welfare schemes for workmen, is that they are not as much in need of judicial protection as they used to be. On the contrary, it is employers who are at a disadvantage. Hence, since about 1950 the courts have leaned slightly in their favour. For instance, with regard to statutory and common law duties, Lord Tucker said:

18 *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237 at 240-241, [1975] 1 WLR 61 at 64-65.

19 *English Hop Growers Ltd v Dering* [1928] 2 KB 174 at 180; and see *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266 at 270. An important decision, where inequality was not involved and the employee's obligation to act fairly by his employer was taken into account, is *Hivac, Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, [1946] 1 All ER 350.

20 *Smith v Baker & Sons* [1891] AC 325; but see *ICI, Ltd v Shatwell* [1965] AC 656, [1964] 2 All ER 999.

1 *Priestley v Fowler* (1837) 3 M & W 1, abolished by the Law Reform (Personal Injuries) Act 1948, s 1 (1).

2 *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145, [1959] 2 All ER 745.

3 *Paris v Stepney Borough Council* [1951] AC 367, [1951] 1 All ER 42.

4 *Riddell v Reid* [1943] AC 1 at 24, [1942] 2 All ER 161 at 172.

5 *R v Industrial Disputes Tribunal, ex p Queen Mary's College, University of London* [1957] 2 QB 483, [1957] 2 All ER 776; *Beetham v Trinidad Cement Ltd* [1960] AC 132, [1960] 1 All ER 274. Where two unions are entitled to represent a workman, the employer may withdraw recognition from one: *Gallagher v Post Office* [1970] 3 All ER 712.

> 'It appears to me desirable in these days, when there are in existence so many statutes and statutory regulations imposing absolute obligations upon employers, that the courts should be vigilant to see that the common law duty owed by a master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations'[6].

The modern law has gone so far in redressing the balance of power between master and servant that the mere relationship will not give rise to a presumption of undue influence[7]. Again, the courts have come to imply a term in contracts of service whereby the employee has to indemnify his employer if the latter is held vicariously answerable for his negligence[8], and they have also revived the defence of consent within limits[9]. Finally, there was also a tendency to call in question an employer's non-delegable duty to provide for the safety of his employees. The idea of non-delegable duty had been used as a means of restricting the defence of 'common employment'[10], but with the abolition of that defence there was an attempt to re-interpret the duty in a less extensive form, especially as the sociological reasons for pushing personal responsibility to its logical conclusion no longer obtain[11]. The non-delegable duty appears, however, to have been restored[12].

As has been mentioned, trade unions developed to protect workmen against employers, but the trade union movement has raised problems of its own. The idea that trade unions are there to protect workmen against over-mighty employers is fast becoming anachronistic at the present day, and the strike weapon is more and more damaging to the national economy. Some occasions when it has been resorted to, especially when used to interfere with an individual's liberty to work and also in inter-union disputes, show how anti-social and anti-individual it can be. Any legal restriction of the freedom to strike must come from legislation, but judicial interpretation of this will inevitably be governed by a value-sense[13]. Moreover, the individual workman is still not free to bargain as he likes, but is subordinated to the contract as negotiated between his union and the employer[14]. A more serious menace is that the union can deprive him of work by bringing pressure to bear on the employer not to employ him. The problem of the over-mighty unions has to be faced by government, but the courts in their limited way have striven on occasions to redress the inequality by giving the workman relief. An example is *Rookes v Barnard*[15] in which the plaintiff, the workman,

6 *Latimer v AEC Ltd* [1953] AC 643 at 658, [1953] 2 All ER 449 at 455.

7 *Matthew v Bobbins* (1980) 256 Estates Gazette 603.

8 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125. Under a 'gentlemen's agreement' employers will not now claim indemnities.

9 *ICI Ltd v Shatwell* [1965] AC 656, [1964] 2 All ER 999. The limitations are that the employer's answerability has to be purely vicarious, not personal, and it would not be contrary to public policy to allow the defence. See also *O'Reilly v National Rly and Tramway Appliances Ltd* [1966] 1 All ER 499 at 504.

10 *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628.

11 Viscount Simonds and Lord Reid in *Davie v New Merton Board Mills Ltd* [1959] AC 604, [1959] 1 All ER 346. As to the effect on the *ratio* of *Wilsons case* (note 10 supra), see pp 137–138 ante. See also *Sullivan v Gallagher & Craig* 1960 SLT 70.

12 The Employer's Liability (Defective Equipment) Act 1969, has overruled *Davie*'s case (note 11 supra) and has imposed a statutory non-delegable duty with regard to equipment.

13 In *Collymore v A-G of Trinidad and Tobago* [1970] AC 538, [1969] 2 All ER 1207, the Privy Council decided that freedom of association is not impaired by restricting the freedom to strike. In *Associated Newspapers Group v Flynn* (1970) 10 KIR 17, a token strike in protest against proposed legislation was held not to be a trade dispute.

14 *National Coal Board v Galley* [1958] 1 All ER 91, [1958] 1 WLR 16.

15 [1964] AC 1129, [1964] 1 All ER 367; overruled by the Trade Disputes Act 1965.

was lawfully dismissed by his employers, who succumbed to the threat of the union, to which the plaintiff belonged, that the union would induce their other workmen to strike in breach of their contracts with the employers and so cause them loss. The House of Lords decided in favour of the plaintiff. A reading of the speeches will reveal how their lordships found a loophole in the Trade Disputes Act 1906. It is also to be noted that the judges of the Court of Appeal and of the House of Lords came to opposite conclusions as a result of their respective interpretations of the law. It is difficult to assert with confidence that any particular value, or set of values, underlies such a decision as this where there is a difference of opinion among the judges and where, in any case, the values, whatever they may be, are not explicit. As against allegations of class-bias, anti-trade unionism and the like it is suggested that a sense of distributive equality is at least as likely an explanation. For this reason, if for no other, the decision deserved to be applauded.

