The Spirit of the British Constitution

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I feel that, to write in your Canadian Bar Review about the "Spirit of the British Constitution" is rather like carrying coals to Newcastle: for I do not doubt that the Canadians have in their constitution the self-same spirit as that which has guided the English in all these years. The spirit of a constitution reflects the character of its people and we, in England and Canada, all have the same outlook on fundamental matters. We all inherit from our forefathers, be they English or French, the same sense that individual personality is the unique intrinsic value that we know upon this earth: and this is, at bottom, the spirit which underlies our constitutions.

The constitutions of Britain and of Canada of course differ greatly in point of form. Legislative power in Britain rests solely with the Parliament of the United Kingdom: whereas in Canada it is divided between the Dominion parliament and the provincial legislatures. But these are matters of form. They are not fundamentals. We in England have frequently changed our forms of government but, some how or other, we have always kept the same spirit. "The history of England is emphatically the history of progress. It is the history of a constant movement of the public mind, of a constant change in the constitutions of a great society."[1] The last century has seen as great changes as any of the preceding centuries. There has been a social revolution accompanied by a constitutional revolution. When Dicey wrote in 1885 he could point to the sovereignty of parliament and to the rule of law as cardinal features of our constitution. Now in the year 1951 the emphasis has altogether changed. In legal theory Parliament is still sovereign, and we still claim to be under the rule of law: but anxiety is raised in many quarters by the growing powers of the executive.

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[1] Macaulay's Essay on the History of the Revolution.

The change has no doubt been forced upon us by circumstances. You cannot fight great wars except by giving your leaders power to make great decisions and to translate them into immediate action. You cannot safeguard your currency and trade in a competitive world except by strict control over exchange, and over exports and imports. You cannot ensure fair distribution of necessaries which are in short supply except by a system of rationing. You cannot nationalise essential industries except by putting them under the general direction of the government. All this involves the entrusting of great powers to the executive: and the powers, once given, are apt to continue indefinitely. Some, indeed, have been made permanent: and others cannot be retracted.

But, with all this change, nevertheless the spirit of the constitution remains the same. What is this spirit? Like other things of the spirit, it is more easy to recognize than to define. It is to be felt rather than to be seen: and to be experienced rather than to be learnt. It is an atmosphere which springs out of our long experience and tradition. If you would catch something of it, you should go to Westminster Hall and remember the great scenes that have been enacted there. "The great hall of William Rufus, the hall which has resounded with the acclamations at the inauguration of thirty Kings . . . the hall which witnessed the just sentence of Bacon and the just absolution of Somers . . . the hall where Charles confronted the High Court of Justice with the placid courage which has half redeemed his fame . . . the hall where the great proconsul Warren Hastings presented himself to his Judges."[2] The hall where only the other day the Speakers of the British Commonwealth of Nations came to witness the opening of the new House of Commons. Such memories will bring back to you some of the great constitutional issues which have been decided by the English people. But you should also remember that, in this hall for nigh on seven hundred years, the judges of England laid down the common law which precisely defined the rights of the individual and made the life and liberty of every law-abiding citizen secure from injury on the part of others or of the State. Here sat the judges of England right from the days of King Henry II in 1189 till the year 1873 when the courts were moved to their present situation in the Strand. The principles laid down by them have sunk deep into the mind of the nation and have been more powerful than anything else in creating the spirit of the British constitution. If you reflect on all this in that hall, so strong and so well balanced, so built as if for all time, you will get a sense of wonder-

[2] Macaulay's Essay on Warren Hastings.

ful history, and with it a knowledge that the English people — and their cousins throughout the British Commonwealth — are heirs of a spiritual worth which is a greater power in the world than armies or navies or atomic bombs.

Again, however, I revert to the question, what is this spirit? It lies I believe, first, in the instinct for justice which leads us to believe that right, and not might, is the true basis of society; and secondly, in the instinct for liberty, which leads us to believe that free-will, and not force, is the true basis of government. These instincts for justice and liberty are abstract ideas which are common to all freedom-loving countries: but the peculiar genius of the British constitution lies in a third instinct, which is a practical instinct leading us to balance rights with duties, and powers with safeguards, so that neither rights not powers shall be exceeded or abused. Throughout all this runs the Christian instinct and with it a sense of the supreme importance of the individual and a refusal to allow his personality to be submerged in an omnipotent state. This is in direct contrast to those constitutions which attach supreme importance to the state and little or none to the individual.

