conflicts must largely depend on legislation. Of course procedural structures and competences play an important role when a binding order of society is to be established. Law provides competences and procedures for the regulation of conflicts. It serves as a pattern to channel and coordinate the interests and influences in a society. But the legal procedures usually lead to the substantive question of how to regulate a conflict in a fair and equitable way, e.g. to the question as to which of two conflicting interests should equitably have priority. Moreover the procedures principally have the purpose of producing just results. The framework of procedural conditions aims at an optimum chance for gaining a judgment which is fair in its outcome[7].

Thus legitimacy is result oriented. It has not only procedural but substantive components. This is confirmed by the insight that also in an "open society" the dignity of man has to be preserved and that, moreover, in an "open society" freedom and equality have to be respected, and this not only in their formal but in their substantive interpretation: as postulates to provide the economic and educational conditions for a free development of personality and to give everybody an equal chance.

III. Legitimation by consensus

To regard everybody as an equally respected moral authority and to respect individual autonomy (so that everybody might follow his own conscience) means in a strict sense that the principle of unanimity has to be realized. This is, of course, impossible. Nevertheless Kant transposed this postulate into a "regulative idea", i.e. into an ideal guiding principle. The idea of the social contract should bind every legislator, "to make his laws as if they arose from the collective will of a whole people and to regard every subject, willing to be a citizen, as if he had

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7 R. Zippelius, *Legitimation durch Verfahren?* in *Festschrift für K. Larenz*, 1973, pp. 293 ff.

concurred with that will"[8].

But in reality this model doesn't work. The consciences of different people would diverge even if everyone were directed by his conscience and not by his interest. Such disagreements arise for instance over questions such as: if and under which circumstances abortion should be allowed; whether parents ought to be permitted to beat their children, and if so, to what measure; at what age the religious self-determination of a child should be regarded as more important than the educational authority of his parents; which punishment is adequate for which crime; and which payment is merited by which performance.

In order to keep the social system in function, first of all the decision of the majority instead of the unanimous decision must be recognized as binding. Moreover the pattern of consensus must be modified into the pattern of a representative process of decision. Everybody knows the pragmatic reasons for this necessity and the famous summing up of these reasons which was given by Sieyès[9].

The principle of consensus must be modified not only with regard to reasons of practicability but also with regard to the greatest possible justice of a decision, even if "justice" is merely interpreted as the nearest approach to the conscience of the greatest possible number. "Everybody's co-determination" does not yet mean that everybody decides according to his conscience. On the contrary anyone can act in his mere interest. Moreover it is possible that the majority is manipulated by interest groups.

IV. "Clearing up" consensuality by institutions and procedures

Therefore the problem arises of how to reach rationality of judgement and a detachment from the actual engagement in interests. For this purpose "rules of the

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8 I. Kant, *Über den Gemeinspruch "Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis"*, 1973, II, Folgerung.

9 E.J. Sieyès, *Qu'est-ce que le tiers état*, 1789, ch. 5: Vues sur les moyens d'execution, 1789, 1ere sect.

game" and institutions must be provided which bring the decision-making process closer to these ends. We need procedures that provide the nearest approach to a substantive result which is consensual for the greatest possible number, *i.e.* a result which is acceptable for the conscience and sense of justice of the greatest possible number.

1. The first "rule of the game" is that the exchange of views, arguments and criticism must be kept open. This follows already from the consensus-principle and its premises. The general and equal right of co-determination was based on the consideration that everybody's conscience must be equally respected. From here the principle of consensus - also in the version of the majority principle - is fundamentally limited by the requirement to respect and preserve continually the equal dignity and competence for co-determination of everyone. This alone is sufficient to reject the legitimacy of the famous "absolutism of majority", although this conclusion has scarcely ever been drawn.

2. An important institutional detachment from a concrete, partisan engagement is realized by constitutional principles which provide that conflicts are regulated by due process, that the fundamental rights of man are respected, and that these principles are not neglected in the heat of an actual discussion, and not even by the majority. Such constitutional principles are usually formulated by constitutional assemblies; they are results of an anticipated and detached reflection on the question as to which principles should rule our living together.

3. Above all a representative government is an important precondition which makes it possible that legal proceedings run their course in a controlled, more or less reasonable, "civilized" manner. In these representative systems we find separate and neutral instances and roles which are kept at the greatest possible distance from the interests on which they decide. This function, to weigh and decide in a detached and reasonable way, is realized to a nearly ideal extent by independent courts, but more or less also by qualified bureaucracies and even by governments and parliaments as long as they are controlled by public opinion.

All these representatives find themselves under a "constraint of legitimation", i.e. they find themselves forced to give good reasons for their decisions in view of an "universal audience"[10], at least in view of the present legal community. This feedback to the general public is most obvious where government and parliament are concerned. They have to legitimize their decisions in continuous discussions with opposition and public opinion. Only if they win the major part of the people for the major part of their decisions do they have a chance to win the majority at the next election (provided that at least two parties will compete for the votes).