CONSISTENCY AND FIDELITY TO RULES, PRINCIPLES, DOCTRINES AND TRADITION

Some believe that judicial reasoning proceeds exclusively by means of the case-by-case method and that the influence of values is infinitesimal, if not non-existent. They overlook two points. One is that the perception of similarities and dissimilarities, which is the essence of this mode of reasoning, is subjective[16]. The other is the need for consistency and what is here called fidelity to rules, principles, doctrines and tradition, which are important values in themselves.

'In legal matters, some degree of certainty is at least as valuable a part of justice as perfection', said Lord Hailsham[17]. It has many manifestations. An obvious one is the doctrine of precedent and *stare decisis*, which was carried to an extreme when both the House of Lords and the Court of Appeal declared themselves bound by their own decisions. The House, as has been mentioned, has now relaxed its practice as a concession to flexibility, but the need for certainty ensures that the power to depart from its prior decisions will only be exercised very sparingly[18]. The Court of Appeal, however, continues to be bound by its decisions, which means that 'flexibility has to this extent to be sacrificed to certainty'[19].

16 See pp 153, 156 ante.

17 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1054, [1972] 1 All ER 801 at 809. He repeated this in *R v Cunningham* [1982] AC 566 at 581, [1981] 2 All ER 863 at 870. See also Megaw LJ in *Ulster-Swift Ltd v Taunton Meat Haulage Ltd Fransen Transport NV (Third Party)* [1977] 3 All ER 641 at 646–647, [1977] 1 WLR 625 at 632.

18 *Note (Judicial Precedent*, [1966] 3 All ER 77, [1966] 1 WLR 1234. In *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874 the House preferred to distinguish a previous decision rather than overrule it. So, too, the House stressed the importance of not weakening certainty when it declined, after careful consideration, to overrule a previous decision although the majority thought it to have been wrongly decided: *Jones v Secretary of State for Social Services* [1972] AC 944, [1972] 1 All ER 145; and the same consideration applied in *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, [1972] 2 All ER 898. In the latter case it is particularly noteworthy that Lord Reid, who had dissented emphatically in the previous case, followed it nevertheless expressly on the ground of certainty. On the other hand, in *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, the House in effect overruled a previous decision. See also *The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148.

19 Per Geoffrey Lane LJ in *Miliangos v George Frank (Textiles) Ltd* [1975] QB 487 at 507, [1975] 1 All ER 1076 at 1088; so, too, Scarman LJ in *Farrell v Alexander* [1976] QB 345 at 371, [1976] 1 All ER 129 at 147, CA (revsd [1977] AC 59, [1976] 2 All ER 721, HL, but Scarman LJ's point was specifically approved: see at 92, and at 741–742).

Even within the framework of *stare decisis*, consistency works powerfully in inducing judges to prefer to play variations on fact-statements than on law-statements[20]. For instance, to take an extreme example, the situation where a dead snail is found in a bottle of ginger beer is different from that where a snail is found in a tin of fruit salad; but there is irresistible pressure not to stress such a difference. Similar pressure applies in varying degrees to less obvious situations. One reason lies in the inertia of human nature, which prefers guidance to the agony of decision. 'The instinct of inertia' said Lord Wright 'is as potent in judges as in other people'[1]. Another is that people often regulate their conduct with reference to existing rules, which makes it important for judges to abide by them. This is especially so in commercial dealings[2]. Innovations can be unsettling and lead to a loss of confidence[3]. The Privy Council expressed the policy aspect of this clearly:

> 'If the legal process is to retain the confidence of the nation, the extent to which the High Court exercises its undoubted power not to adhere to a previous decision of its own must be consonant with the consensus of opinion of the public, of the elected legislature and of the judiciary as to the proper balance between the respective roles of the legislature and of the judiciary as lawmakers ... Such consensus is influenced most of all by the underlying political philosophy of the particular nation as to the appropriate limits of the law making function of a non-elected judiciary'[4].

This need to abide by existing rules is all the stronger at a time when the judiciary happens to be under attack, or viewed with suspicion. A discretionary element is unavoidable in the judicial process, but it is important that this should be played down by conforming with rules as far as possible. In other words at such a time the value of consistency acquires very high priority, so much so that fidelity to rules may even override the sense of justice for the individual and public interest[5].

It follows that judicial discretion should only be exercised within limits, since otherwise confidence in the administration of the law would be shaken. The problem is to determine what those limits are. The point may be illustrated by taking liability for negligence in tort, the requirements of which are the existence of a duty of care owed to the plaintiff, a breach of that duty causing damage, which is not too remote. 'Duty', 'breach', 'causation' and 'remoteness' are terms with a variety of meanings, all of which are controlled by value considerations[6]. It was, therefore, no more than a candid avowal of the actual state of affairs when Lord Denning MR stated:

> 'The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: "There was no duty". In others

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20 Llewellyn *The Common Law Tradition, Deciding Appeals*, speaks of 'situation-sense': see especially pp 121 et seq. His fourteen 'steadying factors' in this connection are examples of the value of consistency. For the use of fiction in combining certainty with adaptability, see Maine *Ancient Law* ch 2; Fuller *Legal Fictions*; Stein and Shand *Legal Values in Western Society* pp 32–40.