The first instinct, the instinct for justice, finds its expression in the rule of law. In order that right, and not might, should be the basis of society, the people must be under the rule of law, and there are four fundamental requisites which the law must fulfil: (1) it must be certain so that the people may act safely upon it; (2) it must be just so that they will approve of it being enforced; (3) it must be readily ascertainable, so that they may know what their rights and duties are; (4) it must be enforced by independent and upright judges in whom the people have confidence.

The keystone of the rule of law in England has been the independence of the judges. It is the only respect in which we make any real separation of powers. There is here no rigid separation between the legislative and the executive powers: because the ministers, who exercise the executive power, also direct a great deal of the legislative power of Parliament. But the judicial power is truly separate. The judges for the last 250 years have been absolutely independent. And when I speak of judges, I include not only the High Court judges, but also all the magistrates and others who exercise judicial functions. No member of the government, no member of Parliament, and no official of any government department, has any right whatever to direct or to influence or to interfere with the decisions of any of the judges. It is the sure knowledge of this that gives the people their confidence in the judges, and I would

add also the chairmen of tribunals when they are independent of the executive, for then they too are judges. It does not depend on the name judge or chairman but on the substance. The critical test which they must pass if they are to receive the confidence of the people is that they must be independent of the executive.

Why do the English people feel so strongly about this? It is because it is born in them. We know in our bones that it will not do for us to allow the executive to have any control over the judges: and we know it because our forefathers learnt it in their struggles with the kings of England—the kings who in the old days exercised the supreme executive power in the land. Ever since the Act of Settlement in 1701 it has been part of our constitution that a judge of the High Court cannot be removed except for misconduct, and, even then, there must be a petition from both houses of Parliament for his removal. This means that a judge is virtually irremovable. No judge has ever been dismissed from that time to this. Secure from any fear of removal, the judges of England do their duty fearlessly, holding the scales even, not only between man and man, but also between man and the state. Every judge on his appointment takes an oath that he "will do justice to all manner of people according to the laws and customs of England, without fear or favour, affection or ill-will". Never since 1701 has any judge failed to keep that oath.

If the independence of the judges is the keystone, then the certainty and justice of the law is the structure on which the rule of law depends. This certainty and justice is not attained in England by any code of laws. The law of England was in former times for the most part declared by the judges, who were guided by the precedents of their predecessors. They decided each case as justice demanded and then built up principles from the individual cases. The precedents were collected and reported, and form a body of case-law unique in the history of the world. The principles which they enunciated are still today the basis of our fundamental freedoms. Our freedom of the press, freedom of mind and conscience, and freedom of speech are all protected by the rules of law laid down by the judges. To our mind this form of protection is better than the provisions of a written constitution. Some may think that the English went too far in their adherence to precedent but it made for certainty, which has recently been described by Lord Simonds as of "paramount importance" in the law.[3] If the law so declared was found to be unjust or unsuited to changing times, it could only be altered by Parliament. The conception, however, of

[3] *Jacobs* v. *London County Council*, [1950] A.C. at p. 373.

English law as being mainly judge-made law is out of date. Much more law is nowadays made by Parliament and by the ministers than by the judges. The appellate courts of today do not spend much time in developing common law principles. They spend most of their time interpreting statutes made by Parliament or regulations made by ministers. This does not, however, mean that there is any derogation from the rule of law itself. It does not matter so much who makes the law, the judges or the ministers, so long as it is certain, and just, and readily ascertainable by the people, or at any rate by their lawyers. Nor does it matter so much who tries the cases, whether it be judges or tribunals, so long as they are independent of the executive. These are the only principles which are involved in the rule of law and they have over the centuries become part of the British constitution. They were well expressed by our own philosopher John Locke in 1690 when he wrote in his Essay on Civil Government: "Whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; and by independent and upright judges, who are to decide controversies by those laws".