In so far as courts take an active part in the solution of legal problems, they also are under a "constraint of legitimation" in view of the general public. The courts, especially the higher courts, have a sense for this necessity and are anxious not to lose their authority - and this means, in a more subtle sense, the willingness of the people to identify themselves with the decisions of their representatives.

Another approach to a reasonable consensus can be the effort to find a decision fitting in the context of similar decisions. This pattern of deliberation is highly cultivated in jurisprudence. By referring to precedents first of all consensuality is secured within the juridical tradition, and this not only in legal systems with binding precedents. If possible, legal decisions should also fit into the wider "context of the legal culture"[11], that means, into the whole concept of legal principles and rules which are ethically relevant in this society and to which the actual problem can be referred. Constituent elements of this wider context are especially the legal and moral principles which are laid down in the constitution or which are predominantly accepted elsewhere by this society.

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10 Cf. Ch. Perelman, *Über die Gerechtigkeit*, 1967, pp. 158 ff.

11 R. Zippelius, *Das Wesen des Rechts*, 4th ed. 1978, ch. 23 c: "rechsethischer Kontext".

4. Useful in the search for reasonable and consensual answers to legal problems are furthermore some patterns of deliberation which help to eliminate the influence of interested engagements and at least to promote a limited rationality of decision.

One of these patterns is Kant's principle that a maxim cannot be right if it is not "universalizable"[12]. That means: A rule cannot be right if it should only be valid for other people, but not for myself, if I were in the same situation. Rawls' "veil of ignorance"[13] has the same function as Kant's principle of "universalizability". Legal realizations of these ideas are the equality of rights and the principle that administration and jurisprudence should be directed by general rules. On the other hand these principles provide merely an indispensable, but not a sufficient, criterion for a reasonable decision: Not every "universalizable" decision is already a right decision[14]. There are some more patterns of deliberation which can be used in order to achieve a detached and reasonable decision. Part of them are Rawls' postulates to provide equal and fair chances for a free development of personality and to allow deviations from equality only if they are to everybody's advantage[15]. Helpful are furthermore the analyses of evaluations[16]. But all these patterns of deliberation are not instruments which

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12 Cf. I. Kant, *Metaphysik der Sitten*, 1797, I, 2nd introd. C; cf. R.M. Hare, *Freedom and Reason*, 1963, ch. 2.5, 3.1 ff., 5.4 f., 6.2 f., 6.5, 9.1.

13 J. Rawls, *A Theory of Justice*, 1971, pp. 12, 18 ff., 136 ff.

14 R. Zippelius, *op. cit.*, ch. 18 c.

15 J. Rawls, *op. cit.*, pp. 60, 76, 83, 150 f.

16 Cf. H. Hubmann, *Wertung und Abwägung im Recht*, 1977, pp. 20 ff., 145 ff.

alone lead precisely and inevitably to an exact solution of actual problems of justice. These problems usually require additional evaluations, for instance in the questions mentioned: under which conditions should an abortion be permitted; in which limits should a punishment of children be allowed; where in questions of religion should the educational authority of parents end; which penalties are adequate for which crimes and so on[17].

So these patterns are conducive, heuristic instruments, but they are not the philosopher's stone. In actual problems of justice they do not dispense with the necessity to seek the greatest possible consensus again and again in an open discussion.

5. In this "discussion" jurisdiction plays an important role, especially in case-law systems. Here statements of justice are found especially by "reasoning from case to case", i.e. in the interplay of a concrete, professionally trained sense of justice and a typifying comparison of cases[18]. Consensus is sought within two fields. Following the precedents in similar cases the judge is looking for consensus in the field of the legal experts and the legal tradition. On the other hand the broader base of consensus in the whole society is also taken into consideration. Being a representative of a democratic society the judge must examine whether his decision is compatible with the moral ideas prevailing in this society (see para. 3 above).

What a methodically guided sense of justice has found in this way can be summed up in more general concepts; on the other hand excessive generalizations can be restricted by subsequent juridical experiences.

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17 Cf. R. Zippelius, *op. cit.* ch. 22 d, and: *Zur Praktikabilität der Gerechtigkeitstheorie von J. Rawls* in *Archiv des öffentlichen Rechts*, 1978, pp. 248 ff.

18 Concerning this point I refer to the paper by Professor Alice Erh-Soon Tay on "The Sense of Justice in the Common Law" [reprinted below].

This "groping along" in the field of juridical insight is a continuous process of "trial and error". In this way a thesaurus of rules and principles can be found, which are at least acceptable to the sense of justice prevailing in this society[19].

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19 Cf. R. Zippelius, *op. cit.*, ch. 20, 23.