1 Wright 'Precedents' (1943) 8 CLJ 144.

2 *A/s Awileo v Fulvia SpA di Navigazione, The Chikuma* [1981] 1 All ER 652 at 659, [1981] 1 WLR 314 at 322, HL, per Lord Bridge.

3 Cf *Llewellyn* p 3 et seq. He was concerned at the alleged loss of confidence in the Supreme Court.

4 *Geelong Harbor Trust Comrs v Gibbs Bright & Co* [1974] AC 810 at 820–821, [1974] 2 WLR 507 at 514, per Lord Diplock.

5 *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, [1980] 1 WLR 142, HL.

6 *Clerk & Lindsell on Torts* pp 588–591.

> I say: "The damage was too remote". So much so that I think the time has come to discard these tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable, or not'[7].

His Lordship is here drawing attention to the importance of values; he should not be misunderstood as advocating the abandonment of the rules concerning duty, breach etc. The important thing is to fit value-judgements into them. Policy paraded in its nakedness is more disturbing than when it is fitted into traditional garments. If the ambiguous requirements are to be removed, then negligence liability in its entirety should be abolished and replaced by a different scheme; but as long as such liability is retained, its rules must be seen to be applied. The task of the judge is not only to see that justice is done, but that it is seen to be done according to law.

Apart from rules, there are principles and doctrines, eg *mens rea*, fault, *ex turpi causa non oritur actio*, privity of contract, presumption of innocence etc. The part which these play has been explained in an earlier chapter[8]. Fidelity to them is no less important than fidelity to rules.

It is obvious that the balance between certainty and flexibility can never be fixed. Both can be combined in the case of concepts of indeterminate content, eg negligence, possession, since the rules, which embody them, can remain fixed and at the same time allow flexibility in their application. Also, perhaps with less frequency, new rules can be created within some established concept, principle or doctrine[9]. Greater restraint has to be observed in creating or overturning an established rule or doctrine.

A different kind of pressure is exercised by traditions as distinct from rules, principles and doctrines. Public confidence is also retained by adhering to tradition. One aspect of this derives from the pressure of office. It is commonplace that even the most radical innovators are tamed in the saddle of power. The traditions of the judicial office impose a sense of responsibility and conformity with its standards and values. Above all, there is an ingrained way of thinking, which is the product of training and the expertise of the craft. The lawyer's way of 'going about the job', as Llewellyn put it, inculcates an attitude of mind of keeping to what is known and this becomes standard practice[10].

MORALITY

There can be little doubt that moral considerations *do* influence rules of law, but this aspect has to be distinguished from the question how far laws *should* give effect to moral attitudes, which was discussed earlier[11].

Allen said that 'our judges have always kept their fingers delicately but

7 *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 at 37, [1972] 3 All ER 557 at 562, CA.

8 See pp 45-46 ante.

9 Eg *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL.

10 *Llewellyn* pp 19 et seq. Simpson has argued that the 'common law' is not the sum-total of stated rules, but the acceptance as more or less correct by a specialist profession of formulations of a mass of ideas and practices, which are used in deciding disputes rationally. In this sense common law is the general custom of the realm; and this is also how professional ethics generates pressure to conform: 'The Common Law and Legal Theory' in *Oxford Essays in Jurisprudence* (2nd series, ed Simpson) ch 4. See also Weyrauch *The Personality of Lawyers*; Shklar *Legalism*.

11 See pp 111 et seq. ante.

firmly upon the pulse of the accepted morality of the day'[12]. How far in fact they do so it is not easy to say. Lord Mansfield went so far as to assert that 'the law of England prohibits everything which is *contra bonos mores*'[13]; but other judges have been more cautious[14]. Viscount Simonds, however, forcibly re-asserted the judicial task of preserving moral standards in words which have been quoted earlier[15].

So it is that the courts will contrive to suppress dishonesty. The purchase of honours has long been held illegal[16] and further instances of the manipulation of legal concepts to this end will be found in Chapters 12 and 13. The attitude towards sexual immorality has changed, generally speaking, from one of prohibition to a refusal to assist the parties in the enforcement of claims based on immorality. Adultery used to be an offence, but is not now; an immoral consideration still avoids a contract[17]. In *R v Prince*[18], it was a sense of the immorality of Prince's conduct in abducting a girl that influenced the court to reject his defence of a *bona fide* mistake that she was of statutory age; while in *R v Tolson*[19], Mrs Tolson intended to do nothing immoral by re-marrying when she reasonably believed that her first husband had died; so the court allowed her *bona fide* belief to be a defence. In *Parry v Parry and Adams and MacKay*[20], a co-respondent in a divorce case, who disputed having to pay costs to the husband on the ground that he did not know the wife was married, was nevertheless cast in costs since he should not have had intercourse with a woman other than his wife. So, too, 'unlawful sexual intercourse' in the Sexual Offences Act 1956, s 19 (1) has been held to mean 'illicit', ie outside marriage[1].

With regard to the marriage tie, the attitude towards it can become complicated by differing religious views. For instance, has a marriage been consummated if the parties use contraceptives? The House of Lords said, yes[2]. The sanctity of the marriage bond has produced the rule that there can be no conspiracy between spouses, nor publication of defamatory matter. Any condition attached to a bequest, which might encourage separation or strife, is void[3]; and so is a condition that a wife (as distinct from a widow) shall assume the testator's name and arms[4]. Under the old Rent Acts a tenant husband, who deserted his wife, was deemed to remain in possession of the premises so that the wife could be protected from eviction by the landlord[5]; but the same did not apply to a mistress[6]. In *R v Wheat; R v Stocks*[7], it was

12 Allen *Legal Duties* p 201.

13 *Jones v Randall* (1774) 1 Cowp 17 at 39; *R v Delaval* (1763) 3 Burr 1434 at 1438-1439.