During the last twenty-five years, however, many misgivings have arisen lest the rule of law is being crowded out. In the first place, the growth of delegated legislation has often meant that the laws are not effectually promulgated or known to the people. In the second place, the growth of departmental tribunals has often meant that those who decide controversies are not independent of the executive. The anxiety felt by the people of England on these subjects is reflected in the Report of the Committee on Ministers' Powers[4] and in an extensive literature. It culminated in a bill called the Liberties of the Subject Bill which Lord Samuel introduced into the House of Lords and which received its second reading there,[5] but unfortunately was not proceeded with owing to Lord Samuel's illness.

Let me illustrate the mischiefs arising from delegated legislation by cases that have actually come before the courts. The most illuminating case on delegated legislation was where Parliament authorised regulations to be made enabling the Crown to requisition property. In pursuance of that authority, the executive made regulations enabling the government departments to requisition property and — this is the point — also enabling the government department to delegate their powers to other persons. In pursuance

[4] Cmd. 4060 (1932).
[5] Hansard for June 27th, 1950.

of those regulations, the Ministry of Health delegated powers of requisitioning to the clerks of local authorities and they did it by circulars which were not promulgated or known to the people at all. In the circulars the ministry said that the local authorities could only requisition houses that were unoccupied and must give fourteen days notice before they went into actual occupation of a house: and that if the owner, within the fourteen days, declared that he intended to occupy it himself, the local authorities had to withdraw the requisition. Those circulars were what Lord Justice Scott described as "sub-delegated legislation" and ought in fairness to have been published. But they were not: and see what happened. The owner of a house at Blackpool wanted to sell it as it was too large for him. When he had got a purchaser and agreed to sell it with vacant possession, the town clerk stepped in and requisitioned it. Whereupon of course the inevitable happened. As soon as the purchaser heard of the requisition he called off the deal. So the owner told the town clerk that he would go into occupation himself. But the town clerk did not take any notice of that. He proceeded with the requisition and got the Ministry of Health to back him up. The owner's solicitor asked for a copy of the circulars but was told that they could not be made available to the public. It was nearly six months before he got them: but, of course it then appeared at once that, as soon as the owner said he would go into occupation himself, the town clerk ought to have withdrawn the requisition. The courts therefore held the requisition to be bad. The judges sternly condemned the executive for withholding the circulars and Lord Justice Scott said: "The modern extent of sub-delegated legislation is almost boundless: and it seems to me vital to the whole English theory of the liberty of the subject, that the affected person should be able at any time to ascertain what legislation affecting his rights has been passed under sub-delegated powers".[6]

In that case there was no publication at all of the sub-delegated legislation. Now let me take a rather different case where there was publication of the delegated legislation but injustice was done because the meaning of it was unknown to the people. The Defence Regulations enable the Ministry of Works to exercise strict control over building. The regulations provide that it is unlawful for anyone to carry out certain building works except under a licence granted by the Minister. A builder who was proposing to do some building asked the proper authority for a licence and was told by word of mouth that he could get on with the work and that the

[6] *Blackpool Corporation* v. *Locker*, [1948] 1 K.B. 349, at p. 370.

licence would be issued later. So he did get on with it and the licence was issued afterwards. But when he sought to get payment, the building owner said the work was done illegally because there ought to have been a written licence in existence before the work was started: and, as there was no such licence, he was not liable to pay anything. That defence was held to be good.[7] So the builder, who had done the work on the oral licence of the proper authority, got no payment at all. The licensing authority ought not, of course, to have given an oral licence at all, but the builder can hardly be expected to have known that. In these days, when there is so much delegated legislation, the ordinary man relies on the officials to know the extent of the legislation and acts on what they tell him. It comes to a pretty pass when they fall into error themselves and the ordinary citizen suffers in consequence of it. It may, perhaps, some day be worthy of consideration whether they may not be liable in damages on the analogy of breach of warranty of authority.

