

# DEVELOPMENTS IN JUDICIAL JURISPRUDENCE

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*"Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter."*—CARDOZO J.

Most of us are not so far gone in legal "realism" as to have overcome the lawyer's traditional reserve towards extra-judicial pronouncements by Her Majesty's judges. We do not normally regard the political or philosophical views of the judiciary, in so far as those views are expressed outside the courts, as of much moment for the law or its jurisprudence. But this is not just because we disbelieve the extra-judicial dictum of Holmes J. that law is just "prophecies of what the courts will do in fact";<sup>1</sup> nor because we really subscribe to the extra-judicial ruling of Lord Bacon L.C. that "Judges ought to remember, that their office is *Jus dicere*, and not *Jus dare*".<sup>2</sup> It is not even simply that we hold the opinion which Lord Devlin expressed recently at Birmingham University, that "the judges of England have rarely been original thinkers or great jurists".<sup>3</sup> Nevertheless, for whatever reason it may be, the reserve persists.

Yet it would be unwise to ignore a distinctive movement of thought manifested among those judges who, since the Second World War, have cared to articulate their thoughts outside the courts. For this is a movement which has recently found the words of its most cogent publicists quietly, without acknowledgment, but quite definitely adopted in the highest English court, by judges who have taken no part in its public extra-judicial exposition. It is a movement made more noticeable by, and best understood by contrast with, the very different mood of the law schools and universities. The purpose of this Comment is to explore briefly the fundamentals of what Prof. H. L. A. Hart has called "the contribution offered by the judges to the jurisprudence of our day",<sup>4</sup> and to indicate in outline the disparity between this contribution and those of the most recent academic writings.

*Shaw v. D.P.P.*,<sup>5</sup> regardless of its practical effect on the administration of criminal justice,<sup>6</sup> is a notable case. "Great cases," said

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1. O. W. Holmes, "Collected Legal Papers" (1920), p. 172.
2. Francis Bacon, "Essays", lvi.
3. Presidential Address to the Holdsworth Club of Birmingham University, 17 March, 1961.
4. Letter to "The Times", 12 November, 1960.
5. [1961] 2 W.L.R. 897; [1961] 2 All E.R. 446.

13. [1961] 2 W.L.R. 897, 940.

14. Devlin, "The Enforcement of Morals" (1959), pp. 15-17.

Holmes J., "are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."<sup>7</sup> And here in *Shaw's Case* we have what Lord Radcliffe once called a "classic focus of conflicting points of view".<sup>8</sup> It will be remembered that in *Shaw's Case* the House of Lords upheld a conviction for "conspiracy to corrupt public morals", and refrained from commenting adversely on the opinion of the Court of Criminal Appeal that the criminal law knows also a common law misdemeanour, "conduct calculated and intended to corrupt public morals", independently of conspiracy.<sup>9</sup> Viscount Simonds delivered the leading judgment, in which the seminal passages were as follows:

In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. . . . The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society. . . . Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. . . . I say, my lords, that if the common law is powerless in such an event, then we should no longer do her reverence. . . . There are still, as has recently been said, "unravished remnants of the common law".<sup>10</sup>

Viscount Simonds gave no indication of the author of this last remark. But if we turn to a series of lectures delivered in 1960 by his noble and learned friend, Lord Radcliffe, and published under the title of "The Law and Its Compass" a few months before the judgment in *Shaw's Case*, we find the following:

The fecundity of democratic assemblies has provided a complex of detailed rules and regulations governing very many aspects of the conduct of human life. In each of these rules and regulations we are bound to think that we hear the dim murmur of the popular will, as children are told that they hear in a shell the sound of the waves of the sea. . . . But it would be credulity to think that . . . the judge has no further duty for the future than to act as the skilled expounder of statutory prescriptions, sup-

6. Cf. Lord Morris, [1961] 2 W.L.R. 897, 938: "Though it may be that the occasions for presenting a charge such as that in count I will be infrequent. . . ."

7. Cited in B. N. Cardozo, "Selected Writings", ed. M. E. Hall (1947), p. 84.

8. Radcliffe, *op. cit.* infra n. 12, p. 47.

9. [1961] 2 W.L.R. 897, 908, 936.

