

ARTICLES

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THE COMMON LAW AS ARBITRAL LAW†

A DEFENCE OF JUDICIAL LAW-MAKING

1 Bentham and the Common Law

The Benthamite tradition finds in statute law the qualities of clarity, honesty of purpose and social utility, and in the common law confusion, mystification and a ready refuge for unmerited privilege. Two centuries ago Bentham wrote his fierce indictment of the judge-made common law: he branded it a "bastard law [without] shape . . . which is everywhere and nowhere, which come from nobody, and is addressed to nobody and which . . . can never . . . be known or settled".¹ In Bentham's view the common law was politically not legitimate, for it had been made, as he contemptuously stated, by "Mr. Justice Ashhurst and Co. without king, parliament, or people".² The only way to legitimacy was to turn all the common law into statute law, so that "everybody may have a rule to go by".³

Much of the common law, greatly reformed, refined and rejuvenated, is still with us, but its condemnation by Bentham has left an influential legacy. One recent triumph of the Benthamite tradition was the creation of permanent law reform machinery in most Commonwealth jurisdictions.⁴ In the spirit of that tradition the English Law Commission "challenged] the value of reported judicial decisions as the receptacle of the law",⁵ and decided that, as part of its very first programme, it would pursue the path of large-scale codification.⁶ The Law Commission (like its sister institutions in other common law jurisdictions) has successfully completed many of its less ambitious law reform projects, but the

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1 "Truth versus Ashhurst" in *The Works of Jeremy Bentham* (Bowring edn 1843) vol 5, 223, 236. This characterization of the common law was followed by the famous words: "How should lawyers be otherwise than fond of this brat of their own begetting? or how should they bear to part with it? It carries in its hand a rule of wax, which they twist about as they please — a hook to lead the people by the nose, and a pair of sheers to fleece them with."

2 *Ibid* 235.

3 *Ibid* 236.

4 See Farrar, "Law Reform Now — A Comparative View" (1976) 25 ICLQ 214; Castles, "The New Principle of Law Reform in Australia" (1977) 4 Dalhousie LJ 3; Gosse, "Canadian Law Reform Agencies" (1970) 1 Can BJ (NS) 1.

5 Scarman, *Law Reform, The New Pattern* (1968) 22f.

6 *First Programme of the Law Commission* (Law Com No 1) 6. Although the first, large-scale codification project was confined to the law of contract, it was obvious enough that this was intended only as a beginning — see Hahlo, "Here lies the Common Law: Rest in Peace" (1967) 30 MLR 241; see also observations by Scarman, *supra* n 5 at 17.

fulfilment of Bentham's dream of comprehensive codification of all the law is still, at best, an extremely remote prospect.⁷

Bentham's indictment of the common law raised important issues which are still alive today: do judges make law in fact,⁸ in the eyes of the law,⁹ or in strict jurisprudential analysis?¹⁰ If judges do make law, do they have a political mandate when legislation, in liberal democratic countries, is the preserve of parliaments?

There are still no generally accepted answers to these questions, which may either show their complexity (and the quality of Bentham's mind for perceiving them so clearly), or indicate that there has been much less progress in the last two centuries in law and jurisprudence than there has been in science and technology. The fact remains that the issues continue to demand our attention. The problems of judicial law-making are not confined to the common law: some of the most penetrating scholarly analyses of these problems have been written in code-countries such as France¹¹ and Germany.¹² However, the common law, being predominantly judge-made, raises these issues in a particularly acute form.

"Common law", the prime concern of this paper, is a phrase with many meanings. Here it will be understood as signifying all that judge-made law in Commonwealth countries which is neither associated with statute law nor rooted in some particular local custom. Common law in this sense includes "equity". As a leading law dictionary states: "common law . . . denotes the unwritten law, whether legal or equitable in its origin, which does not derive its authority from any express declaration of the will of the legislature."¹³ Statutes, and judgments which interpret and amplify statutes, are not strictly part of the common law. On the other hand, few canons of statutory interpretation are supplied by statute:¹⁴ they are mostly supplied by the common law. The line between statute and common law is further blurred by the existence of numerous provisions which merely adjust and modify specific aspects of the common law without disturbing its broad flow.¹⁵

Such problems of delimitation make it difficult to isolate the essential characteristics of the common law: any generalized analysis of all or even of a substantial part of the common law is bound to be beset with some

7 In 1972 the Scottish Law Commission withdrew from the Contract project and since then the whole project has faded from view — see The Law Commission, *Eighth Annual Report 1971-72* (1973) 2.

8 Cf Radcliffe, *Not in Feather Beds* (1968) 212-216, reprinted in Zander, *The Law-Making Process* (1980) 197-200.

9 Cf Devlin, "Judges and Lawmakers" (1976) 39 MLR 1, 11.

10 Cf Dworkin, *Taking Rights Seriously* (1977).

11 For an assessment of the work of Géný, see Mayda, *François Géný and Modern Jurisprudence* (1978).

12 Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956).

13 *Jowitt's Dictionary of English Law* (2nd edn 1977) vol 1, 391.

14 Cf Cross, *Statutory Interpretation* (1976); Driedger, *The Construction of Statutes* (1974). Rules of construction which appear in Acts Interpretation Acts tend to be narrow and specific — see, eg, s 26(6) and (7) of the Interpretation Act, RSC 1970, c I - 23 (Canada) ("Words importing male persons include female persons and corporations"; "Words in the singular include the plural, and words in the plural include the singular").

15 An example is s 27c of the Wrongs Act 1936-1975 (SA) which served simply to reverse the legal effect of *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555.

uncertainty. Nevertheless, the common law as such remains a worthwhile object of study, for it is a very unusual instrument of government. It has been made and continues to be made by judges who enjoy considerable independence from other governmental forces; it is unpolitical in the sense that it is based upon the professional and personal values of the judges. The kind of judge-made law which merely elaborates and supplements legislation is bound to be much more strongly influenced by the (ultimately political) values which are embodied in the legislation, particularly when judges are committed to use the purposes of the legislation as their main interpretative guide.

This paper is based upon the assumption that the judges have not just declared but have in fact made the common law.¹⁶ Particular attention will be paid to the legitimacy of the process and of the product. In part at least, this will involve questions of social utility. As Bentham would have been the first to acknowledge, political legitimacy may flow from proven and accepted social utility. A defence of the common law based upon such premises would have seemed strange indeed to Bentham, for whom utility and progress were synonymous with statute law. However justified such a view might have been in Bentham's day, the common law has changed greatly since then and one can now afford a more dispassionate and less partisan outlook. A true utilitarian would be dishonest if he were to close his eyes to the possibility of such a defence of the common law, however much his Benthamite training may have conditioned him to do so. To make a case upon this basis, it would not be enough to show that the common law fulfils a useful social function; rather, it must be established that the common law is of greater potential utility than statutory substitutes would be.

2 A Fundamental Distinction: Regulative Law and Arbitral Law

Law is concerned with human conduct and particularly with conduct which affects others, whether on the small scale of interpersonal relations or on the large scale of social structures such as those which make up industrial, commercial, political and other organisations. The intended effect of all law must be to influence human conduct in some way and this may explain why it was once thought that all legal norms were, in the last analysis, generalized commands,¹⁷ ie sanction-supported rules of compulsion, intended either to prevent or to induce defined forms of conduct.

It is now generally accepted that such an analysis is simplistic and that there are types of legal norm which should not be forced into the mould of the command concept.¹⁸ Law has many functions. It establishes the political framework for the life of nations and creates public institutions. Law governs public, private, industrial and commercial affairs. It controls sport, the arts and education. Law invests public officials, and, to a lesser extent, even private individuals with power, and creates safeguards to prevent abuse of such power. Law not only prohibits and commands, but also liberates, permits, licenses, justifies and excuses. In

16 Some of the problems involved in a declaratory view of the common law have been examined in a companion paper: "The common law: judicial impartiality and judge-made law" (1982) 98 LQR 29-93.

17 The *locus classicus* for this view is Austin, *Lectures on Jurisprudence* (5th edn 1885) vol 1, 79ff.

18 Cf Hart, *The Concept of Law* (1961) 18ff.

the age of the Welfare State, law has become the great equalizer and provider. Law revises and reforms: some legislative schemes are designed to bring fundamental change to whole social structures. To achieve such varied governmental aims, law must tax and appropriate, organize and regulate.

One can classify legal norms in accordance with fairly concrete and specific functions. However, at a more abstract level, it may also be useful to acknowledge that many types of legal norm still fit comfortably and without distortion into Austin's category of the generalized command.¹⁹ There are many legal norms in all areas of the law which are imperative in form and substance and are backed by sanctions intended to come into effect in the event of disobedience. Such norms are sufficiently distinctive to be brought together under some general concept. It is submitted that they are best described as "regulative law". The aim of such law tends to be to curb freedom of action, to limit power and influence when there is a danger of abuse, or otherwise to modify the conduct of individuals or of groups.

To pretend that a concept such as regulative law can be defined with complete precision would be futile: its delimitation from other forms of law is bound to be beset with some uncertainty. The most obvious examples are to be found in the criminal law, whether it be of statutory or of common law origin. A legal norm which prohibits defined conduct and threatens a heavy penalty in the event of disobedience can only be described as regulative. However, the "threats" attached to regulative norms need not be quite so draconian, nor is the involvement of public officials as "enforcers" an indispensable characteristic: gentler forms of persuasion may be envisaged and may, nonetheless, be sufficiently distinct indications of an essentially regulative intent and outlook. For example, a statutory provision or judge-made rule could be described as regulative in character if it purported to withhold the benefit of enforceability from certain contracts by declaring them void on grounds of public policy. One basic purpose of such a norm would be to discourage, if not to prevent, the making of such objectionable contracts. Hallmarks of regulative law are the underlying intention to modify conduct in a fairly direct way and the *de jure* (if not *de facto*) inability of those affected by such law to abrogate it by agreement with others and thus to avoid its operation.

Regulative law diminishes, in a direct and readily demonstrable way, the freedom of action possessed by those to whom it is addressed. It seems to follow that only the kind of democratic political mandate possessed by parliaments will justify the creation of such law: in general, only statute law, not the common law, should be the source of regulative law. Although courts have created much of the criminal law, there is a justified view that their mandate for criminal law-making, whatever it may have been in the past, has now lapsed: the creation of new crimes by the judges has become a rare occurrence.²⁰

If it is inappropriate for judges to make regulative law, it is even more clearly inappropriate for them to make "reformist law", ie law which

¹⁹ *Ibid* 26ff, 41.

²⁰ The House of Lords last exercised its power to establish a new crime in *Shaw v Director of Public Prosecutions* [1962] AC 220.

seeks in some way to alter the very structure of society. Lord Devlin has explained convincingly why it would be unwise for judges to try to be "dynamic" law-makers.²¹ Admittedly, it is not inherently beyond the capacity of the judiciary to attack injustices which have their roots in well-established social structures. The Supreme Court of the United States has shown that it can be done.²² However, to establish such a proud record,²³ the Supreme Court had more than the advantage of glaringly unjust social conditions: in addition, it had the mandate of the Bill of Rights in the United States Constitution which gave some indication of the standards and ideals to which that society aspired. Moreover, it had an exclusive, final jurisdiction over constitutional interpretation combined with the capacity to act as a collective, all nine judges sitting together in all cases. Lord Devlin has drawn attention to this important factor and has contrasted it with the very different practice of the House of Lords. Writing with obvious affection for the great tribunal to which he once belonged, he stated: "Compared with the Supreme Court, the House is a disorganized rabble. There are not nine men constantly working together, but shifting groups of five."²⁴ Like the first-past-the-post electoral principle which may appear to the politically uninformed to be a mere electoral technicality,²⁵ the arrangement of business in the highest appellate tribunals is a matter of profound political significance, for it dictates the extent to which a collective judicial will (and thus, political power) can be established.

Without a constitutionally entrenched bill of rights and without the ability to act collectively courts in Commonwealth countries cannot invoke a reformist concept of social justice. This task must be left to governments and parliaments. Such limitations of the judicial power are not difficult to defend on political grounds. Any attempt at large-scale social reform, however pious its intent, is in the nature of a political experiment with uncertain, often unpopular, and sometimes even disastrous consequences. Political experimenters with security of tenure, even if they wear judicial robes, should not be inflicted upon society, for love of power might make them prone to misinterpret the signs when their experiments fail. The essence of democracy is the capacity of the electorate to dismiss failed political reformers. Time and again the electorate will judge wrongly, but there is no judge who can be trusted more. Social and political reformers, even revolutionaries, can be of the greatest benefit to society as long as they submit to the limits of their electoral mandate. There is no acceptable substitute, whether it be some minority ethos, a pseudo-scientific theory, divine guidance, individual conscience (however strongly reinforced by some oath of office) or indeed a jurisprudential dogma. No matter how benign the recipient, the surrender of democratic controls is always a life-and-death issue, for the ultimate stake is freedom.²⁶

The common law in general (with the exception of the criminal law) should not be seen as "regulative" in the sense which has been specified.

21 *Supra* n 9.

22 See Jaffe, *English and American Judges as Lawmakers* (1969).

23 For a cautious assessment and some reservations, see Berger, *Government by Judiciary* (1977).

24 Devlin, "Judges, Government and Politics" (1978) 41 MLR 501.

25 On the political significance of this principle, see Wilberforce, "The Need for a Constitution in the United Kingdom" (1979) 14 Israel LR 269, 271.

26 See Devlin, *supra* n 9 at 16.

The role for which the courts, and the law which they have made, are particularly well equipped is that of resolving, or of helping to resolve, spontaneous conflict by means of even-handed and authoritative adjudication.

Within any society, however it may be governed, disputes will occur which are inherently so serious that they tend to escalate and to prove disruptive. Disputes feed upon and in turn generate a sense of injustice in the disputants which, unless it is assuaged, can lead to unilateral "remedial" action, to violence and ultimately to bloodshed.²⁷

Man's earliest response to serious conflict was resort to self-help which led to feud. The deficiencies of feud as an instrument of pacification are overwhelming. Its methods are primitive and barbaric; worse still, it tends to perpetuate and aggravate conflict until one side is wholly vanquished. Dispute settlement through trial by battle, a limited form of feud,²⁸ was a great advance, for it helped contain the conflict.

Further and more decisive progress towards a civilized society was made when conflict began to be resolved by placing authority to arbitrate and, if necessary, to enforce, in the hands of a third, independent person. Shapiro has aptly called this solution the "triadic model":

"The basic socio-logic of courts, the reason courts appear in almost every society, is the logic of the triad. Cutting across the various cultures of the world, there is a basic common sense appeal to the notion that if two persons find themselves in conflict, and they cannot resolve it themselves, they should resort to a third person."²⁹

At the municipal, and even to some extent at the international level, the triadic model has been translated into elaborate judicial systems and accompanying formal procedures. Conflict solution is the principal task of these systems.³⁰ The more effectively a judicial system alleviates feelings of injustice occasioned by disputes, the greater is the social service of effective dispute solution and pacification rendered by the system.³¹

In common law countries, a fundamental feature of judicial dispute settlement is the adversary character of both civil and criminal procedures. One reason for these procedures is the desire to allow the judge to remain uninvolved in the conflict and thus to safeguard his impartiality. Another is that it allows the parties a kind of ritualized continuation of the conflict in the court-room, a process intended to merge into its ultimate sublimation, the authoritative judicial settlement. The "inquisitorial" or "investigatory" system of procedure, which prevails in civil law systems, seems based upon the principle that the parties must leave their conflict, or at least its active pursuit, behind at the court-room door, and must, more or less passively, submit to the judge's investigation, diagnosis and compulsory cure of their conflict. This method may be faster and more economical, but the common law system

27 See Hailsham, *The Door Wherein I went* (1975) 100ff.

28 Brunner, *Deutsche Rechtsgeschichte* (3rd edn 1961) vol 1, 265.

29 Shapiro, "Judicial Independence: The English Experience" (1977) 55 *North Carolina LR* 577.

30 For an analysis of the changing role of litigation, see Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harv LR* 1281.

31 Devlin, *supra* n 9 at 3.

of procedure seems based upon a number of sound assumptions: that active judicial involvement in the conflict is incompatible with impartiality, that the ritual of conflict is preferable to its raw reality, that parties in conflict should accept and observe defined rules of fair play, that the aim of conflict should be its fair and rational settlement rather than its mindless perpetuation, and that the parties' participation helps rather than hinders in the finding of a satisfactory solution.

Not all judicial procedures, even in the area of the private law, involve dispute settlement. Judges occasionally give advisory opinions.³² Some important jurisdictions are not concerned with actual disputes.³³ Such exceptions notwithstanding, common lawyers regard dispute settlement by litigious means as the essence of the judicial function.³⁴

The growth of the common law is the response of the courts to the need for coherence and consistency in their dispute-solving activities. Without these qualities there can be no fairness, no justice. The greater part of the substantive common law, particularly the private law of common law origin, consists, not of "regulative" rules of conduct addressed to the public at large, but of precedents and precedential rules which govern the way in which courts decide lawsuits. Many of the rules and principles of the common law show this procedural origin and orientation very clearly: although their effect may be substantive, they are frequently formulated in terms derived from their usual procedural setting. For example, the principle of non est factum (a rule which in effect nullifies a signature to a document which was based upon a fraud-induced fundamental mistake³⁵) is commonly described as a "plea" or a "defence", not as a rule which invalidates transactions. Rules with mixed substantive and procedural content, like the parol evidence rule, tend to receive attention in both substantive³⁶ and procedural³⁷ treatises. An authoritative demarcation becomes necessary only in exceptional situations.³⁸

To the extent that the common law is an instrument for the consistent, fair and authoritative settlement of disputes, it is very unlike regulative law. Regulative law unceasingly demands obedience: in the folklore of the common law, "statutes are always speaking".³⁹ By contrast, the adjudicatory rules and precedents of the common law lie silent in the reports. There is some truth in Bentham's claim that the common law is addressed to nobody. It is only when actual conflict makes it necessary to resort to law that "adjudication law" performs its function, usually through the mediation of the legal profession. This type of law is best

32 See, eg, Arbitration Act 1950 (UK) s 21 and comment in *Russell on Arbitration* (18th edn 1970) 243ff. As to the legal standing of such opinions, see *Re Knight & Tabernacle Permanent Building Society* [1892] 2 QB 613.

33 An example is the power to grant probate and letters of administration in non-contentious cases — see *Halsbury's Laws of England* (4th edn 1976) vol 17, 780.

34 "In this country judicial duties ... do not arise until there is a dispute." — *Sutcliffe v Thackrah* [1974] AC 727, 735 per Lord Reid.

35 See *Saunders v Anglia Building Society* [1971] AC 1004.

36 *Chitty on Contract* (24th edn 1977) vol 1, 735-766.

37 *Cross on Evidence* (2nd Aust edn 1979) 21.35-21.44.

38 Such a rule might need to be characterized as procedural or substantive for purposes of the conflict of laws, in order to determine the applicable law — see *Dicey and Morris on the Conflict of Laws* (10th edn 1980) vol 2, 1175ff.