Such cases illustrate the mischief which flows from the great growth of delegated legislation. Efforts are being made to deal with it. One way is to give Parliament more control over it. This is being done. In 1944 there was set up a Scrutinising Committee of the House of Commons which examine every statutory instrument containing delegated legislation. This is a considerable safeguard: but the difficulty is that neither the House of Commons nor the House of Lords can amend this type of legislation. The regulations that are made by a minister must either be rejected in whole or approved in whole. There is no intermediate course. So if there is an instrument of some 15 regulations, 14 of which are desirable and one only objectionable, neither house can reject the one objectionable regulation without rejecting the other 14 also, which it may not wish to do. Suppose, for instance, that in the case of the building regulations, the house thought it would be better to amend one of the regulations by saying that the licence could be either oral or in writing — and so avoid the injustice already mentioned — it would have no power to make such an amendment. This seems a remarkable limitation on the powers of Parliament in favour of the executive: and Lord Samuel has pointedly observed that "it has been felt by many Parliamentarians for a long time past that there ought to be a power to amend, and that we should not merely have to submit to a dilemma, both horns of which might be dangerous, either to accept or to reject".[8]

Let me now come to the other anxiety, the growth of depart-

[7] *Jackson Stansfield and Sons* v. *Butterworth*, [1948] 2 All E.R. 558.
[8] Hansard for June 27th, 1950.

mental tribunals, and illustrate the misgivings about them also by cases that have come before the courts. These tribunals are often staffed by men who are only appointed for the occasion: and who may be dropped if they are not satisfactory. They are therefore not independent of the executive: and if the government department who appoints them should issue circulars to them giving its view of the law, they would hardly dare to disregard them. This cannot happen, however, when there is an appeal to a superior court, which is itself independent of the executive. The law will then be laid down by the superior court and there is no reason for any misgivings. If the tribunal falls into error, it will be corrected by the superior court. That was well shown in regard to pensions for men disabled in the war. The pensions appeals tribunals used often to accept the minister's view about a case or the view of its medical member — as for instance his view that a disease could not be attributed to war service — without requiring it to be supported by the evidence of any doctor. But when the matter was taken on appeal to the High Court, those decisions were overruled. Lord Justice Tucker said: "it is, I think, of the essence of 'evidence', according to English ideas, when used with reference to judicial or quasi-judicial matters, that it should consist of oral statements or documents in writing *which are made in the presence of or communicated to both parties before the tribunal reaches its decision.* . . . Information communicated by the medical member to his colleagues during their deliberations does not fulfil these requirements. . . ."[9]

Now contrast that case with cases where there is no appeal to a superior court. Then misgivings do arise. There are, for instance, a large number of rent tribunals which have jurisdiction to fix the rent of houses or flats which are let furnished: and there is no appeal from their decisions to a superior court. In one case there was a block of flats at Brighton which were of a kind occupied by professional men who had agreed to pay the rents that were asked. Then, in spite of their tenancy agreements, the tenants applied to the tribunal so as to get the rents reduced. The tenants called no evidence but nevertheless they succeeded in getting their rents reduced by £50 a year. The tribunal acted not on evidence, but on its own impressions and knowledge. The landlords applied to the High Court to quash the proceedings but their applications failed. The Lord Chief Justice said that the tribunal had acted in a way which would not be tolerated in a court of law but it had not offended against any statutory provision or regulation, and so the

[9] *Moxon* v. *Minister of Pensions*, [1945] K.B. 490, at p. 501 (italics added).

High Court could not interfere. He added these important words: "While it would be improper for us in any way to question the policy of the Act, I feel that possibly it might be a more satisfactory state of affairs if there were some method of appeal to a central tribunal, such as has so often been provided for where these *ad hoc* tribunals have been set up. Though one recognises to the full the virtue and value of these tribunals and of their inquiries being held in an informal manner, it is unfortunate if conflicting decisions are given by different tribunals in different parts of the country without there being any method through some appellate tribunal of co-ordinating and correcting the decisions."[10] I regret to say that when that courteous suggestion was brought to the notice of the House of Commons, the Minister of Health rejected it with these words, "This is the House of Commons!" as if it were not for the judge to make such a suggestion. But a more enlightened view was expressed by Lord Chorley in the House of Lords when he said: "This country is one of the few countries with modern civilised legal systems in which provision is not made for appeal from administrative decisions on legal points of great importance. . . . the great masses of the people of this country are feeling very anxious at the present time, holding the view that something is needed in respect particularly of administrative law and the decisions of Ministers of State, given in almost every Department of State at the present time, which in all sorts of ways affect the rights and liberties of the ordinary man and women in this country and from which they have no sort of appeal whatever. . . . I cannot see why some sort of administrative court such as exists in other countries should not be set up."[11]

So you see that, although the rule of law is threatened by the growth of delegated legislation and of departmental tribunals, nevertheless the spirit of our constitution is making itself felt so as to see that justice is done. It will, I hope, result in a stricter control by Parliament over delegated legislation and a strict control by an administrative court over the departmental tribunals. This is where the practical instinct of the people comes into play. Every thinking person accepts the necessity for delegated legislation and departmental tribunals: but there must be safeguards against the powers thus entrusted to the executive. I do not doubt that the practical good sense of the people will be able to devise these safeguards.