14 Eg Scrutton LJ in *Re Wigzell, ex p Hart* [1921] 2 KB 835 at 859.

15 *Shaw v DPP* [1962] AC 220 at 268, [1961] 2 All ER 446 at 452-453, quoted at p 181 ante.

16 *Egerton v Brownlow* (1853) 4 HL Cas 1; *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1.

17 *Ayerst v Jenkins* (1873) LR 16 Eq 275; *Alexander v Rayson* [1936] 1 KB 169.

18 (1875) LR 2 CCR 154. Cf *R v Hibbert* (1869) LR 1 CCR 184.

19 (1889) 23 QBD 168.

20 1962) 106 Sol Jo 288.

1 *R v Chapman* [1959] 1 QB 100, [1958] 3 All ER 143.

2 *Baxter v Baxter* [1948] AC 274, [1947] 2 All ER 886.

3 *Re Johnson's Will Trusts* [1967] Ch 387, [1967] 1 All ER 553.

4 *Re Howard's Will Trusts* [1961] Ch 507, [1961] 2 All ER 413.

5 *Old Gate Estates Ltd v Alexander* [1950] 1 KB 311, [1949] 2 All ER 822.

6 *Thompson v Ward* [1953] QB 153 [1953] 1 All ER 1169; *Colin Smith Music Ltd v Ridge* [1975] 1 All ER 290, [1975] 1 WLR 463. See also *Dixwell v Farnes* [1959] 2 All ER 379, [1959] 1 WLR 624.

7 [1921] KB 119; disapproved in *R v Gould* [1968] 2 QB 65, [1968] 1 All ER 849. See also *Wiggins v Wiggins and Ingram* [1958] 2 All ER 555, [1958] 1 WLR 1013.

held that after a decree nisi had been granted on a divorce petition, but before it had been made absolute, the marriage still existed technically so that a party committed bigamy by re-marrying within that time, notwithstanding an honest belief that a decree nisi meant that the marriage had ended. In *Fender v Mildmay*[8], on the other hand, a contract to marry another person before the decree nisi was made absolute was upheld by a majority of the House of Lords. Here the conflict of values was between the sanctity of contract and the mere outward shell of a marriage which had come to an end for all practical purposes.

ADMINISTRATIVE CONVENIENCE

No orders will be made unless their working can be effectively supervised[9]. In *Paton v British Pregnancy Advisory Service Trustees*[10] the point arose for the first time whether a husband was entitled to an injunction to stop his wife from having an abortion as allowed by the Abortion Act 1967, but against his wish. Sir George Baker P refused an injunction, saying, 'it would be quite impossible for the courts in any event to supervise the operation of the Abortion Act 1967. The great social responsibility is firmly placed by the law upon the shoulders of the medical profession'. Apart from this, convenience may determine the interpretation that is to be placed upon a rule[11], and in the absence of authority convenience may help to decide an issue[12].

INTERNATIONAL COMITY

The desire to conform to the practice of other nations and to maintain friendly relations with them has shaped a number of rules. In default of any statutory or common law rule, a court may adopt a rule of customary international law. There is a view put forward by international lawyers that international law 'is *per se* part of the law of the land'[13], which was originally based mainly on dicta in certain ancient cases the decisions in which, however, were based on statute. More recently the Court of Appeal accepted it in *Trendtex Trading Corpn Ltd v Central Bank of Nigeria*[14], and the rule that was adopted from international law has since been made statutory. It is not

8 [1938] AC 1, [1937] 3 All ER 402.

9 Eg *Chapman v Honig* [1963] 2 QB 502, [1963] 2 All ER 513.

10 [1979] QB 276 at 281, [1978] 2 All ER 987 at 991.

11 *Fry v IRC* [1959] Ch 86, [1958] 3 All ER 90; *Gatehouse v Vise (Inspector of Taxes)* [1956] 3 All ER 772 at 776-777 (affd [1957] Ch 367, [1957] 2 All ER 183).

12 *Adams v National Bank of Greece SA* [1961] AC 255 at 276, [1960] 2 All ER 421 at 426. Inconvenience: *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453 at 457. Where the inconvenience is not too great: *Rodriguez v Speyer Bros*, [1919] AC 59 at 132. It has been held to prevail over sanctity of contract: *Taunton-Collins v Cromie* [1964] 2 All ER 332 at 333, 334, [1964] 1 WLR 633 at 635, 637.

13 Lauterpacht (1939) 25 Grotius Society 51; *Private Law Sources and Analogies* 75n; *Oppenheim's International Law* (8th edn) pp 37-47; McNair (1945) 30 Grotius Society 11; Dickinson (1932) 26 American Journal of International Law 239; Scott (1907) 1 American Journal of International Law 831; Westlake (1906) 22 LQR 14 (reprinted in *Collected Papers* 498); Morgenstern (1950) 27 BYIL 42; Seidl-Hohenveldern (1963) 12 International and Comparative Law Quarterly 88.