39 See Cross, supra n 14 at 45.

described as "arbitral law". Its aim is not to impose specified forms of conduct by threats of sanctions in the event of disobedience, but to provide fair solutions for anticipated spontaneous conflict. As Rheinstein has said: "the [common] law is thought of less as a body of norms of social conduct than as a set of rules of decision for the relatively few disputes that cannot be settled extrajudicially."⁴⁰

The arbitral rules of the common law are not just important to judges. Their true arbitral function unfolds even more usefully outside the sphere of litigation. These rules enable disputants to predict, usually with the help of their lawyers, how a court would decide their dispute. If such a prediction can be made with reasonable confidence (and if the facts are not in dispute), it will be a strong inducement to the parties to settle their conflict upon the basis provided by the law, and thus to save themselves the trauma and the cost of litigation. Thus, arbitral law promotes social harmony. Its very existence in areas such as contract, tort, property or succession prevents conflict, for parties will often choose to act in accordance with the available arbitral rules rather than quarrel.⁴¹

Unlike regulative law, arbitral law does not seek to intrude into relationships which are being managed without friction and conflict; it only offers its services once conflict has arisen. People who avoid disputes are free to ignore arbitral law without suffering penalties or other legal disadvantages. For example, there is a rule obliging the debtor to make his payment at the creditor's residence or place of business.⁴² This "duty" becomes relevant only when debtor and creditor quarrel about the place of payment. When that is agreed (whether it be the creditor's residence or place of business or some other venue), the legal rule remains irrelevant. "Arbitral law" seems related to what, in Civilian terminology, is called "*ius dispositivum*", ie law which can be abrogated by agreement (distinguished from "*ius cogens*", law which cannot be so abrogated). However, the concepts are not entirely co-extensive: the rule that a promise not supported by consideration is unenforceable cannot be abrogated by agreement, yet it seems arbitral in character, for the law is indifferent to whether such promises are performed voluntarily.

Although arbitral law is often, like regulative law, couched in terms of conduct, of rights and duties, these are not the primary "control mechanisms": they are only secondary rationalizations, the primary element being dispute solution as such. To couch these solutions in "rights and duties" terms has proved a useful way of making future dispute solution more certain and predictable, and that is their only significant function. Having explained, in a famous lecture, that reported cases are useful as prophecies of future judicial action, Holmes continued:

40 "Legal Systems: Comparative Law and Legal Systems" in *International Encyclopaedia of the Social Sciences* (1968) vol 9, 204, 209.

41 Diplock, *The Courts as Legislators* (*The Holdsworth Club, Presidential Address*, 1965) 16f.

42 Chitty, *supra* n 36 at 1297.

"It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into text-books . . . The primary rights and duties with which jurisprudence busies itself are nothing but prophecies . . . a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court, -- and so of a legal right."⁴³

Holmes sought to apply this analysis to common law and statute law alike and to contrast law as such with morals, a system based upon primary rights and duties. However, it seems even more apt to contrast common law with statute law, or, more exactly, arbitral law with regulative law in this fashion.

In the area of private law, arbitral law tends to focus upon the conflict and its immediate "social environment". It provides an answer to the question: what is fair and just as between the immediate parties to particular types of social conflict? It usually avoids resort to grand visions or designs for society as a whole. This modest arbitral function of the common law might once have been immune from political controversy and intervention. In recent times, however, it has become political, probably for the following reasons:

- (a) How far society should be legally regulated and how far, on the other hand, it should merely be governed by the settling of spontaneous conflict, are intensely political questions.
- (b) The concept of arbitral justice as the judges administer it can be seen as based upon a tacit assumption of the inherent legitimacy of the status quo. More than any other person who works constructively within the status quo, the judge can be depicted as its active defender and as being politically committed to it. His arbitral activities provide society with an important social lubricant in the form of conflict settlement, thus lessening the likelihood of revolutionary or even of less violent forms of social change. It is this, more than their alleged middle or upper class background, which makes judges unpopular with avid social reformers and vulnerable to politically based criticism.⁴⁴

The legal structure of a regulative norm is not difficult to understand. In essence it consists of the following components: (a) a descriptive, generalized specification of certain conduct, (b) a legal "command", either seeking to make the conduct mandatory or forbidding it, and (c) a specification of the sanction intended to come into effect in the event of disobedience. One of the important abortion decisions of the US Supreme Court, *Roe v Wade*⁴⁵ (a decision which presents a particularly vivid contrast between arbitral and regulative law) may serve to provide a convenient, if random, example. Section 1191 of the Texas Penal Code (which was declared unconstitutional) read in part:

"If any person . . . shall use towards [a pregnant woman] any violence or means whatever, externaly or internally applied, and thereby procure an abortion, he shall be confined to the penitentiary not less than two nor more than five years . . ."⁴⁶

43 Holmes, "The Path of the Law" (1897) 10 Harv LR 457, 458.

44 See Wilberforce, "Educating the Judges" (1969) 10 JSPTL 254.

45 410 US 113 (1973).

46 See *ibid* 117.

It will be noted that only elements (a) and (c) are expressed in the section, but (b) (the command) is plainly implied.

It might be argued that regulative norms contain yet a further element: the interest or interests for the protection of which they have been enacted. One has come to think of legal norms as devices by which society achieves the adjustment of conflicting interests. That, at any rate, is a widely held view in Continental legal systems, for the German school of interest jurisprudence has gained wide, if not universal acceptance. That school teaches, in the words of one of its most prominent propounders:

“every legal rule delimits contradictory interests; it decides a conflict of interests. The decision is based on an evaluation of the interests involved.”⁴⁷

In s 1191 of the Texas Penal Code, for example, one might find a reference to the interest to be protected in the word “abortion” which involves the killing of the foetus and thus could be said to import pre-natal life as the interest to be protected. Such an argument would be a complete *non sequitur*.

It is reasonable to assume that s 1191 was enacted after due consideration of the interests involved in the abortion problem: the woman’s desire not to have to bear the baby, the reasons which might have prompted her to adopt such an attitude, and the conflicting interest (perhaps vested in the community, perhaps in the foetus) in the preservation of pre-natal human life. In a sense, the section delimits such contradictory interests (as the school of interest jurisprudence would insist), but the interests, their evaluation, balancing and desired adjustment, were no more than the reasons or motives for the enactment of the provision. The mere fact that s 1191 in fact protects pre-natal life does not necessarily mean that pre-natal life was the interest meant to be protected. As Mr Justice Blackmun pointed out in *Roe v Wade*,⁴⁸ there was scholarly, if not historical or judicial, support for the view that the only interest which abortion laws were intended to protect was the mother’s health. Such a view could not have been put forward plausibly if the interest in the protection of pre-natal life had been an integral component of the statutory provision itself.

Regulative law has a scope and an operation which is largely independent of the underlying interest constellation and evaluation which may once have been the reason for its enactment. Some corrective may be provided by purposive interpretation (interpretation guided by the *ratio legis*) to the extent that such interpretation is legitimate in the particular jurisdiction.⁴⁹ However, such interpretation is limited to the resolution of ambiguities. Where the regulative terms are clear, they will operate in accordance with their own regulative logic. To that extent regulative law will exercise its restrictive effect even if it was never supported by a worthwhile interest or if such an interest has vanished after its enactment.

An arbitral norm is not a rule which seeks to prescribe or proscribe conduct in any direct way. Rather, it is a rule of conflict solution and interest adjustment: the conflicting interests, their evaluation, and their

47 Heck, “The Formation of Concepts” in Schoch (ed & tr), *The Jurisprudence of Interests* (1948) 101, 134.

48 410 US 113, 151 (1973).

49 See Cross, *supra* n 14 at 9.

adjustment by some means are integral components of the norm itself. Almost any of the common law rules of the private law could be used to demonstrate this essential structure of arbitral law: the conflicting interests are either expressly or impliedly embodied in the rules and precedents (they become “distinguishable” when the interest constellation in a new case is not the same as it was in the precedent case), and the means of adjustment, the operative arbitral component of the norm, is either a prescribed change in the parties’ legal relations, or the provision of a remedy, often in the form of the ubiquitous common law money damages. One encounters arbitral law in the sphere of private law, but also in other areas; its operation can be observed particularly clearly in the Constitutional Law of countries with an effective, constitutionally entrenched bill of rights. *Roe v Wade*⁵⁰ may serve for purposes of exemplification.

A pregnant single woman brought a class action against the State of Texas, seeking a declaration that s 1191 of the Texas Penal Code⁵¹ and associated provisions were unconstitutional, and that she was free to have her pregnancy terminated with the help of expert medical procedures. In support she relied upon her right to privacy, recognized by earlier decisions of the Court as being implicit in the US Bill of Rights and as shielding from state interference important aspects of every person’s private life in such matters as marriage, procreation, contraception, family relationships, child rearing and education.⁵² The State of Texas argued that the foetus had a right to life which prevailed absolutely over any privacy interest the pregnant woman might possess: the foetus, so the argument continued, was a “person” within the Fourteenth Amendment and therefore possessed a right not to be deprived of life without due process of law. The Court rejected the argument: the Fourteenth Amendment was not intended to have any pre-natal application; personhood presupposes live birth.⁵³ Thus the Court felt free to hold that the woman’s right to privacy “is broad enough to encompass [her] decision whether or not to terminate her pregnancy”.⁵⁴ The Court rejected the plaintiff’s submission that her right to privacy was absolute in the sense that she alone was entitled to decide when, how and for what reason to terminate her pregnancy,⁵⁵ and instead regarded the right as qualified: “a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.”⁵⁶

Thus the stage was set: there were conflicting interests and the Court’s task was to work out the appropriate reconciliation or adjustment. The first step in this process was to ascertain the importance or weight to be attributed to the various conflicting interests. The right to privacy, being a constitutionally endorsed and protected interest, was “fundamental”,

50 410 US 113 (1973).

51 *Supra* at n 46.

52 See the precedents referred to by Mr Justice Blackmun in *Roe v Wade* 410 US 113, 152f (1973).

53 The argument would have succeeded if “person” in the Fourteenth Amendment had been interpreted as including the foetus. As Mr Justice Blackmun stated: “If this suggestion of personhood is established, the [plaintiff’s] case, of course, collapses, for the foetus’ right to life would then be guaranteed specifically by the Amendment.” — *ibid* 156f.

54 *Ibid* 153.

55 *Ibid* 153f.

56 *Ibid* 154.

attracting the principle that it could only be legislatively restricted by a "compelling state interest" and that such legislation had to be drawn narrowly to do no more than protect the particular state interest.⁵⁷

One such compelling interest was the State's interest in protecting the pregnant woman's health. However, that interest could not justify restraints being imposed upon the woman's freedom to seek a medically expert abortion during the first trimester of her pregnancy, for statistics showed that the health risks to her from such an abortion were less than those which flow from normal childbirth. However, after the first trimester the health risk from abortion becomes greater and the health interest therefore becomes "compelling". The Court adjusted these interests by limiting and defining the legislative competence of the State of Texas as follows:

"For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."⁵⁸

Another legitimate interest was the State's interest in potential life. The determination of the weight to be accorded to this interest and of the point at which it becomes "compelling" proved difficult for it involved historical, philosophical, moral, theological, medical and scientific considerations. The Court found the question "when does life begin?" surrounded by great uncertainty in all these areas and felt thus impelled to give considerable weight to the traditional legal approach, viz to make legal recognition of personhood for the purpose of vesting legal rights dependent upon live birth.⁵⁹ In view of the many conflicting views which bore upon the subject the Court found the greatest "logical and biological justification" in support of the view that "viability" ("the capability of meaningful life outside the mother's womb"⁶⁰) represented the "compelling point" at which the state interest in the preservation of pre-natal life became capable of overriding the woman's privacy interest. This led the Court to the following adjustment of the conflicting interests:

"For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."⁶¹

The ratio decidendi of *Roe v Wade* (the legal norm which the decision has added to the body of American Constitutional Law) is not a regulative norm. It is an arbitral norm, for it specifies both the legitimacy and the weight to be accorded to certain conflicting interests and then prescribes the way in which these interests are to be adjusted, viz by definition and imposition of limitations upon the legislative powers of the member States of the Union. The conflicting interests (and the

57 Ibid 155.

58 Ibid 164.

59 "the law has been reluctant to endorse any theory that life, as we recognise it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth." — ibid 161.

60 Ibid 163.

61 Ibid 164f.

need for their adjustment) are not just the underlying reasons for the norm, they are its fundamental constituent parts. This makes their continued existence in the form perceived by the Court a precondition of the continuing effect and operation of the decision as a precedent. Two examples may serve to illustrate this important characteristic of the arbitral norms of judge-made law.

If the medical abortion procedure from the end of the first trimester to the point of viability were to be improved and to become safer than actual birth, the State's interest in the mother's health would cease to be "compelling" during that period and the pregnant woman's right to make her own decision about abortion without interference by the State would expand accordingly. The nature of the State's interest having materially changed, the ratio in *Roe v Wade* would cease to be binding *pro tanto*.

The Court defined "viable" as "potentially able to live outside the mother's womb, albeit with artificial aid".⁶² The state of medical technology in 1973 was such that the foetus reached viability at some point between the 24th and the 28th weeks. It seems likely that future procedures will make the foetus viable even earlier. Should this occur, the compelling point for the State's interest in the protection of pre-natal life will advance with it — again the norm in *Roe v Wade* will undergo a significant modification.

Regulative law and arbitral law differ in the impact they have upon the freedom of action enjoyed by members of society. By definition, regulative law has a direct restrictive *de jure* impact upon those to whom it is addressed. It directly outlaws some types of conduct and renders others compulsory. A wholly regulated society may be a just society, but it could not be described as free. Democratic legislatures possess the necessary political mandate to restrict freedom by means of regulative law, but judges, not having been democratically elected, lack such a mandate. It seems that judges view statute law as generally regulative and freedom-restricting, and that they feel under a strong inhibition when they are invited to expand statutory provisions by analogical application to cases not strictly covered by the relevant statutory terms. Even in jurisdictions in which judges are committed by statutory fiat to fair, large, liberal and purpose-oriented statutory interpretation,⁶³ analogical extension of statutes has not taken hold.⁶⁴

62 Ibid 160.

63 S 11 of the Interpretation Act, RSC 1970 (Canada) reads as follows: "Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." There are similar provisions in New Zealand (Acts Interpretation Act 1924 s 5j) and in South Australia (Acts Interpretation Act 1915-1975 s 22).

The Australian Commonwealth Parliament has recently amended the Acts Interpretation Act 1901 to require that "a construction that would promote the purpose or object underlying the Act . . . shall be preferred to a construction that would not promote that purpose or object." — Acts Interpretation Act 1901 s 15AA. To a lawyer in the civil law tradition this may do no more than state the obvious. However, it runs counter to common law traditions; in the words of one of Australia's leading authorities in Constitutional Law: "such a provision is manifestly an attempt to tell the judiciary how to perform part of the judicial function. In our federation, under our version of the separation of powers, this is a matter beyond the reach of Parliament." — Howard, "Tax Laws and the Judiciary" *The Age*, 1.6.1981.

64 Burrows, "The Cardinal Rule of Statutory Interpretation in New Zealand" (1969) 3 NZULR 253.

Like all law, arbitral law has its restrictive impact upon the freedom of individuals and of groups. However, arbitral law always liberates to the same extent to which it restrains. In disputes requiring the arbitral intervention of the courts one person's freedoms or interests have come into conflict with those of another. Were there no arbitral machinery, the interests of the stronger would prevail: might would be right. The arbitral function of the law is to restore or create a fair and proper balance between conflicting freedoms, eg A's freedom to be left alone and B's freedom to invade A's interests. In such a situation the judicial act in limiting B's freedom restores or broadens A's so that *the sum total of human freedoms is not diminished*. B should not expect his freedom to invade A's interests to be vindicated beyond the point where a fair and just balance is struck. A demand for freedom beyond this point becomes a plea for injustice and oppression.

This relationship between arbitral law and freedom defuses the otherwise difficult problems of legitimacy which beset judicial law-making. Appointment by a democratically elected government on terms which safeguard judicial independence and impartiality legitimates sufficiently the main judicial function, viz the arbitral adjudication of disputes. If arbitral law is a necessary or at least a useful supportive adjunct to that function, then its making can be seen as partaking of the legitimacy of the adjudicative function of the courts.

There may be good reasons why judges should refuse to extend regulative norms by analogy. On the other hand, to apply a similar limitation to arbitral norms would make no sense at all. To deny that a novel constellation of conflicting interests can be dealt with in the same way as is a closely similar constellation for which an arbitral rule already exists means placing an embargo upon the one interest adjustment most likely to accord with justice. It is because judges have perceived the essentially arbitral character of most of the common law that they have treated the analogical application of common law rules and precedents as so inherently appropriate.⁶⁵

On the other hand, common law courts, at least outside the United States,⁶⁶ have yet to learn that statutory provisions are sometimes arbitral in character and lend themselves to analogical extension just as readily as common law rules and precedents. In view of the inherent appropriateness of analogy to arbitral law, it is not surprising that it became a firmly established judicial technique in the application and elaboration of the extensive collections of statutory arbitral law to be found in the great European codes of the private law.⁶⁷ It was from there that the technique extended to ordinary statutes.⁶⁸

3 An Historical Justification of Judicial Law-making: Practical Necessity

The distinction between regulative and arbitral law is of no great significance to an argument intended to provide an historical justification

65 See *Mirehouse v Rennell* (1832) 8 Bingham 490, 515f per Parke B.

66 The analogical application of the provisions of the Uniform Commercial Code is prescribed by s 1-104 of the Uniform Commercial Code — see 15A *American Jurisprudence* 2d, Commercial Code, s 14.

67 Zweigert and Kötz, "Statutory Interpretation — Civilian Style" (1970) 44 *Tulane Law Review* 704.

68 "traditional civil law jurisprudence has focused, mainly, if not exclusively, on the codes, and all civilian methodology including legal interpretation is, basically, code methodology." — *ibid* 707.

for the growth of the judge-made common law. There is a powerful principle of political justification which extends to both types of law: practical necessity. The common law can be said to have evolved under the compulsion of jurisdiction-based necessity. This view should commend itself to present-day lawyers who have come to think of court jurisdiction in terms of the duty to decide disputes by application of a given and circumscribed body of substantive law. Defined in such terms, the dilemma of the early common law courts was that they were given jurisdiction over a wide range of disputes but were not given, at the same time, a sufficiently elaborate body of substantive law for their resolution. It would seem that, not able to refuse to adjudicate for lack of law, they faced a stark choice: either to relegate every case to the unfettered discretion of the individual judge or to create, by their own efforts, a body of substantive law to govern their adjudications. If they saw their mandate as being to do justice, they had to reject the former alternative ("palm-tree justice" with all its unbearable inconsistencies), and were then left with the gradual creation of substantive law as the only real possibility. The account just given could be criticized as being simplistic. It must be fortified against historical criticism in three respects.

First, there were many bodies of local customary law even before the Conquest which the King's judges could, in theory, have been content simply to apply. However, if Pollock and Maitland are to be believed, these customs were primitive and scattered and not sufficient to serve the needs of judges whose mandate was to develop a unified, centralist approach to law. Thus, it was the custom of the King's Court as developed by the judges which prevailed over local customs.⁶⁹

Secondly, it must be admitted that the historical origins of the jurisdiction of common law courts are very complex and to some extent beyond historical reconstruction. When litigation was commenced by a royal writ — an order requesting the sheriff to secure attendance of the defendant in court and authorizing the court to hear the case — it appears that the court's jurisdiction was created ad hoc by the writ and thus by the direct authority of the King.⁷⁰ However, this was not an exclusive method: in many cases proceedings could be commenced by bill,⁷¹ for which another jurisdictional foundation must have existed. Moreover, the royal courts tended not to be content with the scope of jurisdiction as first given to them and expanded it by allowing subtle and evasive procedural devices.⁷² The resulting jurisdiction was jurisdiction usurped rather than granted, although one might regard it as legitimated by later royal acquiescence.