The second instinct of which I spoke, the instinct for liberty,

[10] *Rex* v. *Brighton Rent Tribunal*, [1950] 1 All E.R. 946, at p. 950.
[11] Hansard for June 27th, 1950.

finds its expression in certain fundamental principles of law. In order that free will, and not force, should be the basis of government, there are three fundamental requisites which must be fulfilled: (1) there must be freedom of discussion so that the people may criticise the existing government and propose an alternative; (2) there must be freedom of association so that people may form themselves into a party to advocate an alternative government; (3) there must be free and timely elections so that the people may have the government they choose. But experience has shown that these freedoms can only be secured by the rule of law; and can only be granted to those who propose and advocate a government which will recognize these self-same freedoms in others.

The keystone of our political liberty is freedom of discussion. In former days people used to think that our liberty was secured by the sovereignty of Parliament, but that has become a thing of the past. Over one hundred years ago Parliament was no doubt the supreme power in the land, both in law and in fact. The House of Commons was elected by a selected class of the people—the householders — and the House of Lords was a hereditary body which could veto any bill except a money bill. Members of the House of Commons were unpaid and were expected to vote according to their conscience and not according to the dictates of a party. All that has altered now. The House of Commons is elected by everyone over the age of twenty-one and the House of Lords can no longer veto any bill, it can only suspend it for a year. Members of the House of Commons are paid £1000 a year and are not as independent as they were. Nearly all legislation is initiated by the executive and members of the government party are expected to endorse it. This was strikingly shown in a recent debate in the House of Lords where experienced parliamentarians stated the present situation in these words: Lord Simon said, "there is undoubtedly a greatly increased practice of regarding the individual, to whatever Party he may belong, as being an automaton who, if he attends, will obey the call, and will, therefore, from time to time authorise the Cabinet to do what the Cabinet wants, whatever it is": Lord Cecil said that "If they show any disposition to take an independent line, information is conveyed to them that they will not be the Party candidates at the next Election"; and Lord Salisbury said, "private Members during recent years have been driven more and more into the Party Lobby, irrespective of their personal views".[12]

I am not concerned with whether this is desirable or not. It

[12] Hansard for May 17th, 1950.

may very well be necessary in the interests of efficiency. All I would point out is that, if it is correct, it means that in practice sovereignty no longer rests with Parliament. It rests with the executive and in particular with the cabinet. The ministers of course gain their authority by being leading members of the party which wins the general election. So it may be said that ultimately they are dependent on the will of the majority of the people. But this is a very remote control, not only because there may only be a general election once every five years, but also because it is often impossible to ascertain what the will of the majority is upon any particular topic.

The remoteness of this control has given rise to many misgivings lately. Take for instance the doctrine of the mandate. Before a general election the rival parties issue manifestoes giving details of all that they propose to do if they are elected. Once elected, the leaders claim that they have a mandate to carry out everything which was in their manifesto. Nothing of course could be further from the truth. Many of the people do not study these manifestoes in detail. Those who do often find in each of them much of which they approve and much of which they also disapprove. But they cannot pick out the bits of which they approve and vote for those bits only. They have to vote for a member, not for a manifesto. The personal qualities of the member do not weigh so much in the scale nowadays as they used to do. This is no doubt because his personal views do not count so much in the House of Commons as they used to do. Much more important are the views of the party to which he belongs and to which he has to conform. Hence the importance of its manifesto. Some people vote for him because they approve of some of the proposals in his party's manifesto, others because they approve of others of the proposals. Yet others because, while they do not really approve of the proposals, they disapprove still more of the counter-proposals of the rival party, and so forth. It is impossible to say therefore that the majority of the people approve of any particular proposal, let alone of every proposal in the manifesto. Yet that is what the doctrine of the mandate involves. It is, I venture to think, a complete misconception of the constitutional position to suppose that the party which is elected has a mandate to carry out their manifesto or is, so to speak, under a trust to carry out all they have proposed. If there were any trust in the matter, the courts could inquire whether it has been fulfilled, which is unthinkable. The true constitutional position is that no radical change, that is, no change which is so radical that the views of the electorate should be obtained on it, should be