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THE SENSE OF JUSTICE IN THE COMMON LAW *

BY

ALICE ERH-SOON TAY

I. Common lawyers, together with the country in which the Common Law was born and developed, have a certain reputation for matter-of-factness and practicality. They are, we are often told, the enemies of general speculation, of the bold proclamation of universal principles and, above all, of metaphysics. It is possible that Common lawyers do justice. If so, they believe that they do it best by talking about it rather little, and hardly ever in the abstract, by recognizing, as a fundamental truth, that justice is done concretely in balancing conflicting human interests, moral claims and even 'principles' of justice. For two centuries, since the decline of natural law thinking after Blackstone, the respected histories of English law and compendia of English law and legislation have contained little, if any, reference to the concept of justice in the abstract. English books on jurisprudence long either devoted virtually no attention to the topic or drew their views from a consideration of philosophers and others not learned in the Common Law. It was not, and probably still is not, the belief of Common lawyers that sound reasoning or moral sensitivity is best obtained by deduction from first or even broad principles.

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Civil and natural lawyers, many of whom have not been noted for their sympathy toward these attitudes, are liable to dismiss them as 'positivism' and to believe that they imply a vicious moral scepticism, a readiness to allow justice to be driven out by law. It is true that John Austin, in his lectures on jurisprudence in London more than one hundred and fifty years ago, was especially concerned to rid law and the philosophy of law of empty and portentous metaphysics and to separate law from morals. If justice was to have any precise and definite meaning for the lawyer, he argued, it meant conformity with the law, with the actual, existing law—the positive law. To call a law unjust, it followed, was to talk nonsense, to make noise instead of saying something or, in modern un-Benthamite parlance, to appeal to emotion and not to reason.

There are no doubt many who would like to believe that John Austin expresses correctly the spirit, traditions and procedures of the Common Law. They are wrong. The outstanding feature of the Common Law, and a principal distinction between it and so much of the civil law of the continent of Europe, is its flexibility, the deliberate open-endedness of its concepts, the extent to which it cannot be reduced to black-letter (so-called 'positive') law or divorced from the moral sentiments of the community in which it operates. Its language, its specific principles, its statutes and its authoritative decisions are infused with terms like 'fair', 'reasonable', 'proper', 'sound', 'commonsensical' and 'just'; judges are enjoined by the provisions of their oath and the law to 'do right', to 'deal justly'. They have agreed with Lord Denning that it is not a tautology to expect them to 'do right according to law' and though they no longer appeal to the timeless or God-given principles of natural law, they achieve much the same effect by reference to 'convenience', 'public policy', and their duty to do right. They have long held themselves to have a general duty and power to act as custodians of morals and guardians against wrong, to the extent, when there is no other way, of filling lacunae in the law or creating new law. It is true that there has been a great, and in my view, sound, suspicion in English law and among English lawyers of presumptuous readiness

to innovate and of that vague jurisprudence which is sometimes attractively styled 'justice as between man and man', of palm-tree justice unfettered by rules, precedent or doctrine. The maxim, 'hard cases make bad law', expresses this concern with systematic justice and the belief that it is easily disrupted and ultimately made unjust, capricious, arbitrary, by a fireside equity that concentrates only on the single situation or the one urgent or obvious interest.

The term Common Law, which is derived, oddly, from the canon law concept *jus commune*, invites stress on the continuity between Common Law and custom, the legal traditions and ways of settling disputes of a community which existed before the Norman Conquest. William the Conqueror in fact undertook to respect such customs and laws. But the evolution of the Common Law as a system rested centrally on the specific justice that came to be offered by the king in competition with local and seigneurial justice. Unlike the latter, it was offered to all manner and estates of men, equally and impartially. It emphasized rationality and argument against trial by battle and ordeal. It combined the local juror with the external judge and gradually defined the functions of each. Thus justice for the English lawyer, by the beginning of the thirteenth century in the time of Bracton, came to be and has since been paradigmatically what is done in the royal courts. It is done there, self-consciously, in a certain manner, within a developing tradition and it is done in precisely that way, except by limitation or delegation, in no other courts or assemblies. For Royal justice is done as a public thing, by the Crown through its judicial representatives as standing above and outside the private sectional interest, acting according to law and in a judicial manner. Such justice, as F.E. Dowrick has it in his very interesting study, *Justice According to the English Common Lawyers*, the English lawyer would maintain to be done adequately only 'when the trial of disputes or disorders is conducted within certain canons of fairness, and when the judge decides the case according to moral principles or takes into account the human interests at stake, or applies established laws'.[1]

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1 F.E. Dowrick, *Justice According to the English Common Lawyers* (London, 1961), p.29.

Dowrick has chosen his words carefully and well and they bring out the extent to which the Common lawyers' conception of justice goes well beyond the application of black-letter law or, as it is sometimes believed, of purely procedural principles.