Nowadays the jurisdiction of common law courts has statutory origins, but parliaments often remind us of its mysterious beginnings by invoking

69 Pollock & Maitland, *The History of English Law* (2nd edn 1911) vol 1, 104ff.

70 Milsom, *Historical Foundations of the Common Law* (2nd edn 1981) 33; Plucknett, *A Concise History of the Common Law* (5th edn 1956) 408.

71 Plucknett, *supra* n 70 at 386f, 640f.

72 See, eg, the use of the Bill of Middlesex by the Court of King's Bench which enabled it to entertain causes normally reserved to the Court of Common Pleas— Plucknett, *supra* n 70 at 386f.

historical criteria when granting jurisdiction by statute.⁷³ Despite these and other qualifications which detailed historical research would undoubtedly render necessary, it remains a valid generalization that the jurisdictions of the King's Courts, which made the growth of a body of judge-made law inevitable, were granted ultimately upon the King's authority.

Thirdly, the suggestion that a body of substantive law must accompany a grant of jurisdiction over disputes could be criticised on the ground that it views the history of the common law through twentieth century spectacles. A modern lawyer may be apt to overlook the fact that disputes can be decided by judges without the aid of substantive law, eg after the manner of Judge Bridlegoose by "a good throw of the judiciary, tribunian, and praetorial dice". In our modern view, the early common law method of trial by various types of ordeal⁷⁴ similarly invoked chance, just as assuredly as it was intended to invoke the verdict of divine justice. Under the older forms of action such as debt or trespass *vi et armis* (which were decided by wager of law or some form of ordeal), plaintiffs had to formulate their claims in specified ways to obtain writs at all or to have them upheld in court. To that extent there was law, although it was more procedural than substantive. As for defendants, all they were allowed to do was deny the claim generally, using its exact terms to phrase their denial. The rest, in Milsom's words, was "put to an oracle beyond the need of human guidance".⁷⁵ The judge was not concerned with the actual facts, he did not inquire into the merits of the parties' respective positions, nor did he have any occasion to pronounce rules of substantive law.

With newer, more flexible forms of action, notably trespass on the case, trial by jury was introduced. Unlike divine justice as invoked by judges who administered ordeals, juries were palpably in need of guidance and increasingly were given it (1) by a body of rules (the rules of counting and pleading) which determined how issues of fact had to be formulated so that juries could decide them, and (2) by more direct instructions which judges issued to juries. Such rules had a strongly procedural orientation and allowed substantive common law to grow only "interstitially".⁷⁶ It was only in the nineteenth century, when the old procedure was swept away by great reforms, that the substantive common law was able to unfold, free from the fetters of the forms of action.

In a sense, the history of the common law is a history of ever-growing judicial concern with the actual substantive merits of the concrete dispute between the parties, ie with the detailed facts. Milsom has given the most informative account to date of this fascinating interaction between

73 Eg, s 17 of the South Australian Supreme Court Act 1935-1978 vests in the Supreme Court of South Australia, inter alia, the like jurisdiction as was formerly exercised in England by the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer and the courts created by Commissions of Assize.

74 Plucknett, *supra* n 70 at 118ff.

75 *Supra* n 70 at 41.

76 "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms." — Main, *Early Law and Custom* (1883) 389.

procedure and substantive law.⁷⁷ The need for substantive rules of law grew in exact proportion to that judicial concern. One might have thought both to have become total with the completion of the great reforms of the nineteenth century. It seems, however, that the obsolescence of jury trial in civil cases in the present century has added yet another dimension to the story.⁷⁸

The law reform agencies established in common law jurisdictions in the last two decades⁷⁹ were intended to serve the cause of reform, renewal and legal progress generally,⁸⁰ and there can be no doubt that, to some extent, they have fulfilled these expectations. The early advocates and promoters of these bodies entertained the hope that, in the wake of their creation, all lawyers would become more conscious of the need for legal change.⁸¹ It was not generally expected that these new agencies would also serve to inhibit legal change in some respects; yet that has been their impact upon law-making by judges. Although some judges, led by the indefatigable Lord Denning,⁸² believed that vigorous judicial development of the law is desirable, the majority acknowledge that litigation provides too narrow a base from which to promote systematic and well-informed legal development. Accordingly they tend to decline invitations by counsel to take bold new initiatives, and defer to law reform agencies and parliaments instead.⁸³

This new judicial diffidence implies that since the creation of permanent law reform machinery, "practical necessity" as a principle of political justification for judicial law-making has been a spent force. For the reasons which have been explained above,⁸⁴ one should not quarrel with such a view when it is applied to criminal law or to other forms of regulative law. However, it would be unfortunate if the continued vigour of judicially created arbitral law were to be impaired by similar considerations. Even where law reform agencies have a comprehensive mandate for law reform⁸⁵ their actual capacity for effective action is severely limited by the inadequacy of their resources,⁸⁶ by the time-

77 Milsom, *supra* n 70 at 37ff.

78 See the analysis of the impact of this factor upon the substantive law in *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743.

79 *Supra* n 4.

80 See Sawyer, "The Legal Theory of Law Reform" (1970) 20 U Toronto LJ 183.

81 "The uncovenanted blessing that has followed the establishment of the [English and Scottish Law] Commissions is their indirect effect upon the whole climate of legal thinking" — Scarman, *supra* n 5 at 22f.

82 For an autobiographical account of Lord Denning's efforts at judicial reform, see Denning, *The Discipline of Law* (1979).

83 In England, this outlook manifested itself shortly after the creation of the Law Commission (1965) — see the *Suisse Atlantique* case [1967] AC 361, particularly observations by Lord Reid (at 405f). The same judicial attitude has also become firmly established in Australia — see, eg, *SGIC v Trigwell* (1979) 26 ALR 67; *The Queen v O'Connor* (1980) 29 ALR 449.

84 *Supra*, at n 20.

85 The English and Scottish Law Commissions are intended "to keep under review all the law with which they are respectively concerned" — Law Commissions Act 1965 s 3(1). Other law reform agencies have more limited tasks. For example, although the Australian Law Reform Commission has its functions set out in a similarly broad manner in s 6 of the Law Reform Commission Act 1973, it may only undertake such tasks as are referred to it by the Attorney-General — see Kirby, "Reforming the Law" in Tay & Kamenka (eds), *Law-making in Australia* (1980) 39, 48ff.

86 Kirby, *supra* n 85 at 39, 64f.

consuming and arduous nature of the law reform process,⁸⁷ by shortage of parliamentary time,⁸⁸ by political pressures which often lead to even the best reports by law reform agencies being shelved,⁸⁹ and, last but not least, by the legislators' perennial dilemma: the unpredictability of the future circumstances for which their legislation is intended to provide. Acceleration in the rate of change and increased uncertainty in predicting the direction of change make legal planning for the future more and more difficult. The ad hoc decision-making process of the common law may yet prove to be, at least in some respects, the least wasteful and most rational and effective method. English law reformers seem to have come to realize that the kind of large-scale legal planning involved in the codification of whole fields of law is not suited to common law legal traditions, and perhaps quite generally inappropriate in our age of rapid change.⁹⁰

In countries with a federal political structure there may be yet another consideration which makes undue judicial diffidence and deference to the legislature a problematical stance: federal courts may have opportunities for uniform law-making not possessed by federal parliaments.⁹¹ In Australia, for example, the federal parliament has no power to make law in common law areas such as tort or contract, but the High Court of Australia is not similarly limited in its right to hear appeals from lower courts, including State courts. In such a situation the only alternative to judicial law-making is action by the several States; prospects for effective legislation at this level (particularly for uniform legislation) are not always good.

4 Economy of Effort and Expense

The continued judicial creation of arbitral law can be defended simply on the ground that it saves effort and expense. The adjudication of disputes occasions costs, both public and private. Courts must be established and maintained, for which the public pays, recouping only some of this expenditure from litigants. The parties to litigation incur considerable expense in the form of both court and lawyers' fees. Not much of all this expenditure can fairly be debited to judicial law-making, for even if judicial law-making were to cease, the expense would not diminish significantly. Even if the rule of precedent were to be abolished and common law, as we know it, were no longer to emerge from decided cases, adjudication would still be needed and would remain just as costly.

Codification projects in common law countries⁹² have, at least in part, been inspired by a desire for a simpler form of law which would be applied more easily and cheaply than the common law.⁹³ Whatever the

87 See Sutton, *The Pattern of Law Reform in Australia* (1970) 14f.

88 Kerr, "Law Reform in Changing Times" (1980) 96 LQR 515, 531f; Kirby, "Getting Things Done" [1980] Reform 102ff.

89 See Kirby, *supra* n 85 at 68f; *Reforming the Law*, A Report from the Standing Committee on Constitutional and Legal Affairs on the Processing of Law Reform Proposals in Australia; Parliamentary Paper No 90/1979, paras 2.8-2.15.

90 Kerr, *supra* n 88 at 527ff.

91 See Jaffe *supra* n 22 at 69ff.

92 For a survey of earlier attempts at codification, see Pound, "Codification in Anglo-American Law" in Schwartz (ed), *The Code Napoleon and the Common Law World* (1956) 267.

93 *Ibid* 282, 288ff.

virtues of the common law, simplicity is not one of them. Its major premises are often concealed in many pages of judicial reasoning and may reveal themselves only after long and arduous analysis.⁹⁴ A great deal of legal argument may be required to establish the law applicable to the case before the court,⁹⁵ and the cost of the professional time involved is considerable. However, in the practical administration of the law, the worst of common law complexity is frequently ignored: short cuts are often available⁹⁶ and will be resorted to freely. On the other hand, codes tend to create a new range of uncertainties. They attract a wealth of interpretative material with the result that complexity soon returns.⁹⁷ An heroic attempt to quantify the complexities of the common law and the comparable difficulties of English code law (in areas like sale of goods where it has superseded the common law) has been made by Diamond.⁹⁸ His statistical evidence suggests that code law is more accessible to lawyers (and thus indirectly to their clients) than common law, but that the difference is not sufficient to constitute a major argument for codification.

As long as the adversary system and counsel's obligation to make submissions on points of law are retained, codification of the common law, even if it were to resolve all its needless complexities, would be unlikely to save litigants much money. Argument about the code and about material helpful in its interpretation would simply take the place of argument to elucidate the common law. Experience shows that application of legislation, even where it is not encumbered by precedent, often occasions just as much argument as does application of the common law.⁹⁹

It seems to follow that a decision which becomes part of the common law as a precedent does so at little, if any, additional cost to the parties and at no cost to the public purse. This must be compared to the quite considerable expense occasioned by the legislative apparatus of government, including the recently added cost of law commissions. Public administration is even less endowed with a faculty for self-simplification than is the common law. Eternal vigilance is the price to be paid for the prevention of wasteful duplication of functions.

What has been said about the making of law applies even more forcefully to its amendment. Legislation needs to be monitored and

94 "Small wonder that over the centuries voices have been raised in protest against the tons of verbal pulp that must be squeezed to obtain an ounce of pure judicial law." — Diamond, "Codification of the Law of Contract" (1968) 31 MLR 361, 362.

95 Not just the sources of the common law, but also the intricacies of the rule of precedent itself, are complex, particularly in Australia where appeals from state courts can still be taken to the Privy Council. That makes both the High Court of Australia and the Privy Council ultimate appeal courts and rivals in authority. On precedent generally, see Cross, *Precedent in English Law* (3rd edn 1977); for Australia, see Blackshield, "The Abolition of Privy Council Appeals: Judicial Responsibility and The Law for Australia" (1978), and, Crawford, *Australian Courts of Law* (1982).

96 A suitable example would be the common law rules of waiver which are exceedingly complex and which can often be avoided by application of fairly simple rules developed in equity — see *Treitel on Contract* (5th edn 1979) 81-88. See also Denning, supra n 82 at 199ff.

97 See the analysis of this problem by Hahlo, supra n 6 at 245-250.

98 Supra n 94 at 363-372.

99 Lord Evershed has spoken of "the intellectually exacting, but spiritually sterilizing, duty of interpreting the enacted law" — "The Judicial Process in Twentieth Century England" (1961) 61 Col LR 761, 763.

frequently amended, and this also requires a great deal of expensive manpower. The common law has the capacity, not perhaps always sufficiently exploited by the judges, to adapt to changing circumstances without cost to the public purse.¹⁰⁰

There must be no confusion between the sources of the law and its functions. Judges have been the originators of much of the criminal law in England and that has already been characterized as regulative.¹⁰¹ The great European codifications of the private law, notably the Code Napoleon and the German Civil Code (which consist largely of provisions with arbitral functions) show that arbitral law is not necessarily judicial in origin. However, in any inquiry into the respective capacities of legislators and judges to make fair and effective arbitral law, arguments based upon economy of effort assume a special dimension.

Arbitral law and regulative law manifest their practical relevance and their effectiveness in different ways. Normally there cannot be any doubt about the practical impact of regulative law, at least as long as the conduct which is to be modified is not just imaginary and as long as the particular law is obeyed, at least by some. Regulative law is at its most effectual when occasion for its application by court action no longer arises: the conduct at which it was aimed has been successfully modified and the law continues merely as a prop to prevent relapses.

An arbitral norm is of practical relevance only (1) if actual disputes of the kind envisaged by the norm in fact occur, and (2) if at least one of the parties insists that the dispute be settled by legal action or otherwise in accordance with the norm. If an arbitral norm fails to encounter these conditions, the law-maker responsible for it has been "beating the air". Judicial arbitral law only emerges from actual disputes and the occurrence of these is some indication that similar disputes are likely to arise again. Parliamentary conjecture as to the nature, likelihood and frequency of future disputes may well go wrong, particularly when it occurs on the large scale of a codification project. The result may be legal clutter vainly waiting for disputes which fail to eventuate,¹⁰² or which do arise but are almost invariably settled in accordance with standards established by tradition or personal choice and independently of the law.¹⁰³ Conversely, many disputes are bound to arise which were not, and perhaps could not, be anticipated, and legislative arbitral law may fail to provide for them.¹⁰⁴ Judges have the capacity to deal with

100 Precedents can be distinguished on the ground that relevant commercial practices or other social circumstances have changed — see *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535.

101 *Supra* at nn 19-20.

102 Suitable examples may be paras 961-964 of the German Civil Code which deal with property rights in swarms of bees, the owner's right of pursuit and the right of strangers to acquire ownerless swarms. The BGB-RGRK (one of the leading, practice-oriented commentaries) refers, in the text devoted to these provisions, to only one reported decision (RGJW 1939, 288), and that decision deals, not with property rights but with questions of tortious liability for personal injury and damage done by a swarm of bees — *Reichsgerichtsräte Kommentar* (1959) vol 3, 532-534.

103 A suitable example may be the original version of para 1354 of the German Civil Code, abrogated in 1953: "The right to decide in all matters affecting the common conjugal life belongs to the husband" — Wang (tr), *The German Civil Code* (1907) 301.

104 One of the more spectacular shortcomings of the German Civil Code was the inadequacy of its title concerned with the contract of employment which consisted of a mere twenty short provisions — paras 611-630 — see *ibid* 132-137.

such disputes on an ad hoc basis, which provides standards both for the actual dispute and for the future: invoking the assistance of the legislature whenever a novel dispute calls for adjudication is plainly impossible.

All these considerations lend support to the view that the making of arbitral law is best left to the judges. They certainly weigh heavily against suggestions for the large-scale codification of areas of arbitral law which are governed at present by common law rules and principles. The difficulties experienced by the Law Commission seem to confirm Hahlo's view that "the game of trying to codify the common law is not worth the candle".¹⁰⁵

5 Common Law and Statute Law: Collective Freedom; the Freedom of the Individual

In retrospect, some of the arguments in defence of the common law, which were advanced by early apologists such as Fortescue or Coke, are unconvincing, if not outright farcical.¹⁰⁶ However, their champion argument has proved enduring: the common law, so they claimed, protected the subject from tyrannical and oppressive rule.¹⁰⁷ They contrasted this alleged virtue of their beloved and, in their day, still parochial legal system with that unpardonable maxim of the civil law which made the Prince's will the supreme source of law.¹⁰⁸ It has remained an article of faith with many common lawyers to this day that the legal profession and the judges, armed with the common law, will fearlessly stand between the State and the subject and protect the subject from oppression.¹⁰⁹ According to an influential school of thought, these qualities of the common law render the introduction of a constitutionally entrenched bill of rights¹¹⁰ inappropriate and unnecessary.¹¹¹

105 Supra n 6 at 30.

106 See, eg, Coke's attempt to establish that the "common laws of England" are "the most equal and most certain, of greatest antiquity, and least delay, and most beneficial and easy to be observed". He argued: "If the ancient laws of this noble island had not excelled all others . . . some of the several conquerors and governors thereof . . . 'specially the Romans, who (as they justly may) do boast of their civil laws, would . . . have altered or changed the same." — Coke's Reports (Wilson edn 1777) Pt 2, x. The same argument was put forward by Fortescue, *Commendation of the Laws of England* (Grigor tr 1917) 26f.

See also Fortescue's defence of the refusal of the common law to provide for the legitimation of children through the subsequent marriage of their natural parents — *ibid* 64ff.

107 Coke, supra n 106 at viii-ix; Fortescue, supra n 106 at 17f.

108 *Quod principi placuit, legis habet vigorem* — Dig 1, 4, 1, pr; see Fortescue, supra n 106 at 17.

109 For a brief restatement of this traditional view, see Denning, *The Road to Justice* (1955) 10ff. Probably the most influential exponent of this view was Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn 1959) 198-202.

110 For Britain, see Scarman, *English law — The New Dimension* (1974) 81f; Hailsham, *The Dilemma of Democracy* (1978) 222-225; Wilberforce, supra n 25 at 278; for a forceful restatement of the opposing view, see Griffith, "The Political Constitution" (1979) 42 MLR 1. For Australia, see Evans, "Prospects and Problems for an Australian Bill of Rights" (1970-73) 5 *Australian Yearbook of International Law* 1; Kirby, "Human Rights: The Challenge for Law Reform" (1976) 5 *Univ of Tas LR* 103 (also containing a brief outline of the position in Canada).

111 This point of view was an important element in the popular debate surrounding the unsuccessful attempt made by the Australian Government in 1973 to introduce a bill of rights — see, eg, Menzies, "Common Law Protects Individual" *Sydney Morning Herald*, 14.3.1974.

In liberal democratic countries "freedom" is thought to be an important, perhaps the most important, value. If the common law has inherent qualities which protect and promote freedom, it will deserve support and preservation. What could be socially more useful than the preservation of freedom?¹¹²

"Freedom", like its synonym "liberty", is used dispassionately in some legal contexts:¹¹³ but, when coloured by political considerations, it becomes one of the most emotive terms in our vocabulary. One might, remembering Bentham's preference for rational language, be tempted to call it an "impostor term" or a "passion-kindling appellative", and wish for its "de-mystification",¹¹⁴ were it not for the fact that its emotive potential has so often been put to good use in the pursuit of commendable causes. Like most persuasive slogans, it is also frequently invoked in support of dubious and unmeritorious claims, particularly in defence of undeserved privilege.¹¹⁵ Whilst not abandoning one's sympathy for "freedom", any claim made in its name must be approached with all one's critical faculties on the alert. The suggestion that "freedom" will help the common law through its present period of crisis must not be allowed an easy passage.