14 [1977] QB 529, [1977] 1 All ER 881, CA. See also *The Playa Larga* [1983] 1 AC 244, [1981] 2 All ER 1064; and now the State Immunity Act 1978, s 3. *Trendtex* was not followed in *Uganda Co (Holdings) Ltd v Government of Uganda* [1979] 1 Lloyd's Rep 481, but this case has been disapproved.

possible to express an opinion on this view until the meaning of '*per se*' has been clarified. No one disputes that international treaty law does not become part of English law until the treaty provisions are incorporated in an Act of Parliament. With regard to customary international law, no one disputes that a rule of customary international law cannot go against statute or precedent and that, where these exist, British courts have a duty to follow their own binding authority. Nor, further, does any one dispute that, in the absence of statute or precedent, a court has the power to adopt a rule of international law. The nub of the matter is whether this power is coupled with a duty to adopt the international law rule, or only a liberty to do so. If it is a duty, then customary international law would have to be included in the criteria of validity in English law alongside statute, precedent, immemorial custom and EEC Directives, the consequence of which for constitutional and municipal lawyers would be profound. They have rejected such a doctrine[15]. The precise implication of '*per se* part of the law of the land' has never been faced, which makes even *Trendtex* inconclusive. Moreover, it has to be remembered that what judges say is not always indicative of what they do; and the position here seems similar to that with regard to immemorial custom where also judges say that they are bound by such customs though in fact they exercise discretion whether to adopt them or not[16]. There is the further difficulty of identifying rules of international law, especially customary rules, because the criteria of validity vary with different kinds of tribunals[17]. On the other hand, if '*per se* part of the law of the land' means only that courts have the power and liberty to adopt rules of customary international law without these having to be incorporated in Acts of Parliament, no one will disagree, though '*per se*' is tendentious and misleading. Such, it is submitted, is the position, which is why international law is here included among the persuasive factors that guide judicial discretion.

Further points are (a) Statutes will be construed so as to avoid conflict with international law[18]. (b) Acts giving offence to friendly powers will receive no assistance from the courts[19]. (c) The law of extradition shows an elaborate pattern of rules that are the outcome of accommodating the need

15 Jennings, *The Law and the Constitution* pp 173–176; Holdsworth *HEL* XIV (eds Goodhart and Hanbury) pp 23–74. See also the author's 'Mechanism of Definition as Applied to International Law' (1954) CLJ 226–231. Their view is supported by *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271 at 295; *Compania Naviera Vascongada v The Cristina* [1938] AC 485 at 497–498, 502, [1938] 1 All ER 719 at 725, 728; *Chung Chi Cheung v R* [1939] AC 160 at 167–168, [1938] 4 All ER 786 at 790; *The Tolten* [1946] P 135 at 142, [1946] 2 All ER 372 at 375; *R v Bottrill, ex p Kuechenmeister* [1947] KB 41 at 54, [1946] 2 All ER 434 at 436; *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807, [1961] 1 All ER 495; *R v Secretary of State for the Home Department, ex p Thakrar* [1974] QB 684, [1974] 2 All ER 261.

16 See pp 190–191 ante.

17 See p 496–497 post.

18 Lauterpacht (1939) 25 Grotius Society at 76; *Oppenheim* at p 41. The statement of Lord Mansfield in *Heathfield v Chilton* (1767) 4 Burr 2015 at 2016, is not viewed seriously even by supporters of the doctrine of incorporation. The correct view is to be found in *Mortensen v Peters* 1906 14 SLT 227; *Naim Molvan v A-G for Palestine* [1948] AC 351; *Theophile v SG* [1950] AC 186 at 195, [1950] 1 All ER 405 at 407–408; *IRC v Collco Dealings* [1959] 3 All ER 351 at 355 (affd [1962] AC 1, [1961] 1 All ER 762); *Salomon v Customs and Excise Comrs* [1967] 2 QB 116, [1966] 3 All ER 871; *Cheney v Conn* [1968] 1 All ER 779, [1968] 1 WLR 242; *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616, [1969] 1 All ER 82; *R v Secretary of State for Home Affairs, ex p Bhajan Singh* [1975] 2 All ER 1081 at 1083. With regard to the European Convention on Human Rights, later British statutes will be interpreted so as not to conflict with the Convention: *R v Deery* [1977] Crim LR 550.

19 *De Wutz v Hendricks* (1824) 2 Bing 314; *Foster v Driscoll* [1929] 1 KB 470.

to co-operate with other countries in suppressing crime and to uphold the liberty of the individual[20]. (d) Where courts have discretion, the manner of its exercise will be influenced by considerations of comity[1]. (e) Delicate considerations are also involved in defining the attitude of the courts to foreign confiscatory decrees. The validity of such decrees in the country in which they were passed will not be questioned by British courts, for indeed no point would be served by so doing[2]; but they will not be given effect in Great Britain[3]. (f) When a diplomat has committed a tort or breach of contract, international comity demands, on the one hand, that he be accorded immunity from suit, but corrective justice demands, on the other hand, that the victim be given a remedy. Use has accordingly been made of the 'sanctionless duty' idea, ie that the diplomat is under a duty to pay, but is immune from process. The significance of this is that third parties, such as insurers and sureties, can be held responsible while the diplomat himself goes free[4]. Conflicting considerations of this kind have shaped the concept of duty. (g) Since Britain's entry into the European Economic Community the Court of Appeal has held that courtesy towards other member states requires the revision of certain traditional rules[5].

CONCLUSIONS

In the first place, the part played by values shows the essential relation between law and its social setting in the widest sense. Just as one's knowledge of a fish, for example, is incomplete until one sees it living in its habitat, so, too, knowledge of laws is incomplete without seeing how they live and behave in their social habitat. Furthermore, inquiry into the formation of values can provide insights into the phenomenon of social control through power structures[6].

Secondly, values are the life-blood of the law, the motive-power of a machine which would otherwise be inert. As Holmes J put it:

> 'The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life.