Behind the beliefs of the Common lawyer there stands a more general set of conceptions, which he has in common with all those who belong to the Western legal tradition. These conceptions, and the tradition itself, are rooted in the remarkable impact on Western civilization generally of the ideas of law and legal technique introduced and developed by the Romans. They amount to the fundamental belief that law *counts*, that it is not only an outstanding feature of social organization, but that its rules, procedures and techniques are capable of dealing, justly and under the framework of general precepts and conceptions, with all important human activities. The Romans, indeed, whatever their other habits, were a 'law-inspired' people; they had created such a system of law, capable of counting in their own time and of again inspiring subsequent civilizations. The three great, original characteristics of Roman law as a living system up to the time of Justinian, as Professor Geoffrey Sawer has put it,[2] were first, a complexity which enabled it to cover the main social relationships of human life; secondly, a degree of abstraction enabling many of its principles to apply to a wide range of social relationships and over long periods of time without major change; thirdly, an autonomy of structure and development which gave law an independent role in the development of society as a whole. The subsequent history of Roman and Roman-inspired law, from the sixth century AD to the present, and of its relation to and interaction with Christianity, canon law, Germanic and other legal customs and procedures, is a complex story. But the ideal of a society based on law became stronger and stronger

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2 G. Sawer, 'The Western Conception of Law', in Konrad Zweigert (ed.), *International Encyclopedia of Comparative Law II* (Tübingen, 1975), pp. 14-48 at p. 18. See also 'Editors' Introduction: Law, Lawyers and Law-Making in Australia', in A.E.S. Tay and Eugene Kamenka (eds), *Law-Making in Australia* (London and Melbourne, 1979), pp. 20-38.

within that history, uniting the English Common lawyer and the continental civil lawyer and reaching its apogee in the great legal debates and reforms of the nineteenth century.

In the early history of England, these convictions were reinforced by the belief, found in other societies at particular stages of their history, that the king's justice was the foundation and *sine qua non* of the king's peace, that it replaced fighting by arbitration, violence by reason, arbitrariness and caprice by principled conduct. 'Justice', say the *Institutes* of Justinian in Book I, title I, 'is the set and constant purpose which renders to every man his due;' only a society based on law and with special custodians for legal work and traditions can guarantee such set and constant purpose and a consistent and devoted concern with the business of treating equals equally. Whatever the king's own motives may have been in offering his subjects justice, at a price and initially in competition with courts that historically did not derive their power from him directly, his success in the enterprise, for the Common lawyer, is testimony to its importance and credibility. That is wny, as Dowrick argues [pp. 17-29], the conception of justice as adjudication, and above all as adjudication in the royal courts, is the foundation layer in the Common lawyer's and the Common Law's conception of justice. For the Common lawyer, justice in every aspect—in its source, its location and its procedures—is essentially public and not private, indissolubly linked with sovereignty, inalienable, incapable of becoming sectional, invisible or personal. The process by which these attitudes were formed and this conception of justice emerged may have been full of historical accident, of things done for other reasons. But for the Common lawyer, the process is profoundly historical, practical and yet complex. It is a learning by experience and not an application of concepts and a set of abstract principles that stand above and before experience, people and their problems in actual, historical situations. Law, he argues with Gierke, is the result of a common conviction, not that a thing shall be, but that it is. But what it is we can only see by having to work it out in practice. By itself, an act of parliament or a legal

decision considered apart from the facts from which it arises cannot be pronounced just or unjust, good or bad law. It is in using them further that we learn their quality.

While the Common lawyer has seen the royal courts and what they do as standing at the centre of this conception of justice, it is well known that the Common Law developed many of its most important and attractive traditions in the struggle against royal authority. The king may be the source and fountainhead of all justice, though Blackstone thought that he was rather a reservoir. But since Chief Justice Coke's great confrontation with James I, Common lawyers have held that while the king may be the fountainhead of justice, he is not, as king, the best dispenser of it. The king's personal prerogative is mercy; justice is a matter of being learned in the law, not as an esoteric secret science, but as the record and distillation of experience. Coke, it is true, still put much emphasis on technique, on 'artificial' reasoning. In his time, and until the reforms of 1832-75 abolishing the forms of action, reorganizing the jurisdiction of the courts and merging the administration of Common Law and Equity, Common Law, in its search for certainty and predictability, was dominated by comparatively rigid and formal questions of procedure, cause of action and type of remedy. This was so much so that Sir Henry Maine noted: '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.[3]

But the tendency to burst out of procedural bounds in the interest of doing justice came from within. Thus during the period 1485-1832 a whole body of law, the law of equity, was developed to provide remedies and deal with wrongs that the Common Law courts could not consider. The Lord Chancellor, satisfied that there was no adequate remedy at Common Law, decided cases in the name of the king, 'to