(a) *The ambiguity of "freedom"*

Arguments about law and freedom are sometimes based upon a simple assumption: the more law is made, the less freedom will remain. If this were true, the case for common, instead of statute law, would be made out. Common law imposes constraints at its characteristically slow pace and only when conflict makes official intervention unavoidable. Statute law knows no such inhibitions, and is in fact being generated at an increasingly hectic pace. Does it follow that freedom is under greater threat from parliaments than it is from judges? If by "freedom" we mean "the freedom of the individual", the argument is dubious indeed, for it is akin to the anarchist's naive belief that, if only the police force were abolished, individual liberty would flourish. The State may be, at least potentially, the worst of all oppressors, but it is not the only one: without the State individual freedom would not fare too well, for oppression and exploitation as between man and man would soon be rampant. Many freedoms need to be suppressed because they menace

112 "Social utility" will be used here to denote any propensity to promote values held in high esteem in society. Thus it is unnecessary to become embroiled in the difficult question whether utilitarianism as a philosophy can accommodate the need to protect human rights. Hart adverted to the problem in "Bentham and the Demystification of the Law" (1973) 36 MLR 2, 12ff. Lord Hailsham has suggested that utilitarianism cannot be so restated as to incorporate "the popular conceptions of justice and right" as manifest in the protection afforded in any decent society to the interests of individuals and of minorities - supra n 110 at 89f. For a more detailed analysis of the problem, see Hart, "Utilitarianism and Natural Rights" (1979) 53 Tulane LR 663.

113 Eg in discussions of the action for false imprisonment - see, eg, *Fleming on Torts* (5th edn 1977) 26-29.

114 Cf Hart, "Bentham and the Demystification of the Law" (1973) 36 MLR 2, 3, 7.

115 For "freedom of contract", see observations by Jaffe, supra n 22 at 86ff; see also Fox, "The Judicial Contribution", in Tay and Kamenka (eds), *Law-making in Australia* (1980) 139, 155f.

other freedoms of greater worth. Most of the offences known to the Criminal Law would make suitable examples.¹¹⁶

The fight against slavery was fought in the name of freedom.¹¹⁷ No cause was ever more deserving of support; no thought is as obnoxious as the institutionalized notion that one man should be allowed total domination over another. In a sense, the institution of slavery involves the relationship between only two persons — the master and his slave. The same kind of relationship may exist between society at large and one man — as in the case of the gaoled convict. The stake, individual liberty, is the same, but the presence of a collective oppressor adds yet another sinister dimension. The public is keenly aware of this, as is shown by the abundance of publicity and sympathy attracted by those thought to have been unjustly convicted and imprisoned.

A group may lose its freedom collectively to one man as in a dictatorship, or to another group as in the domination of a country by a junta. The national dimension is not essential: any human group could find itself in a similar position. The stake in such situations is collective, rather than individual, freedom. Often, the two forms of freedom go hand in hand: when a nation of free men and women is vanquished by a foreign dictator, both freedoms — collective and individual — will be lost. In the converse situation, the loss of collective freedom may increase the freedom of individual members of the collective. Hitler rightly claimed that, if he lost the war, Germany would lose her (collective) freedom; yet loss of that freedom proved a pre-condition to the restoration to her citizens of their individual liberties. It suits dictators to obliterate the distinction between the two freedoms, to convince their people that an aggressive assertion of national independence can compensate for the loss of individual liberty. However, if an appeal to freedom is to make good sense, the distinction must be most carefully observed.

Although it may be anthropomorphic to do so, it seems nonetheless helpful to analyse the relationship between law and society with the same distinction in mind. The reaction of the common law to the activities of trading associations illustrates particularly clearly the potential tension between collective and individual freedom and the dilemma of the courts when they are asked, in the name of freedom, to make a choice.

In the *Mogul Steamship Company Case*¹¹⁸ a number of shipowners were engaged in the profitable trade of carrying tea between Chinese river ports and from Chinese ports to Europe. A majority of these shipowners formed an association and promised to abide by certain rules which restricted the terms upon which each member was allowed to trade with shippers, and had the object (of benefit to all members) of excluding all outsiders from the trade. The rules required that shippers be given a rebate of five per cent, but only on the strictly enforced

116 In cases of "victimless crime" the Criminal Law suppresses freedoms just because they are thought worthless — see Morris and Hawkins, *The Honest Politician's Guide to Crime Control* (1970).

117 No more than two hundred years ago the mention of "freedom" seems to have evoked the thought of slavery before all else in people's minds. *The Encyclopaedia Britannica* of 1771 states that "liberty . . . denotes a state of freedom, in contradistinction to slavery". See also *The Case of James Sommersett* (1772) 20 St Tr 1.

118 [1892] AC 25.

condition that they (the shippers) shipped no cargo with outside lines. Members' shipping agents had, on pain of dismissal, to deal exclusively with members of the association. Members were obliged to co-operate in making certain that a competing vessel was always available in Chinese ports to "shadow" ships belonging to outsiders. Finally, the association made rules which determined rates of freight and divided the market as between members. One outside shipowner, who had been refused admission to the association and had lost all his trade, sought damages against some of the members for alleged conspiracy. He complained that he had been deprived of his freedom to trade. The House of Lords upheld the lawfulness of the activities of the association on the ground that each member was free to compete by lawful means and that, to band together and to compete in unison against outsiders, again by lawful means, could not amount to conspiracy. Lord Halsbury LC summed up his own reaction as follows:

"What is the wrong done? What legal right is interfered with? What coercion of the mind, or will, or of the person is effected? All are free to trade upon what terms they will, and nothing has been done except in rival trading which can be supposed to interfere with the appellant's interests."¹¹⁹

The House was really asked to arbitrate between the collective freedom of the association and the plaintiff's individual freedom to trade which had been all but destroyed by the association. It was implicit in the judgment that the association's rules would have been enforced against individual members.¹²⁰ That too would have been, perhaps even more clearly, a choice in favour of collective and against individual freedom. It remained for statute law to vindicate the individual trader and restore free competition against the collective oppression of trade associations.¹²¹

(b) *The common law and collective freedom*

In view of the potential incompatibility of collective and individual freedom, clear thinking requires that they be strictly separated in any discussion of "law and freedom". The problems which arise when we demand the collective freedom of society or of groups within society from the intrusion of the law will be discussed first. Foreign observers regard the desire for at least some areas of social activity to be free from legal shackles as characteristic of English legal thinking. Fikentscher speaks of a "law-free sphere" ("*der rechtsfreie Raum*"):

"There is a basic assumption in English law that there is a sphere of freedom, untouched by the law . . . By passing laws, parliament removes segments from this sphere and subjects them to legal regulation . . . Decisions by the judges also encroach upon areas of the virginal soil of liberty and subject them to legal regulation within the limits of the rule of precedent . . ."¹²²

There seems to be very little in English legal literature to bear out the learned author's observation;¹²³ indeed, a poet often quoted by lawyers has implied that law, or at least judge-made law, is the creator of

119 *Ibid* 37f.

120 See also *Rawlings v General Trading Co* [1921] 1 KB 635, *Auto-Mart (London), Ltd v Chilton* (1927) 43 TLR 463.

121 For Australia, see the Trade Practices Act 1974 (Cth), particularly Part IV.

122 Fikentscher, *Methoden des Rechts* (1975) vol 2, 64 (tr).

123 Some similar comments appear in Goodhart, "Precedent in English and Continental Law" (1934) 50 *QLR* 40, 50.

freedom.¹²⁴ Fikentscher may have thought of freedom as one and undivided. However, the law is concerned with social interaction more than with isolated acts of individuals; thus, Fikentscher's comments can be related more readily to collective than to individual freedom. At any rate, it is advisable to observe the distinction between the two types of freedom when exploring the implications of the learned author's interesting suggestion.

Where in society does one find areas of human interaction which are free from legal intervention and constraint, and how are conflict solution and interest adjustment in fact achieved in such "law-free spheres" (to use Fikentscher's terms).

(i) *Different kinds of immunity from legal control*

Immunity from the law may be achieved by illegal methods. Organized crime succeeds all too often in establishing an umbrella of bribery, corruption, or even violence and intimidation, under which much illegal and profitable business is conducted. The law is intended and designed to suppress such activities but fails to do so because it is outmanoeuvred. Another kind of immunity from legal process can be achieved when law is intended, but not sufficiently carefully designed, to achieve certain ends. For instance, avoidance schemes drawn up with the help of accountants or lawyers have become very widespread in Australia and have created large-scale and, in a sense, legally unintended freedoms from taxation and from other legal impositions. In such situations, freedom from the law is achieved in a manner which defeats its spirit, though not its letter.

Of greater interest in the context of this paper are those forms of social interaction which enjoy a complete and fully intended immunity from legal control and judicial intervention. There are ready examples in the law of contract. Although parties cannot, in general, oust the jurisdiction of the courts by agreement,¹²⁵ it is nonetheless recognized that they can deprive even a commercial agreement of its enforceability by declaring it binding in honour only, and not in law.¹²⁶ The courts will respect such a clause with the result that the promisee of any promise which forms part of the agreement cannot expect judicial help if the promisor defaults. The same unenforceability will befall agreements when courts deem them insufficiently important to warrant their intervention or consider their intervention otherwise inappropriate. Thus, agreements in the social or domestic sphere are unenforceable.¹²⁷ In

124 "You ask me, why, tho' ill at ease,
 Within this region I subsist,
 Whose spirits falter in the mist,
 And languish for the purple seas.
 It is the land that free men till,
 That sober-suited Freedom chose,
 The land, where girt with friends or foes
 A man may speak the thing he will;
 A land of settled government,
 A land of just and old renown,
 Where Freedom slowly broadens down
 From precedent to precedent . . ."

Tennyson, "You ask me, why".

125 Chitty, *supra* n 36 at 935.

126 *Rose and Frank Co v Crompton Bros Ltd* [1925] AC 445.

127 *Balfour v Balfour* [1919] 2 KB 571.

Australia the courts have adopted the same attitude to agreements between governments concerning the performance of public works,¹²⁸ and to undertakings by governments to assist individuals who have suffered from natural disasters or find themselves in difficulties as a result of government policies.¹²⁹ Finally, there is the traditional view that, unless "tangible and practical" property interests are at stake, the rules of social, sporting, political, scientific, religious, artistic or humanitarian clubs or similar bodies offer no protection to a member who has been expelled from the organisation.¹³⁰ In England this judicial policy has been reversed,¹³¹ and there are indications that the Australian courts may follow suit in due course.¹³² In all these cases, quarrels between the parties can arise and there will be neither a regulative provision to direct them nor any judicial help to guide them in finding a solution.

Even in areas of life which are governed by judge-made arbitral law, considerable need and scope for "self-government" remain. It is one of the most prominent style elements of the common law that its rules, as they arise from cases, tend to be formulated no more broadly than is necessary for the decision of the particular concrete case. Legislation, particularly when it takes the form of codes, inevitably paints with a somewhat broader brush. Thus, the fabric of the common law is bound to have more (and wider) open spaces between rules and precedents than one would expect to find in the fabric of statute law. Such spaces are not legally regulated in the sense that the courts have not as yet provided rules for them, although they would do so if requested by a party to a genuine dispute. As long as neither party is willing or able to go to court, "self-government" is the only course left to the parties. Even where an arbitral, judge-made rule exists, the parties are not forced to resort to it. As explained earlier,¹³³ it is characteristic of arbitral law that it may be ignored if some alternative solution can be found without any of the parties seeking judicial intervention. It is of the essence of regulative law that it does not allow (at least not *de jure*) for such alternatives. It follows that arbitral law restricts collective freedom rather less than does regulative law.

(ii) *Common law and statute law: the problem of intrusiveness*

No comparison of the respective qualities of statute law and common law can be fruitful if it seeks to be all-embracing. There are many types of statute law with which the judge-made common law could never be in competition (eg tax laws or laws which establish public institutions). To sharpen the comparison between the two types of law, one must focus upon such statute law as possesses arbitral qualities similar to those of the common law: such statute law can be found in abundance in European codes of private law.

Is statutory arbitral law inherently more intrusive than the common law? Statutory restatements of the common law in common law

128 *South Australia v The Commonwealth* (1962) 108 CLR 130.

129 *The Administration of the Territory of Papua and New Guinea v Leahy* (1961) 105 CLR 6; *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424.

See also Lücke, "The Intention to Create Legal Relations" (1970) 3 Adel LR 419.

130 See *Cameron v Hogan* (1934) 51 CLR 358.

131 See Chitty, *supra* n 36 at 605.

132 *McKinnon v Grogan* [1974] 1 NSWLR 295.

133 See *supra* at n 42.

countries, such as the Sale of Goods legislation,^{133a} can convey the impression that code law can be just like common law, only clearer, more readily accessible and cheaper to apply. Such suggestions are simplistic. When judicial arbitral law is converted into statute law it becomes more amenable to statutory amendment which may, by imposition of penalties or similar coercive measures, openly turn it into regulative law. However, even if there never is such an amendment, the conversion itself causes arbitral law, perhaps slowly and imperceptibly, to change its essential character. There is a change from loosely ordered, unpolitical adjudication to more tightly ordered, political regulation. These differences are not readily apparent to a casual observer who flicks through the pages of a common law textbook and then compares it with its counterpart in a code jurisdiction. The former will sometimes adopt a rather dogmatic style, thus giving the common law a superficial resemblance to code law.¹³⁴ The latter may soften the rigid arrangement of material frozen into the Code and present a structure based upon the author's own ideas. Comparing them may obscure the differences between the laws with which they deal. The common law judicial tradition still calls for close and direct examination and application of actual precedents rather than simple adoption of textbook statements. Even the best of the textbook literature has not closed the gap between code and common law.

It is the difference between adjudication and regulation which deserves emphasis in the present context. By its very nature, the common law provides minimal regulation through its adjudications. Parliaments, on the other hand, will tend towards regulation, even when they intend merely to make arbitral law. How can they avoid this when they are dominated by political parties and forever influenced by political considerations? Moreover, parliaments or, at any rate, those who prepare legislation for them, tend to be much better informed of the social contexts within which disputes unfold than are judges. Being better informed is an advantage in itself, but it does invite more regulation and thus greater intrusiveness.

The real gulf between the two forms of arbitral law, one which can never be bridged, is marked by the distinction between *actual conflict which springs from a conflict of interests as perceived by the parties themselves* (common law), and *conflict of interests as perceived by a third party, whatever the parties' own perception and whether it has led to actual conflict or not* (statute law). It is this distinction which explains the greater inherent intrusiveness of statute law.

Whoever makes arbitral law will have, as his point of departure, the assumed existence of a conflict of interests. His basic intent will be to provide rules for its resolution. Judges become seized of such issues only when actual conflict has occurred and has become sufficiently serious for one or other of the parties to seek judicial help. If a party to it does not understand that a conflict of interests exists, or that he may build rights upon it, the existence of the conflict will not come to the attention of the judges. The same applies if a party is too submissive to the other,

133a The Sale of Goods Act 1893 (UK) has been adopted in all Australian States, as it has been in many other common law jurisdictions.

134 See, for example, the emphasis on "rules" in *Dicey & Morris on the Conflicts of Laws* (10th edn 1980).

or generally too meek, or too lazy to go to court. There being no dispute, such cases are not within the judges' "legislative competence". Parliaments, on the other hand, have no similarly compelling reason to leave well alone when they have not been invited. They are free to make the assumption that all underdogs will one day go to court, and to make supposedly arbitral rules to provide for that contingency. Such rules may not be intended to be regulative in character, but they do have a potential for changing social relations. They are prone to be misinterpreted as containing imperatives addressed to all, and will thus invite obedience. They may give those whom they favour the excuse they need for breaking out of a social relationship which they previously accepted. One way or the other, such statute law may prove intrusive.

Not surprisingly, some extreme instances of over-intrusive code law appeared when the codification movement was still in its infancy. Kelly has highlighted some of these and suggested a link with the present:

"the famous Prussian Code of 1794 . . . tried to legislate for everything in the most minute detail . . . governing all possible contingencies. Samples: 'Spouses may not refuse each other their marital duties' (the law permitted an exception to this if health would be adversely affected). 'A healthy mother is required to suckle her child herself. The father is to decide, however, how long the child is to be suckled.' 'Statues and other such objects which serve only decorative purposes are not appropriate articles for a library. Globes, maps, drawings and engravings, which may be bound or unbound, are, however, appropriate for such a library.' The library concerned was one's personal, private library . . . Many other gems could have been selected from this Code, e.g., that it is for the man of the house to decide what form family prayers will take; and that what clothing belongs in a wardrobe is defined in detail. Is that spirit entirely dead among our Australian regulation-makers?"¹³⁵

One would search in vain in modern codifications for anything quite so grotesque, but the tendency to intrude (sometimes unduly) seems to be of the essence of statute law. There is clear evidence of it in the German Civil Code of 1900 and even in quite recent legislation.

The original version of para 1354 of the Code¹³⁶ (superseded when the principle of equality of the sexes¹³⁷ came into full effect on 1 April 1953,¹³⁸ and formally repealed by the Equal Rights Act of 1957¹³⁹) had given the husband "the right to decide in all matters affecting the common conjugal life", subject only to the limitation that the right must not be abused. From our present-day perspective, this provision deserves to be condemned as "sexist", but that is not the point. The preoccupation of the common law with such questions as: is it petit treason for a wife to kill her husband, is it lawful for a husband to beat his wife or to lock her up, does habeas corpus lie at the instance of a husband who wants his wife to return to him,¹⁴⁰ demonstrates the same sexist attitude even more brutally (and more colourfully). The point is rather that, even if one assumes the answers to all these questions to have been affirmative, none were greatly relevant to marriages which

135 Review of Stoljar (ed), *Problems of Codification* (1977) in (1978) 6 Adel LR 328, 330.

136 For full text, see supra n 103.

137 "Men and women shall have equal rights." — Art 3 II of the Basic Law, 1949.

138 "Law which conflicts with Art 3 II shall remain in force until adapted to that provision of this Basic Law, but not beyond 31st March, 1953." — Art 117 I of the Basic Law, 1949.

139 *Gleichberechtigungsgesetz*, 1957, in force since 1 July 1958.

140 *Bromley on Family Law* (3rd edn 1966) 157f.

were happy and intact. It is in this respect that, by contrast, the intrusive quality of the Code provision becomes revealed. By 1958 the German parliament had come to appreciate this vice of the provision and repealed it. The reasons for the repeal are described in a decision of the Constitutional Court as follows:

"The Bundestag realized that agreement between marriage partners would be more difficult to attain, if it were clear from the outset that the husband has the right to decide in cases of conflict; it therefore removed at the suggestion of its legal committee the husband's right to make the final decisions in all matters which concern common matrimonial affairs . . ."¹⁴¹

It must surely be significant that, despite the understanding thus displayed, the Bundestag attempted at the same time to insert a provision into the Civil Code which suffered from exactly the same defect. In support of this criticism, one is able to invoke the explicit testimony of the Constitutional Court.