made unless the proposal has been included in the manifesto: but that is very different from saying that everything that is in the manifesto should be carried out. Once elected the leaders of the party are the sovereign power in the land. The only limitation on them is that they are under a constitutional duty to govern in the interests of all and not in the interests of party. They must therefore discard their manifesto, if and in so far as the course of events, or subsequent reconsideration, shows it not to be in the interests of the country as a whole. But this is not a duty which can be enforced by law. The only real check on their power is the force of public opinion.

This brings me back to the importance of the freedom of discussion. Public opinion cannot be instructed, nor indeed can it be ascertained, unless there is freedom of discussion: and freedom of discussion involves, of course, freedom to criticise the government. Now experience has shown that governments are very sensitive to criticism. The reason is of course because governments realise that they are ultimately dependent for their power on the support of public opinion: and if the confidence of the people in them is destroyed by justifiable criticism, their position is rendered insecure and their chances of winning the next general election are lessened. They can of course object to unjustifiable criticism, but who is to judge whether the criticism is justifiable or not? History shows many cases where governments have considered any criticism of themselves as unjustifiable. In the 17th and 18th centuries many people were tried in England for seditious libel when all they had done was to criticise the government. In Nazi Germany and Soviet Russia any criticism of the party in power is regarded as treason. The truth is that, if there is to be political liberty, the government which is criticised must not be allowed to be the judge of whether the criticism is justifiable or not. The people themselves must judge: and they can only do so if there is freedom of discussion, so that they can have before them both the criticism and the answer to it.

Herein lies the great importance of Parliament at the present day. It still remains the forum where the opposition can level criticism at the government and where the government can make their reply to it. It still remains the place where questions may be put to the ministers on matters of public concern, which they must answer or take the consequences in public mistrust. There are, I fear, some notable exceptions, as for instance questions as to the day-to-day administration of the nationalised undertakings — but, taken by and large, the government have to answer in Parliament for their conduct of public affairs. Next to Parliament comes the

press, which is free to criticise the government and to ventilate grievances of all kinds. Its importance is realised by ministers who continually hold press conferences so as to instruct public opinion: and at these conferences the journalists themselves ask questions so as to gain further information. Then there is the British Broadcasting Corporation, which gives times for broadcasts not only to government spokesmen but also to speakers of other parties. It is essential to political liberty that all these powerful means of influencing opinion should be free to put all relevant facts before the public and to give voice to the views of all, whether for or against the government of the day.

It is of course possible for this freedom to be abused. Anxieties were recently aroused lest the press should become the monopoly of a few private owners who distorted the news and gave a false picture so as to serve their own ends; but the recent Royal Commission reported that "the present degree of concentration of ownership is not so great as to prejudice the free expression of opinion or the accurate presentation of news or to be contrary to the best interests of the public". Even greater anxieties would be aroused if the state took control of the press, because it would then be able to prevent criticism of itself, which is the keystone of our liberties: but it is reassuring that the Royal Commission said that "nearly everyone would agree that State control ought not to be extended to the Press".

The greatest danger at present lies in the fact that the government departments are the source of much news and information: and they are naturally inclined to present it in a favourable light from their own point of view, or to withhold it if it is unfavourable: and so the press may not have the information on which to base legitimate criticism. The Royal Commission uttered a warning about this. They said that "if newspapers get out of the habit of giving their own news and into the habit of taking all or most of it unquestioningly from a Government Department, they are obviously in some danger of falling into totalitarian paths. Future developments therefore need to be carefully watched."[13] This vigilance is a healthy sign that the spirit of our constitution is still making itself felt so as to see that our liberties are not taken away.

The sources of criticism of which I have already spoken are all frankly partisan and known to be so. In Parliament discussion runs on party lines. So it does in the press and in broadcasts, and nowadays also in municipal elections. Indeed many sources of criticism are to be discounted by reason of party bias. But there is one source

[13] Royal Commission on the Press, 1949: paragraphs 543, 617, 672.

which is not so to be discounted. It is criticism by the judges. Observations by them may form an important basis of public opinion. This carries with it the responsibility of being wise and discreet in all they say, but it does not mean that they must say nothing. If matters come before them where injustice is being done, they are entitled to point it out so that the public may know of it and form an opinion upon it.