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3 H.S. Maine, *Dissertions on Early Law and Custom* (London, 1883), p. 389.

satisfy conscience and as the work of charity', drawing on the principles of natural justice current in the fifteenth and sixteenth centuries through the canon law and Roman tradition. Another, more restricted branch or body of law, the law of quasi-contract, was developed by judges quite specifically to deal with unjust enrichment in situations that the law of contract did not cover, but which seemed to them to cry out for justice. If I pay money to someone falsely thinking I owe it to him, there is no contract between us and I cannot in contract sue for its return. But that, said the judges, is patently unjust; it is unjust enrichment--a basis for recovery not known traditionally to Common Law--and gave a right to recovery as though there were a contract. In the eighteenth century a great and creative judge, Lord Mansfield, almost single-handed brought into being the formal law merchant based on Common Law principles and the customs, usages and moral and commercial expectations of merchants in the city. The nineteenth-century reforms merely made it possible to do justice more directly, more economically, without unnecessary constraints of procedure that reflected the reverence for form so often found in earlier law and complications and accretions that an antiquated formalism necessarily produces in its attempt, within the old system, to deal with new problems and demands. By the late nineteenth century, a series of great lawyers and legal thinkers had persuaded themselves and many others that this learning and artifice of reasoning of the Common Law (now including Equity) in the end came down to common sense, but common sense informed and made cautious and complex by a grasp of the subtle and often unobvious ramifications of human action and judicial decision. The Cartesian ideal is not the Common lawyer's: for him, plain speaking and plain dealing, sound judgement and common sense do not require the belief that everything is or should be clear and distinct, transparent to reason and capable of logical analysis into simples. On the contrary, they require the recognition of flux, complexity and historicity and of a certain intractability of human affairs.

11. Perhaps no modern English judge has been more willing to use the concept of justice *ex cathedra*, to give judgement according to the reason of the thing, with scant reliance on authority and much readiness to pronounce new principles, than Lord Denning. Yet for him, too, justice is not an abstract thing and in his lectures, *The Road to Justice*, he writes:

> When you set out on this road you must remember that there are two great objects to be achieved: one is to see that the laws are just; the other that they are justly administered. Both are important, but of the two, the more important is that the law should be justly administered. It is no use having just laws if they are administered unfairly by bad judges or corrupt lawyers ...[A] country cannot long tolerate a legal system which does not give a fair trial.[4]

This concept of justice as a 'fair trial', linked with and promoting the more general conception of justice as fairness, is indeed for the Common lawyer a *sine qua non*. It is not, of course, exclusive to or especially of the Common Law. As the rules of 'natural justice' -a technical term in the Common Law today- it has been summarized in the form that no man should be condemned unheard and that every judge must be free from bias. As such, they derive from the Latin tags *audi alteram partem* and *nemo judex in re sua* and have been held, in the Common Law itself, to be general principles of law common to civilized communities, belonging indeed to the common consciousness of mankind rather than to the science or specialized tradition of the law. The rules of natural justice in the technical Common Law sense, however, are not an adequate statement of the canons of a fair trial at the Common Law. They enunciate, rather, the minimum standard that the Common Law sets for all manner of hearings and tribunals, public or domestic, that have a duty to act judicially or quasi-judicially or that make determinations which affect the lives, significant interests and property rights of citizens and are not covered by specific exclusions.

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4 Lord Denning, *The Road to Justice* (London, 1955) pp. 6-7.

This supervisory role of the Common Law, long exercised through the prerogative writs, is based historically on the prerogative power of the Crown to do justice throughout the realm, it has opened up a whole field of administrative law in which the rules of natural justice are both central and the subject of detailed consideration. Such consideration in recent years has led to the gradual substitution for them of the single, less formal concept of acting fairly, which in turn has made it easier to import a wider body of Common Law attitudes and principles, if not formal canons, on the subject of acting fairly. Within the work of the Common Law courts themselves, the notion of a fair trial has had a more specific content. It is not easily derivable from the Latin maxims alone (though incorporating them) or from the common opinion of mankind, which has seemed to Common lawyers less than satisfactory in its views on the conduct and administration of courts. The canons of a fair trial at Common Law presuppose the forms and procedures that have been evolved in England. They have been summed up as involving the independence of judge and jury and the absence of personal interest in both, the hearing of both parties and the consideration of all evidence, but evidence properly put before the court and not hearsay; the presentation of strong cases on both sides; the personal integrity—incorruptibility and impartiality—of the judge; the carrying out of their proper roles by counsel with propriety in the search for truth and the giving of reasons by the judge for his decision,[5] reasons that show he is deciding on the evidence according to rules and doctrine and not caprice. To this we may add, as Lord Hewart did, for instance, in *The New Despotism* (1929), the fact that the case must be heard in public, that the parties be treated as equals, that the judge be identified and personally responsible in the moral sense for his decision and that appeals to a higher judicial tribunal from a court of first instance or judicial review be in principle possible.