It appears the Bundestag considered that, whilst the matrimonial relationship could cope with some "deregulation" when it affected only the married couple, the law could not withdraw so readily from matters which involved the children. In an attempt to reconcile the equality principle of Art 3 II of the Basic Law and the postulates of Art 6 I and II,¹⁴² the Bundestag agreed to enact (by way of amendment of the Civil Code) the following provisions:

"Para 1626 [Parental power]

- (1) An under-age child is subject to the parental power of father and mother.
- (2) The following provisions notwithstanding, father and mother have, by virtue of their parental power, the right and duty to take care of the child's person and property; the care of the child's person and property includes the right to represent the child.

Para 1627 [Exercise of parental power]

The parents are obliged to exercise their parental power in the best interest of the child under their own responsibility and by mutual agreement.

Para 1628 [Father's right to make final decision]

- (1) If the parents cannot come to any agreement, the father will make the final decision: he is under a duty to take the mother's opinion into consideration.
- (2) Upon her application, the Guardianship Court may transfer to the mother the power to make decisions in a particular matter or in matters of a particular type, if the father's conduct concerning a matter of particular importance jeopardizes the child's welfare or when such a measure is required to ensure the orderly administration of the child's property.
- (3) If the father persistently violates his duty (a) to attempt to find a compromise when differences occur or (b) to take the opinions of the mother into consideration, the Guardianship Court may grant an application by the mother to transfer to her the power to decide personal and property matters relating to the child, provided that this is in the best interest of the child."

In the constitutional battle which followed ¹⁴³ it was argued, inter alia, that, in the absence of a final right to decide vested in one of the

141 Judgment of the Federal Constitutional Court of 29.7.1959, published in [1959] *Neue Juristische Wochenschrift* 1483 (tr).

142 "I. Marriage and family shall enjoy the special protection of the state.
II. The care and upbringing of children are a natural right of, and a duty primarily incumbent on, the parents. The national community shall watch over their endeavours in this respect."

143 *Supra* n 141.

parents, the family would cease to be a working unit since crucial decisions could not be made, unless judicial intervention (incompatible with the intimacy of the family relationship) could be relied upon to resolve stalemates. The Court rejected these arguments:

"It is possible for decision-making in a community to be based upon a principle other than majority vote or the final right to decide vested in one member: one may instead rely upon the duty to compromise and the loyalty which members owe to the community. These factors may not lead to decisions as automatically as do the first-mentioned methods; they are, however, sufficiently powerful to induce decisions which are really necessary (. . .). In the day-to-day functioning of a family such decision-making results simply from the fact that each parent is particularly concerned with certain types of problems and will, with the consent of the other, make all the necessary decisions within areas of particular concern to him. Fundamentally important problems are rare and when they have to be resolved, the welfare of both child and family are a guiding principle which will normally suffice to ensure that a concrete decision is made through spontaneous agreement or through unilateral or bilateral concessions . . . it seems that one may have confidence in a form of decision-making which is based on agreement and compromise, so that the express appointment by law of an arbitrator is not necessary . . .

However, if it were thought necessary to ensure by legal means that a decision could always be made, then it would accord with the traditions of German law to make it possible to apply to the Guardianship Court for a decision in the event of a disagreement between the parents placing the well-being of the children in jeopardy. Such a solution in one form or another has, not surprisingly, been prominent in the public debate of the matter . . . Contrary to objections which have been advanced the Federal Constitutional Court is of the opinion that such a solution would be constitutionally unobjectionable, as long as it was confined to cases involving real risks of detriment to the child's welfare. This would be acceptable because it involves the principle that court intervention is a 'subsidiary' remedy, ie that the smaller community should be allowed to function undisturbed and that state intervention should take place only when it is utterly unavoidable. It would seem that this principle has found expression in Art 6 II of the Basic Law ('primarily'). Art 6 I and II contain a guarantee that marriage and family shall be allowed to function freely and that the State shall intervene only when these institutions prove insufficient . . . the State should show a general attitude of reluctance in relation to intervention.

According to the proposals so far discussed, the Guardianship Court is not meant to replace the father in the family as the final decision-maker. Rather, the jurisdiction to make final decisions, which has been taken from the husband, is to be taken over by both parents jointly so as to enable them, acting in equal freedom and responsibility, to shape the life of the family, in particular the education of the children. As already explained, it seems likely that most of the differences of opinion will be resolved within the family. Only when parents fail, in an important respect, to perform this task and the welfare of a child so requires, the Guardianship Court is, according to the proposals debated so far, to be kept in readiness as a "last line of defence". Such a position would accord with the principle that State intervention should be a subsidiary remedy: the Guardianship Court would be playing a role no different from the role it plays in many similar situations, situations which frequently do not involve an abuse of parental power or breach of duty by a guardian . . . In all these cases the Guardianship Court assumes the 'watchman's role' (Art 6 II of the Basic Law) of the state. The constitutional function of the Court in that role is to prevent damage to the child, regardless of whether the parents are to blame.

It is just from the point of view of the 'subsidiary principle' that *the general legal transfer upon the father of the decision-making power and of the right to represent the child appears objectionable, since this represents an interference by means of a general norm into the free functioning of the decision-making process in which both parents have a constitutional right to participate . . . This seems to be a more serious form of intervention into the matrimonial relationship that does the legal availability of a judicial tribunal for cases of serious conflict.*¹⁴⁴ The

principles of Art 6 I and II of the Basic Law demand that the process of decision-making in a family be not legally regulated. Such a view alone corresponds to the duty of the legislature in a state such as the Federal Republic with its ideological diversity to lay down the law in such a way as to leave sufficient freedom to its citizens to enable them to fulfil their religious and ideological obligations with all their consequences for their matrimonial and family existence . . . Accordingly it must be left to husband and wife to determine in relation to their matrimonial relations, including the sphere of their parental power, whether they wish to conduct their affairs on the basis of the equality principle or whether they wish conflicts to be resolved by decisions made by the father. It is a fact of life that families come to decisions in different ways from case to case. Para 1628 I BGB interferes with these spontaneous procedures.”¹⁴⁵

(iii) *Conflict solution without legal intervention*

No apology is offered for quoting the judgment of the German Constitutional Court at such length, for it seems most instructive. It shows how, in a code state, the quality of non-intrusiveness, so natural to the common law, may need to be extracted with considerable effort from a specific article of the Constitution.¹⁴⁶ To have to rely upon such constitutional guarantees could be unfortunate, for might there not be other social relations, not protected by any constitutional provision, yet equally deserving of freedom from legal regulation? Before answering this question, one must inquire how conflict is resolved and interests are adjusted when legal regulation or the judicial process is either not available or not used.

(1) *Compromise*

In its analysis of parental decision-making, the German Constitutional Court stressed joint responsibility, division of labour and group loyalty as factors which promote compromise. In commercial and other relations which are less close and permanent than those existing within families, the pressures to achieve compromise will be greatly lessened. Nevertheless, where the law does not dictate a solution, the parties will frequently find that an adjustment of conflicting interests by mutual compromise is the most sensible course.

It may be argued that compromise which involves the voluntary surrender of some interests is undesirable. Ihering considered that the vindication of rights by legal action was a socially useful, even a noble thing. He affirmed the complementary propositions that “The battle for right is a duty owed by the entitled subject to himself” and that “The assertion of a right is a duty owed to the Commonwealth”.¹⁴⁷ It might not be too irreverent to suggest that these sentiments were less forward-looking than most of Ihering’s writing, perhaps because they were to some extent inspired by the pugnacious spirit of the age of imperialism in which Ihering lived. It seems right nowadays to place more emphasis upon the virtue involved in willingness to compromise and less upon self-assertiveness and insistence upon rights. Even among lawyers it is now accepted that settlement by mutual concession and compromise is the preferable course in most cases, not just from the point of view of the public interest, but also from that of the parties.¹⁴⁸ In Australia, this

145 *Supra* n 141 at 1486 (tr).

146 *Ie* Art 3 II of the Basic Law, quoted *supra* n 137.

147 Ihering, *The Battle for Right* (Ashworth tr 1883) 17, 40.

148 In South Australia the Conciliation Act 1929 obliges courts to “endeavour to bring about a settlement of the proceedings on terms which are fair to both parties” (s 3). The Act gives courts power to hear the parties in chambers with or without (!) their solicitors or counsel. The power, given to the government by the Act, to establish

philosophy has long been manifest in the field of industrial relations, where an official conciliation procedure is available to parties in conflict.¹⁴⁹ The procedure involves compulsory negotiations, and compromise is promoted by the persuasive authority of a state-appointed conciliator who will search for suitable formulae acceptable to both parties. In New South Wales, a similar procedure, albeit without the element of compulsion, has been established to resolve disputes arising from alleged invasions of privacy.¹⁵⁰ Although it may be too early for a comprehensive evaluation of the Committee's work, early reactions seem to indicate that the method chosen (to rely upon conciliation rather than law) is meeting with success.¹⁵¹ Similar machinery has now been established by the Commonwealth to deal with infringements of human rights.¹⁵²

As mentioned earlier, the common law itself plays some role in promoting compromise,¹⁵³ but its rules have not been devised with this as one of its principal aims. Like most other legal systems, the common law treats as axiomatic the notion that to every legal right belongs an exactly complementary legal duty.¹⁵⁴ If A has a claim against B for \$100, it follows that B owes A \$100. If the chief function of rights and duties were to promote settlement of disputes by compromise (rather than by litigation), they would not be designed in such a strictly correlative way. Rather, they would incorporate some obligation to seek an accommodation. As an alternative to present practice, one might imagine the imposition of overlapping duties, at least for the solution of bona fide disputes. Suppose that A asserts a bona fide claim to \$100 against B and that B asserts a bona fide defence. A compromise-oriented legal system might expect B to offer to pay A \$75 and expect A to offer to take \$25 in full satisfaction. If substantive duties were so designed, compromise would be almost inevitable since it would improve the legitimate expectations of both parties. Disputes between friends are very often settled upon such a basis, ie by a mutual willingness to meet the other party more than half-way. Australian judges have created at least one precedent for such an approach. Significantly, this involves a situation where the avoidance of a "clash" between the parties is a matter of undoubted and paramount public importance.

In *Robinson v Creaser*¹⁵⁵ damages actions were brought by two motor cyclists against each other for damage each had sustained when they had collided at an intersection. The plaintiff had entered the intersection from the defendant's right. A section of the relevant Road Traffic Act purported to impose a duty upon a driver approaching an intersection to slow down or stop so as to "allow the vehicle on his right to continue

148 *Cont.*

"conciliation courts", has not been used. Even where similar legislation does not exist, judges will often use their influence to bring about a settlement.

149 See Portus, *Australian Compulsory Arbitration, 1900-1970* (1971) 81-85.

150 Privacy Committee Act 1975 (NSW); see particularly s 15(c).

151. Disney, "A Report on Privacy" (1976) 2 Leg Serv Bull 55.

152 The Human Rights Commission Act 1981 (Cth) has established a Human Rights Commission and has invested it, inter alia, with the function "to inquire into any act or practice that may be inconsistent with or contrary to any human right, and — where the Commission considers it appropriate to do so — endeavour to effect a settlement of the matters that gave rise to the inquiry . . ." — s 9(1)(b).

153 *Supra* at n 41.

154 Hohfeld, *Fundamental Legal Conceptions* (1923) 38.

155 [1948] SASR 47.

on its course in front of his vehicle without change of speed".¹⁵⁶ Having failed to do so, the defendant had been negligent. One of the crucial issues was whether the plaintiff had a right to expect that the defendant would obey his statutory duty to give way (in which case the plaintiff was blameless) or whether he was himself bound to anticipate and guard against possible careless conduct by the other party (in which case he might himself have been negligent). Mayo J had not forgotten his Jurisprudence:

"The obligation imposed . . . is to enable the vehicle on his right-hand side to continue its course in front without change of speed. The duty thus connotes a correlative right in the vehicle on that side to proceed on its way and pass ahead . . . Where the . . . statutory duty is imposed, and the correlative right attaches, the subject of the duty will have no remedy if he sustains loss by reason of the exercise of the right . . ." ¹⁵⁷

Accordingly Mayo J found that the plaintiff had not been negligent. Whilst this approach conforms to our jurisprudential assumptions about rights and duties, it is not conducive to road safety. Drivers who insist on their "rights" on the road are known to be a common source of accidents. In *The South Australian Ambulance Transport Incorporated v Wahlheim*¹⁵⁸ the High Court disapproved of Mayo J's approach. The Court considered that it is not always reasonable for a driver to assume that other drivers will obey the road rules. If he has reason to suspect that a driver might drive in a manner contrary to the rules, then he must guard against that possibility. If he fails to do so he will be held negligent — even vis-à-vis the driver who has himself disregarded the rules. As Dixon J explained:

"whether conduct arising from reliance on the expectation that all traffic will . . . behave [in accordance with the law] is reasonable must depend less upon the state of the law than upon the practice which is in fact set up by the law. For laws may speak in vain."¹⁵⁹

This approach has since been confirmed by a Full High Court in a short and incisive judgment.¹⁶⁰ Correlative rights and duties have given way to a concept of overlapping duties which establish a "safety margin" in the interest of accident prevention.

An extension of this interesting model to ordinary conflicts of interests would almost certainly founder on the low state of present-day public morality. The unscrupulous would quickly realize that it pays to be involved in conflict, would provoke it just for the profit which it might bring, and would use the law to extort undeserved advantages from vulnerable "opponents". It seems that wider use of the model must await the advent of a more enlightened and more honest world.

Compromise as a method of conflict settlement is important and deserves to be further promoted. However, its scope will remain limited: it must be supplemented by other, more authoritative methods.

156 Ibid 53.

157 Ibid 55.

158 (1948) 77 CLR 215.

159 Ibid 229.

160 "The failure to take reasonable care in given circumstances is not necessarily answered by reliance upon the expected performance by the driver of the give way vehicle of his obligations under the regulations; for there is no general rule that in all circumstances a driver can rely upon the performance by others of their duties, whether derived from statutory sources or from the common law." — *Sibley v Kais* (1967) 118 CLR 424, 427.

(2) *The dyadic model*

The suggestion made by the German Constitutional Court that parental decision-making should proceed by co-operation and compromise stresses the ideal solution which is likely to be found where parents are well-matched and about equally endowed with will-power and the ability to wield authority. In many other cases the personality of one of the partners will be so much stronger than that of the other that he or she will always be accepted as the leader. In such cases the stronger of the parties may prefer to settle conflict simply by imposing his will upon the other. Such conflict solution by authoritative decision of one of the parties and by its (willing or grudging) acceptance by the other is bound to be one of the characteristic features of decision-making in law-free areas. To differentiate this model of decision-making from the "triadic",¹⁶¹ one might refer to it as the "dyadic model". Whoever argues that collective freedom should be respected, unavoidably promotes the use of this model for the adjustment of interests. The model is problematical because of its great potential for oppression and injustice. We can study its characteristic features for it is widely used in our legal system.

The dyadic model requires one of the parties to be the judge in his own cause, a procedure which usually attracts emphatic legal disapproval. Even the Lord Chancellor cannot take upon himself such a responsibility.¹⁶² Why should the judging party ever favour the other side? If he believes in the justice of his own cause he will see no reason for deciding against himself. If he has started the conflict dishonestly, he is even less likely to decide against himself. Thus, the capacity of the dyadic model for impartiality and fairness seems severely limited. To the unscrupulous it must seem an open invitation to abuse; the timid, placed by law or by some other means in a dominant position, may see it as a call to self-denial. In either case the result is likely to be unsatisfactory. Even if a decision favouring the judging party should be fair in all respects, there still remains the serious question whether it will be accepted as such by the other party. How is he to know that the decision was not simply dictated by self-interest? Why should he have faith in its fairness? *Prima facie*, the dyadic model seems to be an inadequate device for the solution of conflict and the adjustment of interests.

On the other hand, one must not overlook that, in some respects, the dyadic model is greatly superior to the triadic one. Decisions are reached efficiently and quickly. The "judge" is also one of the parties and knows most of the relevant circumstances; thus, there is no need for the complex and chancy process of fact-finding which is characteristic of the triadic model. The whole expensive adversary apparatus is unnecessary: the "judging" party hardly needs legal representation and the other party is not normally allowed it and would rarely be better off if he were. Accordingly, the expense associated with the dyadic model is usually negligible.

Instances of the dyadic model are occasionally created, with the approval of the law, by private contract. Clauses purporting to appoint

¹⁶¹ *Supra* at n 29.

¹⁶² *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HLC 794.

one of the parties to be sole arbitrator in the event of a dispute¹⁶³ have not been tested in the courts in exactly that form, but closely analogous arrangements are not uncommon. It is well settled that a party to a contract may validly promise as much for a performance as the other party may reasonably demand.¹⁶⁴ It has also been suggested that a promise to comply with demands, even if they should be unreasonable, is legally valid.¹⁶⁵ Such clauses purport to make one party the sole arbiter of conflicting interests: his own and those of the other side. The only possible justification for them lies in the promisor's voluntary submission. Even so, one would wish to see some safeguards against abuses.

The parent/child relationship seems a more appropriate one to which to apply the dyadic model, even where the parent's and the child's interests are genuinely in conflict. The usual selflessness of parental love, the child's inexperience and his limited understanding of his own real interests make it right and proper that much of the conflict which arises within that relationship should be resolved, with the approval of the law, by parental fiat.¹⁶⁶

The political system of absolute monarchy represents the application of the dyadic parent/child model to crucial aspects of the judicial power of government. The monarch, so the theory holds, in his unbounded, divinely inspired benevolence, can be trusted to resolve, God-like, with perfect justice, not only disputes between his subjects, but also disputes between his subjects and himself. As James I of England declared when he took his seat in the Court of Star Chamber on 20 June 1616: "Kings are properly judges, and judgment properly belongs to them from God: for Kings sit in the throne of God, and thence all judgment is derived."¹⁶⁷ Whatever the trappings in which it appears, such an assertion cannot expect to meet with popular acclaim when it is applied to the monarch's own causes: it will rightly be seen as an ill-concealed attempt to advance royal or imperial self-interest.

Probably the greatest danger for the democratic form of government arises when an elected government becomes too closely associated with the interests of a clearly identifiable class in society. Once such a government single-mindedly promotes these interests, no appeal to the majority principle, to equality, religious righteousness or other pious formulae will conceal the fact that one is dealing with a naked application of the dyadic method of conflict solution and interest

163 The following clause is an example taken from the conditions of membership of one of Australia's health insurance organisations:

"In the event of any dispute arising between the Association and a contributor or a member in connection with any matter whatever touching the affairs of the Association the same shall be referred to the Directors whose decision shall be final and conclusive."

164 Lücke, "Illusory, Vague and Uncertain Contractual Terms" (1977) 6 Adel LR 1, 17.

165 *Powell v Jones* [1968] SASR 394 per Bray CJ; the suggestion has been doubted by other judges — see Lücke, *supra* n 164 at 18.

166 As for limitations of parental power in various legal systems, see Stoljar, "Children, Parents and Guardians", in *International Encyclopedia of Comparative Law*, vol IV, ch 7.

167 Quoted in Bowen, *The Lion and the Throne* (1957) 322f. To the extent that the monarch resolves (as some monarchs were prone to do occasionally) conflicts between subjects, the dyadic model is not involved: the monarch is a third party in relation to the contestants — see the famous "Müller Arnold" case, decided personally by Frederic the Great of Prussia — Hattenhauer, *Allgemeines Landrecht für die Preussischen Staaten* (1970) 14.

adjustment. Experience teaches that democracy can take a good deal of such "political justice" (whether it emanates from organised capital or from organised labour), but in extreme situations, such as that existing in Northern Ireland at present, democratic government in the ordinary sense no longer represents a legitimate political solution.