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20 Eg *Schtraks v Government of Israel* [1964] AC 556, [1962] 3 All ER 529; *R v Godfrey* [1923] 1 KB 24; *Factor v Laubenheimer and Haggard* 290 US 276 (1933); *US v Rauscher* 119 US 407 (1886); *R v Governor of Brixton Prison, ex p Kolczynski* [1955] 1 QB 540, [1955] 1 All ER 31; *Royal Government of Greece v Brixton Prison Governor* [1971] AC 251 [1969] 3 All ER 1337. See also the Fugitive Offenders Act 1967.

1 *Seyfang v GD Searle & Co* [1973] 1 QB 148, [1973] 1 All ER 290 (on appeal 117 Sol Jo 16); *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888, [1981] 3 All ER 616; *TimberLane Lumber Co v Bank of America* (1984) 66 ILR 270.

2 *Aksionairnoye Obschestvo A M Luther v James Sagor & Co* [1921] 3 KB 532; *Princess Olga Paley v Weisz* [1929] 1 KB 718.

3 *Banco de Vizcaya v Don Alfonso de Bourbon y Austria* [1935] 1 KB 140; *Oppenheimer v Cattermole*, [1975] 1 All ER 538. Cf *Lorentzen v Lydden & Co Ltd* [1942] 2 KB 202 (in time of emergency); *A-G of New Zealand v Ortiz* [1982] 3 All ER 432, [1982] 3 WLR 570 (on appeal [1984] AC 1, [1983] 2 All ER 93). Cf *The Rose Mary* [1953] 1 WLR 246.

4 *Dickinson v Del Solar* [1930] 1 KB 376 at 380; *Zoernsch v Waldock* [1964] 2 All ER 256 at 265-266, [1964] 1 WLR 675 at 691-692; *Magdalena Steam Navigation Co v Martin* (1859) 2 E & E 94 at 115. On the sanctionless duty idea, see pp 236 et seq. post.

5 Eg judgments need no longer be expressed in pounds sterling: *Schorsch Meier GmbH v Hennin* [1975] QB 416, [1975] 1 All ER 152; *Miliangos v George Frank (Textiles) Ltd* [1975] QB 487, [1975] 1 All ER 1076.

6 See chs 19 and 20 post.

> I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis'[7].

Thirdly, nothing could be further from the truth than the belief that judges simply apply laws. The very nature of the process imports choice and discretion which are guided by values. The idea that judges represent the blindfold figure of justice, brooding over a machine, is an illusion that pleases, but the truth is that the machine can be made to work in different ways, and to do this in a socially acceptable manner they have to keep their eyes open and their fingers on every thread of the social pulse[8].

Fourthly, the judicial task is a highly responsible one since the leeways of discretion could be utilised in a socially cohesive or divisive way. Of the cult of doing justice lawyers have been hailed as the priests[9]; the quality of justice depends even more on the quality of the judges than on the quality of legislators.

Fifthly, a study of values also reveals a difference between what are loosely described as 'totalitarian' and 'free' societies. In the former the task of the judge is to reflect an official set of values. In the latter he has to consider these alongside others, which may be opposed to them—a more difficult task. Judicial independence therefore means independence in the choice of values, and it is in this way that the individual can be protected[10].

Finally, a study of values raises the question of judicial impersonality. In a large number of cases the personal element is minimal, but even here, as pointed out, some choice is inescapable. It becomes more pronounced when the question is one of evaluating interests and choosing appropriate standards of evaluation. It was Cardozo CJ who spoke of

> 'other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge'[11].

This raises a point of importance. As long as it is believed that judges are merely mechanical appliers of laws it is proper that they should be immune from criticism. Indeed, one reason why the judiciary has been able to preserve its aloofness for so long is this belief. Another reason has been the judges' refusal to enter into areas which clearly and obviously involve policy considerations. They are being forced to do so increasingly in modern conditions, and when, in addition to that, it is realised that policy and discretion, in whatever degree, are inseparable from the judicial process, then their conduct is at once open to comment and criticism[12]. Are judges socially and

7 Holmes *The Common Law* p 35; Lord Wright: 'In one sense every rule of law, either common law or equity, which has been laid down by the Courts, in that course of judicial legislation which has evolved the law of this country, has been based on considerations of public interest or policy' (*Fender v St John-Mildmay* [1938] AC 1 at 38, [1937] 3 All ER 402 at 424).

8 Cf Robson *Justice and Administrative Law* ch 5.

9 Cf Ulpian *Digest* 1.1.1. *pr*-1.

10 See pp 99-101 ante.

11 Cardozo *The Nature of the Judicial Process* p 167.

12 Stevens 'Justiciability: The Restrictive Practices Court Re-examined' [1964] PL 221, considered the wisdom of Parliament in entrusting the Restrictive Practices Court, which is there to make policy decisions, to the judiciary, thereby laying it open to criticism.

politically prejudiced? This accusation is being levelled increasingly at the judiciary and merits close attention. The whole question illustrates better than any other the point made at the start of this book that jurisprudential study has to include, *inter alia*, the politics of the law[13].

JUDICIAL IMPERSONALITY

Some exercise of discretion, be it large or small, is unavoidable in the very nature of the judicial process. The point that needs to be stressed now is that there is a difference between allowing this discretion to be guided by one's personal likes and dislikes and by one's sense of current values assessed as objectively as possible. Mr Justice Frankfurter said:

> 'It is not the duty of judges to express their personal attitudes on such issues, deep as their individual convictions may be. The opposite is the truth: it is their duty not to act on merely personal views'[14].