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5 Denning, pp. 1-44; Dowrick, pp. 30-32. A number of the quotations that follow have come to me conveniently through Mr. Dowrick's excellent eye for the telling phrase.

These canons have not been empty phrases. They, like the rules of natural justice, have been given flesh, applied in detail to a wide range of circumstances, to new situations and new types of hearings and determinations, by a vast body of case law and affected, for particular purposes, by statute. In the United States, under the 'due process' clause of the Federal Constitution, they have had even more technical discussion and a more formal, though not necessarily greater, general influence. In both countries, recent legislation has had the peculiar and not wholly desirable effect of appearing to separate the canons of a fair trial from the concept of just adjudication generally—something that the Common lawyer has not traditionally done as sharply. New circumstances, as we shall see, have not left these canons totally unchallenged: governments seek, by statute, or by powerful pleading of affairs of state, public interest and policy, convenience and desirability, to exempt some of the activities of their servants and agencies from these canons. Both governments and citizens have urged, in the name of substantive equality, that parties should not always be treated as equals, that the full protection afforded by these canons should be set aside, in part, to minimize delay or cost that hits one party more than another and that there are types of enquiry and decision-making involving important interests of citizens that are not best conducted on a legal basis. There is force in all these points and judges and legislators have recognized and are continuing to recognize it. But the presumption of the Common Law is always in favour of natural justice and the canons that apply in the particular activity. That is the Common Law tradition and Lord Hewart was not wrong and not out of tune with public opinion in satirizing the alternative, attractive to the bureaucrat and the social engineer:

> The inhabitants of these islands are within measurable distance of an El Dorado where there will be no judges at all. In those Isles of the Blest... all controversial questions will be decided in the third floor back of some one or other government department; the decision so reached will not be open to appeal...by any means whatsoever no party or other person interested will be permitted to appear or offer any evidence; the whole law will have

> been codified in a single interminable statute...no lawyers will be tolerated except a group of advisers, departmentally appointed; any questions likely to excite difference of opinion will be submitted to those advisers beforehand on hypothetical facts and behind the back of the parties; and the Lord Chancellor himself will have been exchanged for a Minister of Administration for whose office any knowledge of law, however slight, will be a statutory disqualification. Meanwhile, and until that happy day arrives, our fellow countrymen seem somehow to think not too unkindly of judicial decisions given in open court upon real cases by perfectly independent and impartial judges, who are individually responsible and who have heard both sides.[6]

The Common Law canons of a fair trial are now, in the Common Law world, to some degree and in some areas under attack as allowing formal justice to impede substantive justice, but the basic tradition remains and is strong. It is, in its details, neither a deduction from reason nor a conception of legal operation common to all civilized communities. Those raised in the civil law tradition and the more bureaucratic arrangements of continental Europe seem to have as much difficulty in grasping and sympathizing with the English law of evidence as they have in grasping the concept of a trust. The Common Law insistence that the role of the judge is not inquisitorial often strikes them as being commended neither by the interests of truth nor those of morality. Yet that law of evidence (discounting some inconveniences and irrationalities that should be and are being excised) forms in the main a most important and integral part of the Common Law's conception of a fair trial and its search for truth. (The simple story unchecked by rules to keep it testable, delivered straight from the heart and as the teller sees it, is almost always a pack of lies, unconscious self-deception and malicious innuendo). But pride in these rules of evidence and insistence on the non-inquisitorial role of the court lie very deep and are no external, accidental, inessential thing. Thus, the Court of Appeal in *Jones v. National Coal Board* ([1957] 2 Q.B. 55) ordered a new trial when it found that the trial judge, with the best of motives

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6 Lord Hewart, *Essays and Observations* (London, 1930), pp. 122-3, cited in Dowrick, pp. 38-9.

and intentions, in order to clarify the issues before the court and expedite the conduct of the trial had interfered frequently in the course of argument by counsel on both sides and had taken upon himself the function of examining witnesses. Lord Denning, giving the judgement of the court on appeal ([1957] 2 Q.B. 55,63), said this:

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question 'How's that?'. His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon, L.C., who said in a notable passage that 'truth is best discovered by powerful statements on both sides of the question?' [*Ex parte Lloyd* (1822) Mont 70, 72n]. And Lord Greene, M.R., who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict' [*Yuill v. Yuill* (1945) P. 15, 20].