The dyadic model is much more appropriate where the judging party, whose actions have given rise to the conflict, is not engaged in the pursuit of self-interest, but motivated by some extraneous, higher purpose. Situations involving military subordination may be a suitable example. The power to command implies the power to override objections and thus settle conflict between superior and subordinate. In that sense the dyadic model is present. The superior's duty is to advance overriding military purposes and the position he holds is based upon an assumed superior understanding of military needs and of the efforts and sacrifices which he must demand to meet those needs. The interests he advances are not his own and that makes him, within limits, an acceptable judge of the correctness of his own orders. Despite the presence of these higher purposes, it would be unrealistic to see the superior's own interests as wholly absent. Even accepting that the cause he serves is not his own, he does have a personal stake in upholding the correctness of his own orders: his reputation, his authority, his promotion prospects may depend on it. Nevertheless, a dyadic solution is preferable to a triadic one, since efficiency, not justice, is the prime requirement in military operations. Industrial and educational relationships are governed by similar considerations, but the main area which is remindful in some respects of the military example is that of conflict arising in the sphere of public administration. Whether and to what extent to allow judicial review of administrative acts, whether to use a dyadic or a triadic solution in this sphere, is one of the most important policy issues faced by any legal system.¹⁶⁸

The absence of self-interest (except in an attenuated form) in public servants explains why ombudsmen, despite their lack of power, are so often able to persuade public servants to modify their decisions.

In many and important situations special circumstances may mitigate the usually objectionable features of the dyadic model and make it more acceptable. Even in cases of ordinary conflict it is sometimes possible to neutralize the detrimental impact of the element of self-interest upon the judging process. Children know how to avoid or settle, as the case may be, quarrels which tend to accompany the distribution of cake: he who cuts the pieces must be the last to choose. Thus, self-interest is employed to ensure complete equality of distribution. When judging means making a simple choice between two alternatives, a result acceptable to both can

168 An interesting "mixed" model existed until recently in Australia where it was used for the settlement of disputes concerning social welfare entitlements such as unemployment benefits or widows' pensions. The Social Security Appeals Tribunal, which had been established administratively within the Department of Social Security, heard the appeals of unsuccessful claimants without interference and made independent determinations; but these determinations were only in the form of recommendations to the Director-General of Social Services who was free to adopt or reject them. Thus the ultimately dyadic nature of the dispute-solving machinery was preserved. In 1980 appeals to the genuinely independent Administrative Appeals Tribunal were introduced in certain circumstances. For further details and references, see Note in (1981) 6 Leg Serv Bull 19.

sometimes be achieved if the judging party simply "flicks a coin". The process is entirely impartial, for chance is blind, even though the result may be less fair than the alternative solution would have been. It is an open and interesting question whether and to what extent devices of this kind could be refined and used for the settlement of serious and complex forms of conflict. One might, for example, make it compulsory for each party to civil litigation to submit what he would consider a fair compromise settlement, perhaps coupled with a reserve power in the judge to adopt authoritatively the fairer of the two plans. Such a scheme would give parties a real incentive to compete in the promotion of fair compromise.

The certification procedure, which is common in building and engineering contracts, represents an interesting method of interest adjustment by a procedure which is akin to the dyadic model, but at the same time legally safeguarded in a number of ways.

Qui facit per alium facit per se is a fundamental principle of agency. It seems to follow that the appointment of an agent or servant of one of the parties to settle conflict is yet another instance of the dyadic model. Such arrangements to settle contentious or potentially contentious issues between parties are widely used in some branches of industry and commerce. Certification clauses in building and construction contracts frequently provide that the contractor can only recover his remuneration for work done if he presents a certificate of satisfactory completion issued by an architect or engineer employed by the proprietor (for whom the work is being done), either in permanent employment or on a contract basis. In *South Australian Railways Commissioner v Egan*¹⁶⁹ a contract for the construction of a railway bridge provided that the contractor could not bring an action for his remuneration against the Commissioner until he had first obtained a certificate from the Chief Engineer for Railways (who was an employee of the Commissioner). The insertion of similar clauses in building contracts, giving power to certify to independently employed architects, is common practice in the building industry.¹⁷⁰

The practice of certification shares with more clear-cut instances of the dyadic model the great advantage of efficiency. The certifier may tend to be a little biased, but he is expert in the field and already knows the relevant circumstances. Abolition of the system would greatly increase litigation of a type which the courts usually find very troublesome. Thus, it was probably inevitable that the courts should have declared valid such arrangements for the "ascertainment of private rights upon which otherwise the courts might have been required to adjudicate".¹⁷¹

The courts have done their best to make the certification system as fair as it can be made by merely legal means. They have held that a term must be read into the contract of employment between proprietor and certifier that the latter is to exercise his certifying function free from any employer direction and that he has a duty to act with independence

169 (1973) 47 ALJR 140.

170 Hudson, *Building and Engineering Contracts* (10th edn 1970) 401ff.

171 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, 652. In this case a guarantee signed by A of B's indebtedness provided that the bank's branch manager's certificate stating that B still owed the money should be conclusive evidence in an action by the bank against A.

and impartiality.¹⁷² The judicial expectation which sustains this legal freedom from direction is that the certifier's professional ethos can be relied upon to induce him to act with complete fairness to both parties.¹⁷³ Should a certifier allow pressure by his employer to influence his decisions (perhaps because he lacks a proper appreciation of his position of independence), then the courts will allow the contractor to pursue his rights independently of any certificate.¹⁷⁴ The certifier's legal independence cannot disguise the fact that his employer will often be able to bring to bear effective influences (from crude to subtle) or be able simply to rely upon the certifier's bias in his favour, in order to obtain a decision favourable to him.¹⁷⁵ Thus, as a final safeguard, the certifier's decisions are usually subject to review by arbitration.

Although the law and social custom have succeeded, in some instances, in making the dyadic model work with reasonable fairness, in general it must be regarded as an unfortunate and oppressive device, often used for the promotion of self-interest. Settlement of conflicting interests by compromise or, if this is unattainable, by legal intervention, is generally to be preferred.

The variety of methods used to achieve domination is limited only by the limits to human ingenuity. It is a reasonable assumption that much that is made to look like compromise is, in truth, the result of one party's ascendancy over the other. It is sometimes suggested that a state of perfect equality in society would make men more ready to settle their differences by fair compromise. The truth of the matter seems to be that readiness to compromise is more generally found in societies with strongly hierarchical social structures.¹⁷⁶

(3) *Command structures*

A triadic method of interest adjustment in the form of voluntary arbitration is sometimes used in areas of life which are free from legal control. Such situations need no separate analysis, for they represent simply a special kind of compromise. However, some mention must be made of command structures which involve enforcement by means of pressure and compulsion. The case of the military command has already been mentioned as an instance of the dyadic model. However, it fits into that category only to the extent that interest adjustment takes place

- 172 *Dixon v The South Australian Railways Commissioner* (1923) 34 CLR 71, particularly observations at 94f.
- 173 "the system could not have been allowed to exist, had it not been that . . . engineers and architects are able to maintain, and do maintain, a fair and judicial view with regard to the rights of the parties . . ." — *Hickman v Roberts* [1913] AC 229, 234, per Lord Alverstone.
- 174 *Ibid.* Until recently negligence in carrying out the certifying function was thought not to be actionable because of the need for complete independence of the certifier. However, that view was exploded by the House of Lords in *Sutcliffe v Thackrah* [1974] 1 All ER 859.
- 175 See the list of considerations which cast doubt upon the impartiality of the certifier in Hudson, *supra* n 170 at 452.
- 176 Kawashima, "Dispute Resolution in Contemporary Japan", in von Mehren (ed), *Law in Japan* (1963) 41-72. Of particular interest is Kawashima's description of the process of "reconciliation" of conflict between superior and inferior: "Particularly in a patriarchal relationship the superior (*oyabun*) who has the status of a patriarch is expected to exercise his power for the best interests of his inferior (*kobun*), and consequently his decision is, in principle, more or less accepted as the basis for reconciliation even though the decision might in reality be imposed on the inferior -- *ibid* 50.

between a superior and his subordinate. When a superior allocates duties and reconciles differences between two or more subordinates, the situation resembles the triadic model, although the criteria for adjustment tend to be derived, not from ideals of justice, but from notions of military efficiency: fairness and equality of treatment are usually not aims in themselves, but ingredients of command which help to make the operation run smoothly and efficiently. Further examples are all around us, in the relationship between children and their parents, in industry, in sport, in education; indeed they can be seen in any area of life in which organisational structures are used for the attainment of objectives which transcend the purely individual and personal. Such powers of command are often free from legal control, and may then generate injustice and oppression and consequential pressures for legal intervention.

(iv) *The value of collective freedom*

To promote the common law because of its traditional respect for collective freedom means, as has been shown, that one promotes interest adjustment by "natural" methods which involve the use of personal dominance over others in all its forms. Is that a worthy cause?

Law as a means of group control can be very subtle and pervasive. Unlike the foreign invader, law need not take its group victims as it finds them. It can artificially create as many groups as it pleases ("all careless drivers", "all those who seek to make unfair contracts"), preventing "organized resistance" by the very amorphousness of the groups which it creates. In our modern, much-regulated world, these infinitely complex groupings and the controls exercised by means of penalties and/or officially decreed benefits, are bound to have a great impact upon society, particularly upon qualities such as spontaneity, resilience, self-sufficiency, neighbourliness, compassion and readiness for self-denial. It would be naive to think that law is not an important factor in the creation or destruction of social ethos, good or bad. There is no "legal impact statement", no way in which the effect of law upon society can be objectively measured and assessed: hence the field is wide open to emotion, prejudice and propaganda, and to exploitation by the architects of party platforms.

The "total State", ie the State which allows no groups, no human relations, to exist free from some form of legal regimentation, may well be a real prospect, even in democratically governed countries.¹⁷⁷ Lord Hailsham sees such a development looming in Britain and has called for a written constitution and a bill of rights to avert it.¹⁷⁸ Even a bill of rights can be employed to make the State more, rather than less, intrusive. Such dangers arise when, as in West Germany, "basic rights" are extended to protect citizens against private as well as against public intrusions.¹⁷⁹ It is clear that, so interpreted, a bill of rights can become

177 In 1974 the Australian Government established a "Royal Commission on Human Relationships" with the following terms of reference: "To inquire into and report upon the family, social, educational, legal and sexual aspects of male and female relationships, so far as those matters are relevant to the powers and functions of the Australian Parliament and Government, including powers and functions in relation to the Territories". No inquiry was ever established and carried out with more benign intentions, yet to observers reared on Orwell and Kafka, the overtones were ominous.

178 *Supra* n 110.

179 The West German Constitutional Court has endorsed this extension on many occasions. It is a firmly established part of German constitutional doctrine — see, eg,

a whole new charter for official intervention even in the most private relations, though there must always be at least the pretext that A needs to be prevented from infringing B's constitutional rights. For example, parents could be enjoined from teaching their child their own religion, if the child had shown a preference for some other creed (freedom of religion).¹⁸⁰ A journalist could enforce, against the newspaper which employs him, the publication of his views (freedom of speech). Sensible judges can perhaps be relied upon to prevent such excesses, but the protection of human rights is not necessarily entrusted to the judges.¹⁸¹

Writing before the advent of 1984, one is at liberty to postulate that there should remain some spontaneous spheres in society in which there is no, or at least not much, legal regimentation. One example may be contracting between equals (consumer contracts having become regulated). To identify and delimit all the areas within this postulate would be too onerous a task to be worth attempting in the present context. It would also be a thankless one, for political pressures, not reason, will be the chief determinants. Whatever these spheres will be, amongst them will be the ultimate preserves, or perhaps refuges, of the common law with its delicate arbitral mechanism.

It is tempting to support the call for some collective freedom from regulation by invoking the apocalyptic vision of the total state and by contrasting with it the idyllic image of a society growing and prospering freely under the guidance of a sage common law, which reconciles all serious conflict and knows better than to interfere further in society's affairs. Is this what Lord Hobart had in mind when he said almost four centuries ago that "the statute is like a tyrant, where he comes he makes all void: but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest".¹⁸² Are not Lord Hobart's strange, perhaps prophetic, words still echoed by some of the most admired of our judges, though adapted to the context of our modern world? The late Lord Reid has said:

"If you think in months, want an instant solution for your problems and don't mind that it won't wear well, then go for legislation. If you think in decades, prefer orderly growth and believe in the old proverb more haste less speed, then stick to the common law."¹⁸³

If there is any truth in this, we shall not discover it if we insist upon a simple and undivided concept of freedom. It is essential that we hold steadfast to the truth which tells us that to promote the common law means to continue much private domination and oppression, and also,

179 *Cont.*

the decision of the German Federal Constitutional Court dated 25.2.1975, published in [1975] *Juristenzeitung* 205, 208f (For English translation, see *The Brüggemann and Scheuten Case*, Report of the European Commission of Human Rights, 12.7.1977 (Council of Europe), Appendix VI, 97f).

180 It may be that Art 6 11 of the Basic Law would protect the collective freedom of parents from such intrusion. That provision reads: "The care and upbringing of children are a natural right of, and a duty primarily incumbent on, the parents. The national community shall watch over their endeavours in this respect."

181 Under the Australian Human Rights Commission Act 1981 (Cth), the chief guardians of Human Rights are the Human Rights Commission, the Executive Government and Parliament.

182 Note (c) to *Pigor's Case* (1614) 11 Co Rep 26b, 27b. The statement is usually quoted in the context of severance, but it is not difficult to imagine that a wider significance was intended.

183 Reid, "The Judge as Law Maker" (1972) 12 J Soc Pub TL (NS) 22, 28.

that statute law has the power to interfere on behalf of the victims of private domination and oppression (particularly those who are not complaining) and to set them free. *It is the nature of the liberator which supplies the arguments for the preservation of at least some of the common law.*

As areas of social interaction become controlled by statute law, they become subject to the grip of State power, to control by the political process. As long as the State is benign, so will be the law contained in its statutes. The democratic system with its periodic tests of majority approval helps to keep it benign, although the remoteness of State control, the unfeeling coldness of the bureaucratic process, injects an element which is incompatible with intimate relationships such as those to be found in families and between friends. However, an area of collective freedom once surrendered does not suddenly reappear when the State is taken over by undemocratic forces. Where there would otherwise have been pockets of freedom from regulation, there will then be total and unrestrained control. It is not surprising that observers of the common law with experience of oppressive political systems see the common law as a bulwark of freedom. Esser in his fundamentally important contribution to judicial law-making has seen the politically neutral quality of the common law as one of its decisive advantages. "Common law" to him is an amalgam of customary and professional traditions forming an autonomous body of legal principle¹⁸⁴ and a more effective protection of freedom than any bill of rights: "The continued existence of an unpolitical common law, that lasting achievement from the days of the successful struggle against centralist absolutism means, within the Anglo-Saxon cultural sphere, a legal guarantee much more secure than any written constitution."¹⁸⁵

The political process in democratic countries is much to be preferred to that in non-democratic countries, but that does not mean that it should be viewed through rose-coloured spectacles. The parliamentarian who votes for a bill only because he has to toe the party line (and quite possibly against his conscience) does not compare too well, as a fair adjuster of conflicting interests, with the judge whose oath of office, temperament and training condition him to aim above all at fairness and justice. The fact is that even the democratic political process is nothing but the dyadic model of interest adjustment writ large, however just and honest the leading politicians may be. A politician's duty is to provide good government for all, but it would be surprising if he neglected altogether the sectional interests of those who have elected him. His own interests will coincide with theirs if he belongs to the same group or class as they do. More importantly, the more vigorous he is in promoting their interests, the more certain he can be of retaining their electoral allegiance. In consequence, he is more likely to prove an effective promoter of sectional interests than an impartial and fair adjuster of conflicting interests. The statutes which he votes into law will be equally suspect. Being essentially dyadic, the political model of interest adjustment lacks all the safeguards against promotion of self-interest, which are characteristic of the judicial process. This is particularly true in countries which follow the British doctrine of the complete sovereignty

184 *Supra* n 12 at 293.

185 *Ibid* 301 (tr).

of parliament. A bill of rights, administered by judges competent to invalidate legislation, at least injects into the political process a welcome arbitral element which makes it difficult to carry to extremes the pursuit of sectional interests by dominant groups in society. In the absence of such machinery, the preservation of some collective freedom seems desirable, and this, therefore, yields a persuasive argument for the retention of the common law in at least some spheres.

(c) *The common law and individual freedom*

As we have seen, in the fight against private injustice, exploitation and oppression, statute law is likely to prove more effective as an ally than the common law will. It may be that, with the growth of all-powerful corporations, problems of private oppression have become more serious than they once were. Regulation by statute law may be indispensable if individual freedom is to be protected from threats emanating from sources other than the State itself. One's hope must be that politicians will make use of statute law (and of the power of the State which stands behind it) wisely and well, particularly with mature understanding of the almost unlimited potential of the State for oppression.

Throughout recorded history the most deadly threats to life, limb and liberty of the individual have come from those who wielded the power of the State. Has the common law as proud a record of shielding the subject from such threats as many common lawyers would have us believe? Is it the common law which has tamed the State and rendered it benign? How does the record (or, at any rate, the potential) of the common law as a defender of individual freedom compare with that of statute law, and particularly with constitutionally entrenched bills of rights?

In many countries the call for human rights means freedom from murder and starvation. In the more affluent liberal-democratic countries, on the other hand, most of the problems raised in the name of individual freedom lack such nightmarish proportions: the origin of the alleged infringement is frequently an Act of parliament. An Act may in itself impose restrictions (such as direct statutory prohibitions), or some executive, administrative or, indeed, private action considered oppressive and unfair may be based upon an Act which provides sufficient authority for it. Legislative restraints in one or other of these senses are rarely imposed purely vexatiously. The usual pattern is that the government of the day, acting through parliament, has perceived a conflict between a private interest and some interest vested in a group (which may be the community at large), and has resolved that conflict by imposing (or by authorizing the imposition of) a restraint upon the individual. The individual may argue that the imposition is unjust, that the legislation and/or the action which has taken place under its authority gives an unwarranted preference to group or community interests. In a society which aspires to the ideal of justice, one would expect an individual so affected to be given practical redress to the extent that his complaints are well-founded. In a democratic country, one possible remedy is political action. The affected individuals may band together, lobby the government or petition parliament for relief, and, if this is unsuccessful, bring the weight of their votes to bear at the next election in an attempt to have a more sympathetic parliament installed. Such political remedies are plainly not sufficient. Lobbying and petitioning may fall upon deaf ears. Electoral solutions may fail because the complaints, however

justified, are not grave enough to be made election issues, or because the complainants are so small in number that they lack electoral "weight". The issue to be resolved calls for the assessing and weighing of conflicting interests and thus, *prima facie*, for resolution by an impartial arbitrator. To assess the record of the common law as the protector of individual freedom against invasions by the State, one must ask how effectively common law judges have made their services (including their law-making function) available as arbitrators in such disputes. This question is best discussed under three headings: judicial independence, commitment and jurisdiction.