Subjectivity, however, cannot be excluded altogether, since the pattern of values is what the individual thinks it is. Hence the need to stress 'as objectively as possible'. Both these points were appreciated by Slesser LJ:

> 'Yet, even here, it is suggested, the Judge should apply, not his own private opinions, but an objective test. The customary prevailing moral habits and assumptions of the good citizen should be his criterion, not his own personal preference, to quote Dr Wurzel of Vienna in his famous *Judicial Thinking*. If all interpretation were nothing but a sort of artistic function, then nobody could ever foresee how any law would be understood or what effect it would have. Nevertheless, in matters such, for example, as protection of liberty, the views of the Judge on the respective rights of the citizen and state can hardly be excluded, more particularly where society, as a whole, entertains divided opinions. In this case, where the Judge cannot obtain a consensus, what standard has he except his own opinion?'[15].

The thrust of the attack on judicial values is not so much that judges are consciously prejudiced, but that they are subconsciously influenced by the fact that they come from a narrow social stratum and reflect the values of a minority class[16]. There can be no question but that subconscious influences of this kind do exist, but the submission made here is that the charge is prone to exaggeration[17].

In the first place, if subconscious influences are taken into account, as indeed they should be, then account should be taken of all such influences, including those that tend to counteract and minimise prejudice. One of these is fidelity to rules, principles and doctrines. Even if a judge were to have some prejudice and wants to give effect to it, he has to do so as plausibly as possible within the framework of rules; the leeways of doing so are not unlimited and this does operate as a brake on personal prejudice[18]. It has to

13 See p 15 ante.

14 Frankfurter 'Marshall and the Judicial Decision' (1955) 69 Harv LR 228.

15 Slesser *The Art of Judgment* pp 32-33.

16 Eg Griffith *The Politics of the Judiciary*, and *Administrative Law and the Judiciary* (Pritt Memorial Lecture 1978).

17 For further analysis, see the author's '*Götterdämmerung*: Gods of the Law in Decline' (1981) 1 Legal Studies pp 14-20; and see Lord Wilberforce 'Educating the Judges' (1969) 10 JSPTL (NS) 254, 258.

18 See p 213-215 ante, and the remark of Lord Diplock in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529 at 542, [1980] 1 WLR 142 at 157.

be remembered that cases are argued, often with great ingenuity, by counsel, and if one side puts forward an interpretation of a statutory provision or a precedent, which cannot be countered plausibly, the judge has to decide accordingly, however much his own wishes are to the contrary. Then there is 'role pressure', ie the pressure exerted by the judicial office with its tradition of impartiality. The conditioning influence of roles has been examined by sociologists and will be discussed later[19]. The more ancient the office and its traditions, the stronger the pressure. Most important of all, perhaps, is the training at the Bar, which is unique in de-personalised thinking. Judges are recruited from the leaders of the profession, and these are people who have learned over many years how to throw the whole of their expertise, intelligence and personalities into the causes of their clients, regardless of their own sympathies and preferences, arguing with equal force whether they sympathise with their clients or not. The effect of such a training over the greater part of a working life is indelible. It is because of such factors as these that inquiries into the psychology, upbringing, health, wealth etc of individual judges are unlikely to be helpful. The movement known as American Realism was originally keen to emphasise the significance of the personal element, but this aspect of the movement has virtually disappeared with the appreciation of other factors that neutralise or minimise it[20].

Subconscious influences are also countered by conscious appreciation of the danger of such influences, and such appreciation lies at the root of responsible action in general. British judges have long been aware of the possible influences of class and background, so the following remark of Scrutton LJ is less weighty in favour of critics of the judiciary than they suppose, for it could cut both ways:

> 'Labour says: "Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade union get impartial justice?" It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class."[1].

The learned Lord Justice is here saying that the task is difficult, not that it is impossible; and consciousness of the danger is itself a safeguard. Judges sometimes bend over backwards to avoid it. Thus, in *Ex p Church of Scientology*[2] the Church succeeded in getting their appeal heard by a panel of the Court of Appeal not presided over by Lord Denning MR, who had heard eight cases concerning the Church in the previous ten years and who, it was alleged, had 'an unconscious adverse influence'. Shaw LJ said that the grounds of the application were not merely slight, but non-existent; yet in order to avoid even the possibility or appearance of influence he acceded to the request.

The debate on judicial impersonality is typical of persuasive argumentation, which was mentioned at the beginning of this book[3]. People tend to approach this issue with convictions already formed one way or the other,

19 See p 440 post; and see also p 50 ante.

20 See Chapter 21 on American Realism, and especially the views of Llewellyn, who in his last major work drew attention to what he called 'steadying factors'.

1 Scrutton 'The work of the Commercial Court' (1921) 1 CLJ 8.

2 (1978) Times, 21 February.

3 See p 14 ante.

which makes arguments favourable to one's prejudice more persuasive than contrary arguments. As pointed out earlier, appeals for evidence in this kind of situation are either misplaced, or else such evidence as there is carries greater or less weight according to whether or not it supports the conclusion one likes. Evidence of judicial prejudice comes mainly, though not exclusively, from the area of industrial law and here the allegation is often made that judges are prejudiced against trade unions. A preliminary point that needs to be made is that reported cases do not reveal the whole picture because not all decided cases are reported. Court records show that many pro-union decisions are seldom reported, and, even when they are, evoke no public protest. Only anti-union decisions tend to receive publicity and spark off criticism of judicial prejudice. Since praise of pro-unions decisions is either lacking, or so muted as to pass unheard, this makes the allegation of prejudice no more than a political attack[4].