It is this non-Cartesian, indeed anti-Cartesian, conception of truth and justice as emerging from conflict rather than formal analysis, as requiring the balancing of claims and interests that are best urged in the first instance by those present and affected, that is distinctive of the Common Law. It constitutes, I believe, its great contribution to the theory of freedom and of justice. It is pluralist, empirical, conscious of human error and human limitation. It treats neither man nor the principles of law as abstractions under which real people and events, real claims and conflicts, are to be subsumed. It does not suffer from the illusion that enlightened self-interest, or the moral law, or the principle of utility establish directly and by themselves what either men or judges ought to do in the complex situations of the real world in which one decision constantly affects a myriad others. It does not formulate as a regular procedure hypothetical cases or play thought games with 'original positions' and unhistorical men. This is why

as Professor Bernard Rudden has argued,[7] the Common Law trial can be characterized as consisting of a number of interwoven dialogues. There is the dialogue between the judge and his predecessors as he turns to and examines the precedents. There is the dialogue between the judge and counsel who set out the case before the court by presenting argument and the evidence of witnesses and also usually seek to guide the court in different directions -to hear differently, to appraise differently, to choose different principles or analogies, to decide differently. There is the dialogue between the judge and the jury in which he must sum up the evidence and explain the law in terms that bring it into relation with the understanding and the experience of the ordinary man. Professor R. Zippelius, surveying our law from another tradition, has correctly and sympathetically characterized this process as based on and embodying the empirical belief that truth is reached by a process of trial and error.[8]

Together with the process of trial and error that the dialogues embody and facilitate stands another process which to the Common lawyer is of the very essence of justice -the balancing of facts, interests and principles that cannot in practice be brought to a coherent unity or reduced to a common measure, that requires, in fact, the specific judgement of justice. A great American judge summed this up, characteristically, by way of specific example. In law, as he says, the measure of care imputed to that standardized being, the reasonable man, around whom so much of our legal measure of justice revolves, is dependent upon the value of the interests concerned:

> The law measures the risks that a man may legitimately take by measuring the value of the interests furthered by his conduct. I may accumulate explosives for the purpose of doing some work of construction that is important for mankind when I should be culpably reckless in accumulating them for pleasure or caprice. I may risk my life by plunging into a turbulent ocean to save a drowning man when I should be culpably reckless if I were to make the plunge for sport or mere bravado. Inquiries that

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7 B. Rudden, 'Courts and Codes in England, France and Soviet Russia', *Tulane Law Reveiw* XLVIII (1974), pp. 1010-28.

8 R. Zippelius, 'The Function of Consensus in Questions of Justice', in F.C. Hutley, E. Kamenka and A.E.S. Tay (eds) *Law and the Future of Society*, Beiheft N.F. Nr. XI, *Archiv für Rechts und Sozialphilosophie* (Wiesbaden, 1979), pp. 117-24 at pp. 120-23.

> seem at the first glance the most simple and unitary -was this or that conduct negligent or the opposite? -turn out in the end to be multiple and complex. Back of the answers is a measurement of interests, a balancing of values, an appeal to the experience and sentiments and moral and economic judgements of the community, the group, the trade. Of course, some of these valuations become standardized with the lapse of years, and thus instantaneous or, as it were, intuitive. We know at once that it is negligence to drive at breakneck pace through a crowded street, with children playing in the centre, at least where the motive of the drive is the mere pleasure of the race. On the other hand, a judgement even so obvious as this yields quickly to the pressure of new facts with new social implications. We assign a different value to the movement of the fire engine or the ambulance. Constant and inevitable, even when half concealed, is the relation between the legality of the act and its value to society. We are balancing and compromising and adjusting every moment that we judge.[9]

Or consider this judgement by Lord Denning, sitting in appeal as Master of the Rolls, remembering that it is a reported judgement and thus part of those allegedly 'formal', 'conservative', 'abstract' precedents that make up the principal body of the Common Law and that do sound, in style and manner of argument, so different from the way in which civil law decisions have traditionally been reported:

> This case is entirely novel. Never before has a claim been made against a council or its surveyor for negligence in passing a house. The case itself can be brought within the words of Lord Atkin in *Donoghue* v. *Stevenson:* but it is a question whether we should apply them here. In *Dorset Yacht Co. Ltd* v. *Home Office* [1970] A.C. 1004, Lord Reid said, at p. 1023, that the words of Lord Atkin expressed a principle which ought to apply in general 'unless there is some justification or valid explanation for its exclusion'.
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> So did Lord Pearson at p. 1054. But Lord Diplock spoke differently. He said it was a guide but not a principle of universal application. It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.
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> In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth.
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> Nowadays we direct ourselves to considerations of policy. In *Rondel* v. *Worsley* [1969] A.C. 191, we thought that if advocates were liable to be sued for negligence they would be hampered in carrying out their duties. In *Dorset Yacht Co. Ltd* v. *Home Office* [1970] A.C. 1004, we thought that the Home Office ought to pay for damage done by escaping Borstal boys,

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9 Benjamin N. Cardozo, *The Paradoxes of Legal Science* (New York, 1928), pp. 74-5.

if the staff was negligent, but we confined it to damage done in the immediate vicinity. In *S.C.M. (United Kingdom) Ltd* v. *W.J. Whittall & Son Ltd.* [1971] 1 Q.B. 337, some of us thought that economic loss ought not to be put on one pair of shoulders, but spread among all the sufferers. In *Launchbury* v. *Morgans* [1971] 2 Q.B. 245, we thought that as the owner of the family car was insured she should bear the loss. In short, we look at the relationship of the parties: and then say, as matter of policy, on whom the loss should fall.