Quite recently, however, the Attorney-General laid down in the House of Commons a limitation on the judges. He declared that it was "a most important principle of our constitutional practice that judges do not comment on the policy of Parliament, but administer the law, good or bad, as they find it. It is [he said] a traditional doctrine on which the independence of the judiciary rests."[14] The fact that the Attorney-General said that does not mean that it is correct: but I do not think that anyone would quarrel with it so long as it is not carried too far. The judges, of course, administer the law, good or bad, as they find it. A good deal of it is made by Parliament, and so they must act in accordance with what Parliament says. They should show proper respect for, and confidence in, what Parliament has decided and should always carry out faithfully the intentions of Parliament. If a judge or magistrate should say, "I do not agree with this statute or regulation, and therefore I will only inflict a nominal penalty", he would be doing a grievous wrong. Nor should a judge enter into any captious or irresponsible criticism of what Parliament has done. If a judge should say to a young blackguard, "I wish I could have you birched, but Parliament in its wisdom says I cannot", that borders on the captious, or at any rate displays a want of confidence in Parliament which it is undesirable to express. But Parliament is not infallible. Its policies may have results it did not foresee. Its enactments may not work out in practice in the way in which it had intended. The draftsmanship may be obscure and give rise to unexpected difficulties. When this happens, the judges have the right and indeed the duty to point it out: and in the past they have often done so without being accused of impropriety. The judges are able to see how the acts of Parliament work in practice and, when defects appear in them, their observations may be a great help to those responsible for making or amending the law. Not only the public but also the legislature may be left in ignorance of the defects unless they are pointed out to them.

The true principle, as I understand it, is that judges are entitled to make responsible comments or suggestions on the way in

[14] Hansard, May 3rd, 1950.

which Acts work, if it appears to them necessary to do so in the public interest. This applies not only in respect of enactments in ancient times but also in respect of enactments in modern times, subject to the qualification that judges must never comment in disparaging terms on the policy of Parliament, for that would be to cast reflections on the wisdom of Parliament and would be inconsistent with the confidence and respect which should subsist between Parliament and the judges. Just as members of Parliament must not cast reflections on the judges so judges must not cast reflections on the conduct of Parliament. If everyone observes these rules, there will be no conflict.

The result of it all is therefore that freedom of discussion is still an integral part of the British constitution. There is one qualification, however, that must be made about it. It must not be allowed to be abused so as to be itself undermined. This has been brought home to us by the preaching of communism. In England we allow the communists to advocate communism. We allow communist newspapers to be published and during the general election a communist was allowed time on the wireless to broadcast in support of the communist candidates. This is a very healthy sign because it shows that freedom of discussion still prevails here. But we are told that, in Soviet Russia, where communism is practised, there is no freedom of discussion: and that, if anyone there says anything which is critical of the party in power, he is considered to be a danger and is to be imprisoned or otherwise dealt with. If this were the ultimate aim of the advocates of communism here, then it might well be said that the preaching of it should not be allowed: for it is taking advantage of the freedom of discussion so as to destroy that freedom. So also with other communist activities. They should not be allowed if the ultimate aim is the destruction of our fundamental freedoms. This is, no doubt, the justification for the strong measures taken against communists in Australia and elsewhere. The appropriate steps must always depend on the local situation. All I would say is that only extreme danger would justify any restriction on the freedom of discussion. A war of ideologies is not to be won by throwing people behind bars, but by "having your loins girt about with truth".