After the demise of the Industrial Court, its former President provided statistical data of the cases decided by it during its life, and in the overwhelming number of these there was union and judicial accord[5]. Cases of industrial disputes decided by courts other than the Industrial Court were examined by two left-wing scholars, who concluded: 'Clearly there was less statistical evidence of the influence of judicial bias than might *a priori* have been expected'[6]. Even the oft-quoted dictum of Lord Atkinson in *Roberts v Hopwood*[7] needs to be understood in its context. In this case the House of Lords invalidated a scheme of wages, including equal wages for men and women, drawn up by a socialist local authority. In the course of his speech his Lordship remarked that the local councillors should not allow themselves to be guided 'by some eccentric principles of socialist philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour'. These words certainly indicate his Lordship's own prejudices, but the actual decision of the House reflected a variant of the Aristotelian principle of justice that there has to be equal distribution of burdens as of benefits; the financial burden of an expensive scheme as proposed by the council should not be imposed only on one section of the community without parliamentary authority. Even the chauvinist sentiment deploring equal wages for men and women would probably not have been resented so much at that date as it would be now. The case occurred more or less on the eve of the General Strike and the onset of the Depression, and it is pertinent to ask if trade unions would, or would not, have objected to women taking away yet more jobs from men, let alone equal pay for them.

Objection is sometimes taken that judges are not elected. As to this, it has to be remembered that in the daily administration of the country many

4 In *Gouriet v Union of Post Office Workers* [1977] QB 729, [1977] 1 All ER 696, CA (revsd [1978] AC 435, [1977] 3 All ER 70, HL) the Court of Appeal ruled against the unions involved and the Attorney General and provoked an immediate attack in Parliament on judicial prejudice against unions. The House of Lords reversed the Court of Appeal and no comment was made. Was it only the Court of Appeal that was prejudiced? Critics cannot have it both ways: in the House of Lords either there was no prejudice, or, if there was, then as long as it favoured unions, it merited no criticism.

5 Donaldson 'Lessons from the Industrial Court' (1975) 91 LQR 181.

6 O'Higgins and Partington 'Industrial Conflict: Judicial Attitudes' (1969) 32 MLR 53. Their *a priori* expectation of bias perhaps betrays their own prejudice.

7 [1925] AC 578 at 594, HL. See also *Prescott v Birmingham Corpn* [1955] Ch 210, [1954] 3 All ER 698, CA; *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768, [1982] 1 All ER 129, HL.

decisions are entrusted to civil servants, who are not elected; if so, why not judges? Also, why are elected representatives more trustworthy? Even they have to be trusted to do many things on which the electorate is not and cannot be consulted. Election of judges tends to make judicial values equivalent to political values, and judges elected in one political climate may lose confidence when the climate changes. If judges changed with political change, that would spell the end of certainty and continuity. A political judiciary could operate successfully in a one-party state, in which it will constitute one organ of 'rule by law'. Under such a system election would seem pointless, or at most a useless formality.

It has also been said that judges should bring to bear a 'collectivist' outlook on their job rather than an 'individualist' one. If this means that they should think in terms of people's obligations towards society, of duties rather than 'rights', there is much to be said in favour of such a contention; but this has nothing to do with class prejudice. The attitude of judges in the past may have been unduly narrow, but it has changed since the end of the 1939–45 war. If, on the other hand, the contention is that judges should always give more weight to union interests than to individual interests, this is tantamount to a demand that judges should reflect a new class interest, namely, that of trade unions. It is not easy to see why judges should not think 'collectively' and at the same time also pay heed to individual interests; otherwise, the individual will be subordinated to collective interests, which would result in a totalitarian society. Much of the criticism on this point may stem from a failure to appreciate the historic role of the judiciary of siding with the under-dog so as to preserve distributive equality[8].

The foregoing considerations may not wholly dispel the charge of prejudice, but they do go some way towards blunting its edge. A foremost critic of the judiciary concluded his survey by observing that in capitalist and communist societies judges are, after all, only doing their respective jobs. 'That this is so', he says,

> 'is not a matter for recrimination. It is idle to criticise institutions for performing the task they were created to perform and have performed for centuries ... To expect a judge to advocate radical change, albeit legally, is as absurd as it would be to expect an anarchist to speak up in favour of an authoritarian society'[9].

It would seem that underlying this statement is a regretful acknowledgement of the fact that judges have to espouse values other than those which the author would like them to espouse; but it is veiled as a complaint against the pretence by unspecified persons 'that judges are somehow neutral in the conflicts between those who challenge existing institutions and those who control those institutions'. As has been pointed out, few, if any, doubt that a sense of values is subjective, but the point that seems to be overlooked is the significance and power of consensual domains of shared values. The same author also remarks: 'I am not sure what would be the attitude of judges in the ideal society. Perhaps they would not be needed because conflict between Government and the governed would have been removed'[10]. There is an echo in this of the now defunct Marxist doctrine of the 'withering away of law', which has long been dropped from even communist legal philosophy[11].

8 See pp 91 et seq. ante, and note 7.
9 *Griffith* p 215.
10 *Griffith* pp 214–215.
11 See pp 402–405 post.

It is also naive to believe that there can be even an 'ideal society' without tensions between governors and the governed. There will always be reaction against authority by groups, and to eliminate this all minorities will have to be suppressed; which will not appeal to peoples with traditions of freedom and, in particular, accords ill with this critic's own fervent championing of minority interests.

In a 'free' as opposed to a 'totalitarian' society an independent judiciary is essential, with a sense of values, which is not merely a reflection of governmental values. Whatever the kind of society, confidence has to be reposed in judges if they are to keep the day to day administration of the law on an even keel during its passage through the years.

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