(i) *Judicial independence*

Being a part of State power, the judicial power is capable of bearing an ugly face. It tends to be at its ugliest when, by choice or by coercion, it becomes the instrument of the repressive policies pursued by other branches of the power of the State. Tragically, this face of "justice" tends to appear when the individual most needs judicial protection from state brutality. Probably the worst examples in living memory are the activities of Roland Freisler and his "People's Court", and the post-war Communist show trials against upright men such as Cardinal Mindszenty.¹⁸⁶ In English legal history, one has to go back a little further, perhaps to the Bloody Assize, to find similar occurrences.¹⁸⁷ It is significant that, in all three examples given, the judges worked within systems which did not recognize, or at least did not respect, judicial independence. Judges (or the law which they have made) cannot effectively protect the individual from oppression by the State unless their independence is secure. It is at their peril that nations ignore Montesquieu's fundamental insight that, without judicial independence, there can be no liberty.¹⁸⁸

The history of the common law is replete with royal and other interference with the judicial process,¹⁸⁹ and with incidents involving judicial corruption.¹⁹⁰ However, in recent times such occurrences have been remarkably uncommon. Speaking of the United Kingdom, Lord Devlin has called the reputation of the judiciary for independence and impartiality "a national asset of [great] richness" and "almost beyond price".¹⁹¹ It is equally true of many other common law countries that interference with judicial independence and attempts to bribe judges are in the category of the "unthinkable".¹⁹²

The plainest and most obviously needed safeguard of judicial independence is the legally well-entrenched proposition that no man is allowed to tell the judges how to perform their judicial function. Any

186 On the methods used in Germany under National Socialism to control the judges, see Marsh, "Some Aspects of the German Legal System under National Socialism" (1946) 62 LQR 366.

187 Holdworth, *History of English Law* (1924) vol 6, 527-530; McRuer, *The Evolution of the Judicial Process* (1957) 36-39, and further literature referred to *supra* nn 70-73; Parry, *The Bloody Assize* (1929).

188 Montesquieu, *The Spirit of the Laws* (Nugent tr 1949) i, 152.

189 See Shetreet, *Judges on Trial* (1976) 2-15.

190 See Cecil, *Tipping the Scales* (1964).

191 Devlin, *supra* n 9 at 8.

192 To avoid complacency, one should perhaps recall Lord Devlin's observation that "integrity comes haltingly into public life and . . . without watchfulness it may slip away" — Foreword to Cecil, *supra* n 190 at 11.

person who attempts to intimidate a judge, or to influence him by means of undue pressure or by offering him a bribe is guilty of an indictable offence.¹⁹³ Such conduct also amounts to contempt of court and may be punished accordingly.¹⁹⁴ Should such an attempt emanate from a public official, acting or purporting to act in his official capacity, it would also offend against the basic principles of the Constitution. Even parliaments have no right to tell judges how to carry out their judicial duties, except to the extent that they can force a judge's hand by legislation.¹⁹⁵

The doctrine of judicial independence is sustained not just by legal rules, but also by a long and colourful tradition. Montesquieu's doctrine of the separation of powers is often said to have been based upon mistaken inferences which he drew from his observation of the English system of government. However, if independence means freedom from external direction, then the need for it appears to have been understood almost from the earliest days of the common law. We find independence in that sense clearly postulated and given legal standing in a statute passed in 1346 and couched in the form of a command by the King to his judges:

"We have commanded all our Justices, That they shall from henceforth do equal Law and Execution of Right to all our Subjects, Rich and Poor, without having Regard to any Person, and without omitting to do Right for any Letters or Commandment which may come to them from us, or from any other, or by any other Cause."¹⁹⁶

This early statute contains a surprisingly comprehensive statement of the doctrine of judicial independence: the judges were commanded to ignore attempts at interference whether they came from the King himself or from some other source. The statute stated an ideal, not a fact: true independence of the judges from the Crown was not to become a fact until about four hundred years later, after long and bitter constitutional struggles. However, the statute was not forgotten by the judges: they were to remember and invoke it against the King in later, troubled times.

In the famous *Case of Commendam*,¹⁹⁷ James I had given to the Bishop of Coventry a benefice to be held *in commendam* (ie pending the appointment of a new incumbent). The plaintiffs claimed that they, rather than the King, had had the right to grant the benefice. Although the King was not a party to the action, a decision adverse to the Bishop would have meant financial loss to the King. When the proceedings in the Court of Common Pleas were reported to James, he insisted that they be adjourned until he had spoken to the judges. Presumably, his intention was to intervene in favour of the Bishop with a view to

193 *Russell on Crime* (12th edn 1964) 308f, 381f.

194 *Oswald's Contempt of Court* (3rd edn 1910) 48.

195 Dicey, *supra* n 109 at 406ff. See also *supra* n 63.

196 20 Ed III, c 1. The statute went on to ordain that, if the judges should receive such letters or commandments, they should ignore them in their judicial activity, but notify the King; that they should swear not to take bribes, nor to give advice to anyone in a legal matter which involved the King. The statute also shows an early understanding of the link between judicial independence and remuneration, for it concludes: "And for this Cause we have increased the Fees of our Justices in such Manner, as it ought reasonably to suffice them." An earlier statute — 18 Ed III, c 4 — contained provisions to similar effect — see Cowen and Derham, "The Independence of Judges" (1953) 26 ALJ 462, 466. Both Acts are still in force in Victoria — *supra* n 29 — and probably also in the other Australian states.

197 (1616) Hob 140, sub nomine *Colt & Glover v Bishop of Coventry*.

protecting his own financial position. The judges refused the adjournment, relying upon the terms of the statute. They were called to Whitehall to explain their act of insubordination. The King demanded that, in future cases, they obey his commands. Fearful of the King's displeasure, all but one of the judges gave a solemn undertaking that they would not again disobey him. Only Lord Coke, then Chief Justice of the Common Pleas, continued to defy the King. He is said to have quoted to the King Bracton's statement that "the King should be subject to no man, but to God and the law". When asked point-blank how he would conduct himself in future, Coke is said to have replied: "That, when the case should be, he would do [whatever it would] be fit for a judge to do."¹⁹⁸ Coke's act of courage led to his eventual dismissal,¹⁹⁹ but it has remained an inspiration to this day. The English judges were to gain independence from the Crown by a gradual process in which the most important, though not the final step was the Act of Settlement of 1700.²⁰⁰

Interference with judicial independence has become legally, socially and politically taboo. It is underpinned by statutory provisions,²⁰¹ common law rules,²⁰² acknowledged constitutional proprieties,²⁰³ constitutional conventions,²⁰⁴ professional courtesies²⁰⁵ and judicial practices.²⁰⁶ Outside

198 The scene is vividly described by Bowen, *supra* n 167 at 319-322.

199 *Ibid* 322ff.

200 For a brief account of the struggle for judicial independence with useful references, see Shetreet, *supra* n 189 at 2-15; see also McRuer, *supra* n 187 at 3-42; for an account of the Act of Settlement (which he calls "a mighty declaration of the supremacy of law over arbitrary power"), see McRuer, *ibid* 39f.

201 The foremost example is the provision (which established judicial tenure) that "judges' commissions be made *quamdiu bene se gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them." — The Act of Settlement, 12 and 13 Will III, c 2.

202 The most important of these is probably the rule that no legal action lies against a judge for any utterance made or act done in his judicial capacity — *Scott v Stansfield* (1868) LR 3 Ex 220. In *Anderson v Gorrie* [1895] 1 QB 668, at 670 Lord Esher MR explained the reason for the rule as follows: "if such an action would lie the judges would lose their independence, and . . . the absolute freedom and independence of the judges is necessary for the administration of justice."

203 Eg, it has been argued in relation to the State of Victoria that it is improper for the Executive Government to admonish a judge for comments he has made from the Bench which are thought to be critical of the Government — Cowen and Derham, *supra* n 196.

204 It has long been thought to be improper for a judge to give an advisory opinion in a matter which might later require the exercise of his judicial function. As Shetreet has explained, the historical basis for this convention is the practice of the Crown, in the 16th and 17th centuries, of exercising control over the judiciary by consulting the judges on the legality of proposed courses of action — Shetreet, *supra* n 189 at 4f. For a much publicized fairly recent incident in Australia's constitutional history involving an advisory opinion which, according to some commentators, constituted a breach of this convention, see Sawyer, *Federation under Strain* (1977) 141ff; see also Howard and Saunders, "The Blocking of the Budget and Dismissal of the Government", in Evans (ed), *Labour and the Constitution 1972-1975* (1977) 251, 283ff.

205 Even in countries like Australia where interpersonal relations are generally egalitarian and informal, judges are treated, both inside and outside the professional sphere, with studied formalized courtesy (formal modes of address, courtesy titles, special, sometimes even deferential choice of terms). This practice must help to free the judges from many personal pressures.

206 Upon appointment to the Bench judges feel obliged to withdraw from outside activities (such as lecturing in Universities) which might predispose them to certain views in relation to issues on which they should keep open minds or which might expose them to personal pressures.

observers might feel that some of the assumed threats to judicial independence are imaginary and some of the safeguards over-elaborate if not unnecessary.²⁰⁷ However, even those safeguards most open to criticism can be justified. They can be seen as in the nature of forward defensive positions: as long as the line is held at the perimeters, the main citadel of judicial independence will remain secure. It may be that social taboos can only be created by the strenuous defence of tenuous, almost symbolic safeguards.

The doctrine of judicial independence is complex; this is not the place for a comprehensive exposition. Suffice it to say that the first precondition to the effective protection of individual liberty, viz judicial independence, is clearly satisfied in those common law jurisdictions which are true to their legal traditions.

(ii) *Commitment*

Judges may be sufficiently independent to protect individual liberty, but are they committed to it as possibly the worthiest of all causes? Common law judges see themselves as standing between the individual and the State, and as protecting the individual from oppression;²⁰⁸ yet there are strident and influential critics who maintain that judges are committed to the defence of wealth and privilege and that they have done almost nothing to promote the cause of human rights.²⁰⁹

Lord Wilberforce has explained that the English judges deserve credit for having evolved a number of common law rights and principles which "reveal how large a portion of what the citizen would consider his constitutional rights and liberties has come from the courts of common law".²¹⁰ The "elementary list" of ten rights and principles mentioned by Lord Wilberforce includes five which are mainly of relevance in the context of criminal law and procedure: (1) the presumption of innocence, (2) the requirement of mens rea, (3) the rule against self-incrimination, (4) the rule against double jeopardy, and (5) freedom from arrest. Another two are rules of statutory interpretation: the presumptions against (1) retroactive effect of legislation, and (2) inconsistency with

207 One convention which exists only in the State of Victoria and which is very controversial in Australia is the practice of Victorian judges to refuse appointment to Commissions of Inquiry or to accept similar special government assignments. The reasons for this outlook were set out in a well-known letter by Irvine CJ dated 14 August 1923 as follows: "The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary. It is mainly due to the fact that, in modern times, at least, the Judges in all British Communities have, except in rare cases, confined themselves to this function, that they have attained, and still retain, the confidence of the people." — quoted by McInerney, "The Appointment of Judges to Commissions of Inquiry and other Extra-Judicial Activities" (1978) 52 ALJ 540; see also Brennan, "Limits on the Use of Judges" (1978) 9 Fed LR 1.

208 *Supra* at n 109.

209 At a meeting of a group called "Citizens for Democracy", Mr Frank Walker, Attorney-General for New South Wales, is reported to have said: "Judges are the most conservative class in our community. The history of judges has been the protection of a privileged minority and the overwhelming protection of wealth and property. With a few exceptions judges totally ignore people and human rights." — *The News* (Adelaide), 29 June 1979. Mr Walker is said to have added that, of the hundreds of judges he had known, only two had not changed their attitudes when they received the salary and stature of a judge — *ibid*.

210 Wilberforce, *supra* n 25 at 271.

international law.²¹¹ The remaining three are difficult to classify and of rather uncertain status.²¹²

It was once thought that such common law rights and principles were more effective guarantees of individual liberty than were rights laid down in written constitutions. The most influential exponent of this view was Dicey²¹³ who contrasted the practical, legal remedies in defence of personal freedom available in England with paper declarations in some constitutions which did not provide the means of practical enforcement. He also suggested that guarantees in written constitutions (even if enforceable) could be suspended more easily than could corresponding common law guarantees, since the latter suffused the whole of the legal system. Dicey was careful not to reflect adversely upon the position in the United States where, so he stated, the incorporation of explicit individual rights into a written constitution had not diminished the emphasis upon practical enforceability.²¹⁴ It would indeed have been difficult to maintain that the common law has promoted individual rights and freedoms more strenuously than has the body of jurisprudence which is based upon the American Bill of Rights and is dedicated specifically to that purpose. Nevertheless, the contribution made by the common law undoubtedly shows a judicial commitment to the cause of individual freedom.

The claims made and recognized in the name of "freedom" may vary greatly from age to age. The causes pursued by some of our present "liberation movements" would have had little chance of success, or even of a hearing, a hundred years ago: "freedom of contract" and "the sacredness of property" as legal concepts yielded somewhat richer returns at the beginning of the present century than they do now.²¹⁵ In the days of Queen Victoria the possession of at least a little property was very helpful to those who sought the assistance of the law to protect their freedoms. Judges could hardly be expected to be immune from the dictates of their *Zeitgeist*. Lord Devlin has explained how this spirit influenced the treatment of statutes by Victorian judges:

"They looked for the philosophy behind the Act and what they found was a Victorian Bill of Rights, favouring (subject to the observance of the accepted standards of morality) the liberty of the individual, the freedom of contract and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the judges tended either to assume that it could not mean what it said or to minimise the interference by giving the intrusive words the narrowest possible construction, even to the point of pedantry."²¹⁶

It would be ungenerous to condemn judges of some past age for having entertained notions of "freedom" different from our own. It would also be ungrateful, for it ignores the fact that, without their

211 Ibid 271f.

212 The right to a fair hearing in any matter affecting a person's rights, freedom of expression, and freedom of association.

213 Dicey, *supra* n 109 at 196-202.

214 Ibid 200.

215 In the United States particularly, much social welfare legislation was declared invalid on the ground that it interfered unduly with contract and property. As Jaffe has said: "For a period of more than thirty years, 1905-37, minimum wage laws, price controls, and basic economic regulations of every sort were held unconstitutional on the ground that as an interference with 'freedom of contract' they amounted to the taking of liberty and property without due process of law." — *supra* n 22 at 86f.

216 *Supra* n 9 at 14.

concept to build upon, our own might never have been created. If we show some understanding of the limitations of the past, our own assumptions (undoubtedly still imperfect) about the postulates of liberty may be judged less harshly by a future, still more enlightened, age. That, of course, is not to say that the ghost of the "Victorian Bill of Rights" may not need to be exorcised when it haunts the present law.²¹⁷

Relativism in law and morals may not be a virtue, but to ignore shifts in the meaning of "freedom" is to misunderstand what the traditional judicial commitment to that concept has in fact meant. The rule of precedent will ensure that the present judicial outlook is to some extent linked to past attitudes. Moreover, it would not be reasonable to expect judicial attitudes to accord with the view adopted by the most *avant-garde* social thinkers. The law, as Lord Devlin has said, is "the gatekeeper of the status quo"²¹⁸ and that will colour the judges' view of freedom and, more especially, of the limits to it which they deem necessary. The judicial commitment to freedom derives from a long and impressive tradition, and it seems to have kept pace fairly well with changes in public opinion. Some of the most moving expressions of the very best in our contemporary understanding of freedom have come from prominent judges. An instance is an extra-judicial statement in 1961 by Lord Evershed: "the nourishment of the growth of each individual human spirit is the very essence of a free country. . ." ²¹⁹ The suggestion that judges have no commitment to freedom, that they "totally ignore people and human rights" can be dismissed as political invective.

(iii) *Jurisdiction*

However strong their commitment to individual freedom, judges can only protect it within the limits of their opportunities. When, as will often be the case, the source of the encroachment is an Act of parliament, these opportunities do not include one important element: the power to declare legislation invalid on the ground that it encroaches unfairly upon individual liberty. The theory, presumably created by common law judges, is that parliaments may pass any law, however monstrous, and that judges are obliged to treat it as valid. An Act which said that all blue-eyed babies should be killed might show that parliament had gone mad, but it could not be declared invalid by the courts.²²⁰ The most a court can do is try to soften the impact of such legislation by an interpretation which favours the individual. They might, for example, say that "blue" means a shade of blue almost unknown in human eyes. However, if parliament then became more specific, the judges would have a constitutional duty to obey. On the other hand, they would be under a clear moral duty to disobey and might seek to do so by the revolutionary act of asserting a change in the *Grundnorm*, a right to declare invalid such legislation.²²¹ The difficulty would be that a

217 In Australia, eg, that ghost seems very active in decisions of the courts which support schemes solely and clearly designed to avoid taxation, in defiance of perfectly clear anti-avoidance legislative provisions; also see *Interim Reports of Royal Commission on the activities of the Federated Ship Painters and Dockers Union* (Canberra 1982).

218 *Supra* n 9 at 1.

219 Evershed, *supra* n 99 at 764.

220 See Dicey, *supra* n 109 at 81.

221 For a (somewhat less fundamental) shift in the Australian *Grundnorm*, similarly based upon strong moral sentiments, see the statement by Sir Owen Dixon CJ on behalf of himself and all the other judges of the High Court in *Parker v The Queen* (1963) 111 CLR 610, 632f.

government ruthless enough to pass such legislation would have no scruples and might well have the de facto power to sack disaffected judges.

The doctrine of the absolute sovereignty of parliament has not been adopted in its extreme form in Commonwealth countries outside the United Kingdom. Australia, for example, has followed the American doctrine of *Marbury v Madison*,²²² although not to the point where legislation can be struck down on the ground that it encroaches unduly upon individual liberty.²²³

One might wonder why common law judges have refused to adjudicate disputes between parliament and the individual which involve very genuine and most important issues of justice. Could it be that the common law process is inherently unsuitable for the resolution of such issues? Such a view seems to be implicit in the Australian Human Rights Commission Act 1981, for it vests the task of protecting human rights in a Human Rights Commission (which has the right to conciliate and to make proposals to the Government, but no powers of enforcement) and ultimately in the Government itself.²²⁴ When he introduced the Human Rights Commission Bill 1979, the spokesman for the Government, Mr Viner, explained why this approach was considered preferable to the introduction of a fully-fledged, legally enforceable bill of rights: (1) the protection of human rights was considered to be the special responsibility of parliament (which would be advised by the Commission), the courts being confined to "interpretation and enforcement of remedies", and (2) broad human rights provisions were thought to require an interpretation incompatible with the common law tradition.²²⁵ The individual's complaint, made in the name of human rights, will often be directed against Acts of parliament. To insist that the resolution of such disputes is "the special responsibility of parliament" is to plead for an exclusively dyadic solution, to subordinate justice to efficiency of government *even where parliament has been flagrantly unjust in a matter in which efficiency is of no great importance*. How can such a stand be justified? Effectiveness of government is an important value, but courts with the right to review legislation would be the first to recognize it as such. They would confine their intervention to cases of truly serious injustice and would tolerate even that if overriding exigencies of state had made it unavoidable.

The judicial process is demonstrably well-suited to the task of reviewing legislation on the ground of undue infringement of individual liberty. Let it be conceded that the identification of group and community interests, the assessment of their weight and legitimacy, and the process of weighing them against private interests are complex and delicate tasks. It is usually easier for judges to establish what justice requires when only private interests are in conflict. However, as shown

222 (1803) 1 Cranch 137.