What are the considerations of policy here? I will take them in order. First, Mrs Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible. Who are they? In the first place, the builder was responsible. It was he who laid the foundations so badly that the house fell down . In the second place, the council's inspector was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the council should answer for his failure. They were entrusted by parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet they failed to protect them. Their shoulders are broad enough to bear the loss.

Next I ask: is there any reason in point of law why the council should not be held liable? Hitherto many lawyers have thought that a builder (who was also the owner) was not liable.

If that were truly the law, I would not have thought it fair to make the council liable when the builder was not liable. But I hold that the builder who builds a house badly is liable, even though he is himself the owner. On this footing, there is nothing unfair in holding the council's surveyor also liable.

Then I ask: if liability were imposed on the council, would it have an adverse effect on the work? Would it mean that the council would not inspect at all, rather than risk liability for inspecting badly? Would it mean that inspectors would be harassed in their work or be subject to baseless charges? Would it mean that they would be extra cautious, and hold up work unnecessarily? Such considerations have influenced cases in the past, as in *Rondel* v. *Worsley* [1969] 1 A.C. 191. But here I see no danger. If liability is imposed on the council, it would tend, I think, to make them do their work better, rather than worse.

Next I ask: is there any economic reason why liability should not be imposed on the council? In some cases the law has drawn the line to prevent recovery of damages. It sets a limit to damages for economic loss, or for shock, or theft by escaping convicts. The reason is that if no limit were set there would be no end to the money payable. But I see no such reason here for limiting damages. In nearly every case the builder will be primarily liable. He will be insured and his insurance company will pay the damages. It will be very rarely that the council will be sued or found liable. If it is, much the greater responsibility will fall on the builder and little on the council.

> Finally I ask myself: if we permit this new action, are we opening the door too much? Will it lead to a flood of cases which neither the council nor the courts will be able to handle? Such considerations have sometimes in the past led the courts to reject novel claims. But I see no need to reject this claim on this ground. The injured person will always have his claim against the builder. He will rarely allege -and still less be able to prove -a case against the council.
>
> All these considerations lead me to the conclusion that the policy of the law should be, and is, that the council should be liable for the negligence of their surveyor in passing work as good when in truth it is bad.
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> I would therefore dismiss this appeal.[10]

III. 'Justice must not only be done but be seen to be done'. The canons for a fair trial or hearing enumerate certain forms for achieving justice, forms that must be observed publicly, visibly, that stand as signs of a society's and a profession's devotion to justice. But they are not, to the Common lawyer, sufficient or in fact capable of being abstracted from the content of the hearing and the decision, from the considerations that weigh, properly or improperly, with those taking part. It is here that the conception of justice as a balancing of matters and principles properly taken into account is crucial. There is no question, in the Common Law, with all its emphasis on defining issues and restricting the matters before the court, of failing constantly to bring in, and to require to be brought in, what is *relevant* to just determination. This will include, of course, the law and principles of the law, past discussions and decisions that are to be held pertinent or 'distinguished'. It will include moral

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10 *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B..373, *per* Lord Denning, M.R. at pp. 397-8.

sentiments and standards of behaviour, expectations and aversions that may reasonably be expected to govern the behaviour of men at particular times and in particular circumstances. It will include, as Mr. Dowrick has reminded us, considerations of welfare and utility, of public interest, of morality where it is appropriate for the law to uphold it, and of social justice. Constantly, because the judgement of justice, as Professor Julius Stone has argued,[11] includes a creative leap and not a direct deduction from simple universal principles, the lawyer makes use of open-ended terms that invite judgement to enter at every step, in selecting what is relevant, reasonable, fair. He does so within a system which, for the able and imaginative, does not inhibit and has not inhibited creativity, the capacity to meet new situations and demands, often with decisions that prove to be the revolutionary start of far-reaching developments. But the function of the system is to inhibit (for nothing can stamp out) arbitrariness and prejudice, impetuousness and a disregard for consequences or for the rights of those who are not there to claim loudly and without concern for others. Empty talk of 'morality' and 'justice' without consideration of how its claims would affect a total system of just rules and just determinations is no substitute for law or justice in the concrete sense. The possible conflict there is the reason that law has often been

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11 See especially his *Law and the Social Sciences in the Second Half Century* (Minneapolis, 1966).