10. [1961] 2 W.L.R. 897, 917, 918.

plemented, where gaps remain, by the still unravished remnants of the common law. . . .<sup>11</sup> Unless the law is to equate itself in the eyes of society with the varying impulses of popular feeling, as interpreted by these assemblies or the political parties which dominate them, its conception of the public interest must be related to some more fundamental assessment of human values and of the purposes of society. And if it cannot so relate itself in the modern world, law has ceased to be that pillar of fire before the moving multitude which men in the past have had cause to reverence.<sup>12</sup>

So we find a central thesis of Lord Radcliffe's public lectures taken over almost *verbatim* into the judgment of Viscount Simonds, with which Lords Morris of Borth-y-Gest and Hodson fully concurred. In much the same way we can look at Lord Hodson's judgment:

The function of *custos morum* is in criminal cases ultimately performed by the jury. . . . One may take, as an example, the case of negligence where the standard of care of the reasonable man is regarded as fit to be determined by the jury. In the field of public morals it will thus be the morality of the man in the jury box that will determine the fate of the accused, but this should hardly disturb the equanimity of anyone brought up in the traditions of our common law.<sup>13</sup>

Here, as in all the judgments of the majority in *Shaw's Case*, we hear echoes of Lord Devlin's Maccabean Lecture, delivered for the British Academy in 1959:

How are the moral judgments of society to be ascertained? . . . English law has evolved and regularly uses a standard which does not depend on the counting of the heads. It is that of the reasonable man. . . . For my purpose I should like to call him the man in the jury box, for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion expect to be unanimous.<sup>14</sup>

Thus *Shaw's Case*, in which the jurisprudence of legal theory merges insensibly into the jurisprudence of case-law, provides us with more than sufficient reason to study the extra-judicial utterances of the judges with an interest both theoretical and practical.

11. It is evident that the "unravished remnants of the common law" do not stand for the same thing in Viscount Simonds's judgment as in Lord Radcliffe's opinion. Lord Radcliffe uses the phrase to denote scraps of positive law of the same determinate status as statute law, while Viscount Simonds uses the same phrase to denote relatively indeterminate principles, the content of which is to be filled in by judge or jury, whereby the common law can continuously adapt itself to new circumstances. Yet the phrase provides the clue to the source of much else in Viscount Simonds's phraseology, and the ultimate significance of the two passages, taken as a whole, appears to be the same.

12. Radcliffe, "The Law and Its Compass" (1960), pp. 52-53.

13. [1961] 2 W.L.R. 897, 940.

14. Devlin, "The Enforcement of Morals" (1959), pp. 15-17.

The thirteen public lectures which Lord Radcliffe has delivered during the last ten years (and he has published nothing besides) are devoted to the thesis that law and state alike are grounded on moral purpose, a thesis which he explores and expounds by way both of the history of political theory<sup>15</sup> and of the development of the common law and its doctrine of public policy.<sup>16</sup> His particular concern in his more occasional pronouncements is the application of his larger theme to the theory and practice of censorship.<sup>17</sup> Thus Viscount Simonds, while not at that point employing his very words, truly conveyed Lord Radcliffe's primary notion when he spoke, in *Shaw's Case*, of the supreme and fundamental purpose of the law being to conserve not only the safety and order but also the moral welfare of the State.

It is not a popular doctrine. Lord Radcliffe comes to it in the first of his 1951 Reith Lectures, when he is speaking of Plato:

. . . for him the question "What do men organise themselves into society for?" could have only one answer: "To give the members of society, all the members, the best chance of realising their best selves." So, in one leap, there is made the big decision: the State is an organisation which exists for a moral purpose.<sup>18</sup>

And he returns to it at the end of the last of those lectures, by way of Matthew Arnold (whom he, like Cardozo J., regards as "one of the most enlightening of authors")<sup>19</sup>:

"We want an authority," he says, "and we find nothing but jealous classes, checks and a deadlock; culture suggests the idea of the State. We find no basis for a firm State power in our ordinary selves; culture suggests one to us in our best self." . . . Power, authority, dominion are still with us, they correspond to something that belongs to a man's inmost self, and men do themselves no service by thinking or speaking of them as evil things. Power is good or evil according to the vision that it serves.<sup>20</sup>