223 The most common grounds of review in Australia relate to the distribution of legislative powers between the federal parliament and those of the states — Cf Howard, *Australian Federal Constitutional Law* (2nd edn 1972), chapters 5-8.

224 See supra at n 152.

225 Hansard (House of Representatives) 19 2 1980, 68. Mr Viner also explained that a bill of rights would have "serious implications for our federal system of government" — *ibid*. This objection is specifically related to the "power balance" between the Federal Government and the States; it need not be pursued further in this context.

by judicially created safeguards in criminal law and procedure,²²⁶ judges are quite capable of establishing a proper balance between the interests of the individual and the interests of that infinitely more powerful entity, the State. Moreover, we have the example of the US legal system with a doctrine of judicial review of legislation which shows that judges, given the opportunity, can adjudicate successfully issues of individual freedom which have arisen between an individual and the legislature. One might object that the judges of the US Supreme Court have not needed to strike that balance themselves, because the Bill of Rights in the US Constitution has struck it for them. However, the extent to which judges are really assisted by the phrases to be found in the US Bill of Rights should not be over-estimated. As Pekelis has said:

"The great clauses of the Constitution, just as the more important provisions of our fundamental statutes, contain no more than an appeal to the decency and wisdom of those with whom the responsibility for their enforcement rests. To say that compensations must be 'just', the protection of the laws 'equal', punishments neither 'cruel' nor 'unusual', bails or fines not 'excessive', searches and seizures not 'unreasonable', and deprivation of life, liberty, or property not 'without due process' is but to give a foundation to the lawmaking, nay, constitution-making activities of the judges, left free to define what is cruel, reasonable, excessive, due or, for that matter equal."²²⁷

It is arguable that some of the inspired phrases in the US Bill of Rights have made it more, rather than less, difficult for the US Supreme Court to strike a proper balance between the interests of the community and those of the individual. There are few areas of life where the individual ought not to make some concession to the community in return for the blessings of community support. This moral commitment is all too easily obscured when over-enthusiastic enunciations of individual freedoms are given legal form. Griswold has illustrated the problem by reference to the First Amendment to the US Constitution which reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . ." ²²⁸ Mr Justice Black, a "strict constructionist", has taken "freedom of speech" to mean "all speech of whatever nature must be entirely free", and has concluded that Congress has no power to legislate in any way against libel or slander or against pornography. As Griswold observes: "The court has indeed gone far down this road, and the sad state of Times Square, once one of the country's Meccas, and of many other places in the nation's cities, is evidence of the consequences."²²⁹ These consequences are the result of the successful assertion and commercial exploitation of worthless freedoms at the expense of the substantial public interest in the maintenance of a modicum of decency in public places. Had the Supreme Court been able to exercise the power of judicial review freely, ie without the dubious guidance of the First Amendment, it would surely have given greater weight to the public interest. Excessive emphasis upon individual freedom may ultimately be self-defeating. As freedom is seen to turn to licence, and as the detrimental consequences of that process

226 Supra at nn 211-213. The judicially created system of remedies designed to provide some control over administrative action would make an equally suitable illustration — see De Smith, *Judicial Review of Administrative Action* (3rd edn 1973).

227 Konwitz (ed), *Law and Social Action* (1970) 4. Jaffe has called phrases such as "due process" and "equal protection" "as expandable as a giant accordion" — supra n 22 at 2.

228 Griswold, *The Judicial Process* (1973) 12.

229 Ibid 14.

become revealed, a "back-lash" may be provoked which, depending upon its strength and its direction, may lead to excessive restraints. Individual freedom calls for unrestrained promotion only where fetters are created and/or maintained merely frivolously, ie without any supporting public interest. When there is such an interest, the true problem in law and justice should always be one of fairly balancing private against public interests. The best results could be expected from judges given jurisdiction to perform that task, but left free to evolve the principles to guide their actions by the ordinary processes of the common law. The seeds for such a development were sown when Coke announced in *Bonham's Case*²³⁰ that Acts of Parliament were declared void by the courts of common law when they were "against common right and reason, or repugnant, or impossible to be performed".²³¹ Coke's words fell on barren ground. Instead of a doctrine of judicial review which he appears to have envisaged, the doctrine of the absolute sovereignty of Parliament became entrenched in the British Constitution. It seems that the judges showed wisdom when they desisted from the attempt to proclaim the ultimate ascendancy of the judicial over the other powers of government. However great their prestige, their power base (to say nothing of problems of political legitimacy) for such a definition of their relationship with the political process would sooner or later have proved too fragile.²³² Written constitutions have proved more flexible than the common law. As the US Constitution shows, the judicial power has had assigned to it the role of reviewing ordinary legislation so as to ensure that the legislature does not encroach unduly upon individual liberty; on the other hand, the ultimate ascendancy of the political process has been ensured by making even the Supreme Court subservient to the Constitution itself as well as to constitutional amendments. Constitutional amendments are as much the product of the political process as is ordinary legislation, but they require the demonstration of considerably greater popular political determination. How to define that amending power has proved a thorny problem in some countries,²³³ but, such detail apart, assigning to the judicial process a place above the ordinary legislative power and below the constitution-amending power seems an appropriate compromise. The common law has proved (perhaps inherently) unable to achieve a solution of similarly admirable flexibility. The result has been that, at common law, there is no ultimately effective way of vindicating individual freedoms against unjust legislative encroachments. Accordingly it is difficult to give unqualified support to the view that the common law is the unrivalled champion of individual freedom.

6 Conclusions

(a) *The common law: an "unpolitical" instrument of government.* —

230 (1610) 8 Co Rep 113b, 118a.

231 *Ibid* 118. This remarkable passage has given rise to a considerable literature — see Allen, *Law in the Making* (7th edn 1964) 447-451 and the literature referred to there; see also Lewis, "Sir Edward Coke (1552-1633): His Theory of 'Artificial Reason' as a Context for Modern Basic Legal Theory" (1968) 84 LQR 330.

232 For an interesting analysis of the problem in the context of the West German Constitution, see Dahrendorf, "A Confusion of Powers: Politics and the Rule of Law" (1977) 40 MLR 1.

233 There is a widespread view in Australia that the procedure (which requires, inter alia, majority support in a majority of states) is too onerous — see Howard, *supra* n 223 at 505ff.

The common law is an unusual instrument of government and, particularly to the foreign observer, a fascinating object of comparison and study: it has great historical depth and is based upon the professional and personal values of a judiciary which is separate from and independent of other agencies of the State. The common law is unpolitical in the sense that it is not under the control of the politically powerful and that it enjoys a measure of immunity from the pervasive influences exerted by political currents and fashions of the day. If all the common law were to be replaced by legislation, an important component of political diversity in the structure of common law countries would be lost.

- (b) *Nature of common law and of statute law according to the Benthamite tradition.*— According to the Benthamite tradition, the common law has been made by lawyers to further their own ends: it is considered to be inherently devoid of clarity, simplicity, social justice and even political legitimacy. Statute law, on the other hand, is viewed as capable of being freed from such deficiencies and of being imbued with honesty of purpose and social utility. In the spirit of that tradition, the English Law Commission set out, shortly after its creation in 1965, on a programme of large-scale codification. That programme has faltered, if not altogether failed,²³⁴ a fact which suggests that the Benthamite assessment of the judicial decision as an inappropriate receptacle of the law is fundamentally mistaken.
- (c) *Growth of substantive common law: a practical necessity.*— Until fairly recent times, perhaps until the formation of law reform commissions, judicial law-making was supported by a principle of political justification more powerful than most: practical necessity. Seen in our contemporary terms, the dilemma of the early common law courts was that they were given jurisdiction to resolve disputes but were not given a sufficient body of substantive law to govern their adjudications. This made the evolution of the substantive common law a matter of necessity: the only alternative (an unacceptable one) was wide-ranging judicial discretion, and thus, “palm-tree” justice.
- (d) *Practical necessity as a principle of political justification for judicial law-making after the creation of law reform commissions.*— This principle of justification (practical necessity) is now regarded by many as a spent force. The creation of law reform commissions has caused judges themselves to develop a new attitude of diffidence: they tend to view the procedures of law reform commissions as better suited than the litigious process to the taking of new legal initiatives, and they exercise commensurate restraint in their own law-making, and particularly their own law-reforming activities. Such a self-denying definition of their relationship with law reform bodies is plainly unsatisfactory, for the capacity of the commissions to promote the continuing renewal of all the law is so severely limited that a further vigorous judicial contribution remains an undeniable and pressing practical necessity.

234 See Kerr, *supra* n 88 at 527-530.

- (e) *Judicial making of "arbitral" law (though not of "regulative" law) justified by practical necessity and by social utility.*— The main submission of this paper is as follows: a diffident judicial outlook is appropriate in relation to criminal law, and, more generally, in relation to all forms of law which are best described as "regulative"; but it is inappropriate in relation to those forms of law which are best described as "arbitral". The continued making of arbitral law by judges is still justified by practical necessity. Moreover, such judicial law-making can be supported on the very ground chosen by detractors of the common law for their criticism: *social utility*.
- (f) *Regulative law defined.*— A regulative norm has three, and only three, components: (1) a generalized specification of certain conduct, (2) an order or "command" which either prohibits the conduct so specified or renders it compulsory, and (3) a statement of the sanction or sanctions to be imposed in the event of disobedience. Judges are capable of generating such law as is shown by the judge-made criminal law. Any legal norm which bears a regulative technical appearance (as defined above) has one and only one function: it is directly restrictive of individual freedom. In general it should only be imposed by a person or group of persons with the kind of political mandate which flows from the democratic electoral process. Not having been thus elected, judges should, unless compelled by overriding necessity, refrain from making such law. A large part of the statute law in force in common law countries is regulative in character. Judges tend to think of all statute law as regulative as is shown by their refusal to expand its scope by analogous application.
- (g) *Arbitral law defined.*— Arbitral law is obviously regulative in the broadest sense, but not in the sense here defined. It has another major function: to be available for the resolution (if necessary for the authoritative resolution) of spontaneous and socially disruptive disputes. Most of the common law can be described as arbitral in character: it has grown out of, and remains closely associated with, the dispute-solving (adjudicative) function of the courts. It shows its procedural origins and associations in many ways, eg in the procedural language in which many of its otherwise substantive rules are couched. The most fundamental of its technical characteristics derives from the fact that disputes are based upon conflicts of interests: the first and most important component of an arbitral norm is the specification and, to some extent, the judicial weighting and evaluation of the conflicting interests which require authoritative reconciliation and/or adjustment. The second, legally operative component is the prescription of the way in which that reconciliation and/or adjustment is to be achieved. This component usually consists of a specification of the legal relations between the parties, whether it be in terms of powers, immunities, rights, duties or other legal concepts. However, such concepts are not primary "control mechanisms" but merely secondary rationalizations, intended to make court decisions predictable; they are capable of restriction, amplification or even complete transformation in the light of future developments.
- (h) *Judge-made arbitral law: a continuing necessity.*— Most of the judge-made regulative law is concerned with criminal offences;

there is no practical reason why the parliamentary law-making machinery should not become the sole initiator of such law (as has already occurred in common law jurisdictions which have passed criminal codes), confining the judiciary to an ancillary role of interpretation and amplification. On the other hand, the body of judge-made arbitral law (which includes most of the private law) is very large — too large for effective wholesale codification by present-day law reform commissions within any reasonable time. Thus, vigorous judicial attention to arbitral law remains a practical necessity.

- (i) *The social utility of arbitral law: economy of effort and expense.* — Arbitral norms are rules of conflict solution rather than rules of conduct. No matter how well it has been planned, considered and drafted, an arbitral norm will have little practical relevance and effect unless the disputes envisaged by the norm in fact arise and call for judicial determination. The occurrence of actual disputes is almost certainly a more reliable guide to this kind of practical relevance than is the imagination of even the most far-sighted codifier of arbitral law. Codes of arbitral law are often deficient in two respects: (1) many disputes are bound to occur for which such codes fail to provide, and (2) there will be rules for types of conflict which will not in fact eventuate. The second of these problems is avoided by reliance upon judge-made arbitral law: once a dispute has arisen (and a rule has been made to govern it), the occurrence of further, similar disputes is possible and, in many cases, probable. Moreover, judge-made arbitral law must seem attractive to the taxpayer: legislation has to pass through the costly parliamentary process, but judge-made law is a by-product of litigation and is made at virtually no cost to the public purse.
- (j) *The alleged obscurity and uncertainty of judge-made law.* — The expenditure of public money is justified whenever it prevents an evil, the social cost of which would be greater than the sum of public money expended. Some would argue that the cost of codification represents public money well-spent, for it will remedy an evil, viz the alleged obscurity of judge-made law. What codifiers seek is a form of law which, unlike the common law, is simple, clear and certain, easy to comprehend and capable of application in practice without undue cost and effort. It is true that statute law can be endowed with such qualities more easily than can the common law. However, such greater simplicity comes at a price which may well be payable in the coinage of human freedom. Statute law responds with sympathy to the request: "Don't burden me with the whys and wherefores, just tell me what to do!" However, does such a plea not come from a pleader who cherishes his comfort and convenience more than his freedom? Judge-made arbitral law not only provides the reasons for the restraints it imposes, but writes at least some of these reasons (the identification, evaluation and balancing of conflicting interests) into the very norms which it provides. Unavoidably this adds to the complexity of judge-made arbitral norms, but if such complexity helps to preserve the freedoms enjoyed by members of society, it may be a price worth paying.

- (k) *Judge-made arbitral law and individual freedom.*— Like all forms of law, arbitral law restricts individual freedom to some extent, but it does so in a special way and for a special purpose: A's freedom is restricted only when it imposes a restraint upon B's freedom and only so far as is necessary in order to create a just balance between A's and B's conflicting freedoms. As long as arbitral law functions as intended, it will never curtail any freedom or interest except for the purpose of promoting and vindicating some other, conflicting freedom or interest. Thus, arbitral law does not diminish the sum total of human freedom which society enjoys. In our crowded world, individual freedom must be seen as a commodity which is in limited supply. Courts have no mandate to diminish the overall supply, but they are better equipped than any other agency of the State to provide for its fair and efficient distribution. These considerations may or may not help to establish the social utility of judge-made law, but they undoubtedly defuse, at least in the sphere of arbitral law, the otherwise difficult issue of political legitimacy raised by judicial law-making. Although arbitral law can be given statutory form, it will lose in the process some of its true arbitral character because statute law, by its very nature, tends towards intrusiveness and regulation.
- (l) *Individual freedom and collective freedom distinguished.*— The considerations set out in conclusion (k) cannot be a sole and sufficient reason for preferring judge-made arbitral law to statute law. "Freedom" is a complex concept; it has an enduring emotive appeal but its meaning changes as political conditions change. In any analysis of law and freedom, a fundamental distinction must be observed: the distinction between the freedom of the individual from external restraints whatever their source (individual or personal freedom), and the freedom of groups (eg nations, clubs, partnerships, families) to govern their affairs without outside interference (collective or group freedom). These two forms of freedom must not be confused, for there is a potential tension or conflict between them.
- (m) *Collective freedom and individual freedom: some interactions.*— If, in the absence of legal or other "external" pressures, a group is free to govern its own affairs, it will develop spontaneous, "natural" methods for the settlement of internal conflict and for the adjustment of conflicting interests of its members. Some of these methods may be fair and even preferable to the legal process (compromise, voluntary arbitration), but others, such as settlement of disputes by the exercise of powers of command or by the unilateral fiat of one of the parties to the dispute ("dyadic" dispute solution as distinct from the "triadic" one in which an independent third party provides an authoritative decision), can lead to an unfair and oppressive loss of individual freedom which may need to be restored by legal intervention.
- (n) *The vindication of individual freedom: common law and statute law.*— The fight for individual freedoms and interests against collective oppression and against unilaterally imposed restraints should be seen, in liberal-democratic countries, as the main task of the legal system. The common law has been in the forefront of

this fight, but some of its inherent and/or traditional characteristics seem to limit its effectiveness. The common law cannot support an individual interest or freedom unless it has been first asserted in litigation. Some freedoms may be so effectively suppressed, perhaps by non-legal means, that they cannot be litigiously asserted, thus preventing intervention by the arbitral rules of the common law. Moreover, the common law has been traditionally reluctant to intervene when "self-management" of a social or commercial relationship, perhaps by means of contractual arrangements, has been resorted to and seems available as an alternative to judicial intervention. The common law has traditionally as much respect for collective as for individual freedom. In consequence a good deal of injustice in society passes un-noticed by the common law, or is allowed to pass in the name of the integrity of group autonomy or collective freedom. By contrast, statute law is not subject to similar limitations. It has the power to intervene in social relationships on behalf of anyone the legislature conceives as being oppressed, even if he has made no complaint. However efficiently a social group may "self-manage" its affairs, statute law is free to intervene and to remould the relationships within it. If judged by its potential, statute law appears to be a more effective vindicator of individual freedom than is the common law.

- (o) *The State and individual freedom.*— Throughout recorded history the most deadly threats to life, limb and individual liberty have come from those who have wielded the power of the State. Of all human groups the sovereign nation State is the one least subject to external restraints and thus potentially the most oppressive. Has common law or statute law been the more effective champion of individual liberty in the fight against State oppression? The common law has a proud record, but the English courts have failed to develop a doctrine for the judicial review of legislation alleged to interfere unduly with individual freedom. Such a doctrine introduces a desirable, justice-oriented arbitral element into the political process, particularly into the relationship between the legislature and the individual. Such a doctrine evolved in the United States only after the creation of a constitutionally entrenched bill of rights which is a form of statute law. However, the doctrine of judicial review itself is not statutory; rather, it was created by the US Supreme Court. More importantly, the body of American jurisprudence which protects the individual from undue legislative encroachments owes much more to judicial creativity than to the stark pronouncements in the Bill of Rights itself. Bills of rights tend merely to specify interests which deserve protection — the conversion of such specifications into workable norms requires an essential and extensive judicial contribution: the balancing of such interests against other interests, especially public ones, and their reconciliation and/or adjustment by an appropriate definition of State powers and of their limitations. The resulting law is as much the creature of the judicial arbitral process as is the common law itself.
- (p) *Statute law inherently political; common law inherently justice-oriented.*— In fair weather, statute law may well show itself as the

most effective champion of individual freedom. However, it also has the capacity to become an equally effective instrument of oppression, if the political winds blow in that direction. The Benthamite belief in the power of statute law for good is based upon the rationalist fallacy that statutes are bound to be inspired by a benign political intent. Whilst the common law is politically neutral and justice-oriented, statute law is politically dependent and inherently indifferent to the demands of justice. Its orientation will simply reflect that of its political masters. The liberal-democratic tradition and its institutions help to keep the State benign, but in democracies which adhere to the Westminster tradition, the legislative process lacks an in-built, institutionalized concern for statutory justice. Instead, the political process is based upon the dyadic model of interest adjustment. The common law may not be the most effective safeguard of individual freedom against group oppression, but its belief that some small-scale collective autonomy is a desirable counter-balance against the powers of the State, has yet to be shown to be mistaken. In the absence of a bill of rights, the complete replacement of the common law by statute law may well mean that the one great spring from which the ideals of justice and equity have entered into society for centuries will cease to flow. The result might be, to adapt a statement by Sir Owen Dixon, that the State would exercise "an unregulated authority over the fate of men and their affairs which would leave our system undistinguishable from the systems which we least admire".²³⁵

235 Dixon, "Concerning Judicial Method", in *Jesting Pilate* (1965) 152, 165.