This brings me to the third instinct, the practical instinct to see that neither rights nor powers are exceeded or abused. This instinct runs through the whole of our search for justice and liberty. The English distrust abstract philosophy as much as they distrust formal logic. Some may suggest that this is because they do not understand philosophy or logic, but the better reason is because

they know that they are apt to lead to error. The English approach is empirical. The solution to every problem depends on the question, Will it work? that is to say, Will it help to ensure justice and liberty? But they do not seek to define justice and liberty. They take those conceptions as well understood and busy themselves with the machinery to enforce them. So they evolved the writ of habeas corpus, the great merit of which is that it is an efficient machine for liberating anyone who is unlawfully detained: and so also they have recently evolved the Crown Proceedings Act, 1947, which will, I venture to think, prove an efficient machine for seeing that government departments do not overstep the mark. Likewise the Scrutinising Committee for keeping a check on delegated legislation. This practical instinct finds its most marked expression in a readiness to compromise. Time and time again, when faced with two apparently irreconcilable alternatives, the English find a middle way. Thus when in time of war it was necessary to give to the executive power to detain suspected persons without trial, many people feared that our fundamental liberties were being impinged, but a compromise solution was adopted. A committee was set up, presided over by a distinguished lawyer, to examine every case so as to ensure that no injustice was done. It was really a fusion of executive and judicial functions to meet an emergency: and it worked well. So also in time of peace when it is necessary to give much new jurisdiction to departmental tribunals, many people fear that the rule of law is being ousted: but a compromise solution is being adopted. An appeal is gradually being allowed to an appellate tribunal presided over by a lawyer who is independent of the executive. The rule of law is thus being maintained in the welfare state.

It is this practical instinct also which leads us to believe in an unwritten as against a written constitution. The rigidity of a written constitution has its advantages for some peoples but it appears to us as an attempt by one generation to fetter the hands of future generations. The flexibility of an unwritten constitution has the great advantage that it enables us to make changes gradually, as and when they are needed, without a great deal of fuss and bother. It allows scope for compromise and room for development. Thus the power of the House of Lords has been gradually reduced from a power of veto to a power of suspension, and from suspension for two years to suspension for one year. A movement is on foot to reform the House of Lords altogether by altering its composition. All this is done by ordinary legislative machinery without anyone suggesting that the constitution is being impinged. We draw no legal distinction between constitutional laws and other laws. We

can change a fundamental law just as easily as a transient law. But in point of practice we do not do so. We may modify our laws to meet changing needs, but we keep the fundamental principles intact.

The fundamental principles are accepted by all parties in the state, and the only difference that can arise is as to application to particular circumstances. The principles were well stated by the Lord Chancellor, Viscount Jowitt, in the House of Lords quite recently: "it behoves all of us who have been nurtured and brought up in traditions of liberty to see that those ancient privileges are not snatched away from us. . . . I quite agree, as I have said many times, that there is a danger today of the individual being crushed, and it is a danger against which we have to guard. What are the true remedies that we must follow? First of all, I believe we must have a vigilant, a resolute and strong Parliament. . . . Secondly, I believe that we must maintain a strong and independent judiciary . . . absolutely independent of any control at all. I thank God that I believe we have that today, and I think we shall always have it."[15]

There needs I think to be added the freedom of the press: but this was added by the Lord President of the Council, Mr. Morrison, only a little while ago. After observing that the Labour Government could not expect a good press from Conservative newspapers, he added, "We have, thank goodness, a Press free from the slightest improper interference by Government authority, and it is my fervent wish that this should always be so".[16]

A people, whose leaders speak thus, need have no fear for their liberties. So long as Parliament is vigilant, the press is free, and the judges are independant, there can be no totalitarian state in England. Those three great institutions, Parliament, the Press and the Judges, are safeguards of justice and liberty: and they embody the spirit of the constitution which has made its impress on the character of the people.

This spirit of which I have spoken has been carried by our cousins to the great lands overseas, and it shines as brightly there as here. The colonies have become dominions and the dominions have become nations. First and foremost of these is the Canadian nation, and of them it can be said as truly as Sydney Smith said of the English nation over one hundred and thirty years ago: ". . . Nations do not fall which are treated as we are treated, but they rise as we have risen, and they shine as we have shone, and die as we have died, too much used to justice, and too much used

[15] Hansard for June 27th, 1950.
[16] Times newspaper, Sept. 1950.

to freedom, to care for that life which is not just and free. . . . [The] attributes of justice do not end with arranging your conflicting rights, and mine; they give strength to the English people, duration to the English name; they turn the animal courage of this people into moral and religious courage, and present to the lowest of mankind plain reasons and strong motives why they should resist aggression from without, and bind themselves a living rampart round the land of their birth."[17]

[17] The Judge that Smites Contrary to the Law (1824).