In like manner his object in his most recent work was to make a "teleological inquiry (and from this the mind of every well-constituted person is trained to shrink)"<sup>21</sup> into "what in the end law stands for and what are its final purposes".<sup>22</sup> It is an inquiry which in the end leads Lord Radcliffe to make explicit what was only hinted at in 1951,

15. See "The Problem of Power" (1951 Reith Lectures) 2nd ed. 1958.

16. Radcliffe, *op. cit. supra* n. 12, especially ch. 2.

17. "Freedom of Information: a fundamental human right" (1953 Montagu Burton Lecture at the University of Glasgow); "Censors" (1961 Rede Lecture at the University of Cambridge); speech in the House of Lords on commercial television, 26 May, 1952, 176 Lords Debates 1401-1406. Lord Radcliffe was Director-General of the U.K. Ministry of Information, 1941-1945.

18. Radcliffe, *op. cit. supra* n. 15, p. 23.

19. Cardozo, *op. cit. supra* n. 7, p. 62.

20. Radcliffe, *op. cit. supra* n. 15, p. 117.

21. Radcliffe, *op. cit. supra* n. 12, p. 4.

22. *Ibid.*

namely, his conviction that "we must never lose touch with the idea of Natural Law or give up the belief that all positive law bears some relation to it".<sup>23</sup> But Lord Radcliffe's view is not that of a simple moralist; his subtle and profound examination of the development of the common law and the present structure of its administration ends with the remark: "where Lord Mansfield failed the modern radical jurist is even less likely to succeed."<sup>24</sup> You cannot hope to get Natural Law in at the front door."<sup>25</sup> As he says later, "the principle of Natural Law was never intended primarily for lawyers";<sup>26</sup> it was, rather, "meat for the prince, who has now become the legislative assembly, and the subject".<sup>27</sup> Nevertheless, the heart of Lord Radcliffe's book is directed towards the lawyer rather than the plain citizen, for it concerns the common law doctrine of public policy. The discussion of this cannot properly be summarised, ranging as it does over the whole meaning and application of that contentious doctrine, pointing up by the way the reasons logical, historical and social-psychological for the "increasing reluctance of the Bench to admit a concern with public policy",<sup>28</sup> and analysing the deficiencies of Parke B.'s classic opinion in *Egerton v. Brownlow*<sup>29</sup> and of Lord Halsbury's equally famous judgment in *Janson v. Driefontein Consolidated Mines*.<sup>30</sup> In Lord Radcliffe's own opinion it is "not so much that the judge should withdraw from the whole ground of public policy as that he should make a more intensive effort to analyse what its basic requirements are and to train himself to become a sounder exponent of their intrinsic nature".<sup>31</sup>

Every system of jurisprudence needs, I think, a constant pre-occupation with the task of relating its rules and principles to the fundamental moral assumptions of the society to which it belongs. The doctrine of public policy is capable, rightly understood, of performing part of this service. It is misunderstood if it is supposed to embody any policy except that of realising the true ideals of that society. It has nothing to do with the policy of the government of the day and no inherent connection with such policies as are pursued from time to time by the legislature.<sup>32</sup>

The great problem, as Lord Radcliffe demonstrates by reference to the cases on restraint of trade, is to distinguish a "fundamental moral

23. *Ibid.* at p. 93.

24. This is so, although *Shaw v. D.P.P.* is an explicit and emphatic re-assertion of one of Lord Mansfield's broadest principles, and the appeal throughout the judgments of the majority is to the authority of Lord Mansfield himself: [1961] 2 W.L.R. 897, 917, 918, 934, 937, 940.

25. Radcliffe, *op. cit.* supra n. 12, p. 33.

26. *Ibid.* at p. 95.

27. *Ibid.* at p. 33.

28. *Ibid.* at p. 52.

29. (1853) 4 H.L.C. 1, 123.

30. [1902] A.C. 484.

31. Radcliffe, *op. cit.* supra n. 12, p. 47.

32. *Ibid.* at pp. 63-64.

assumption" from "a fashion of economic thinking or social philosophy",<sup>33</sup> from mere passing considerations of public benefit and prejudice.<sup>34</sup> A tradition of judicial opinion, running from Burrough J. in *Richardson v. Mellish*<sup>35</sup> in 1824 down to Lord Reid dissenting in *Shaw v. D.P.P.*,<sup>36</sup> denies in effect that the judges are capable of resolving this problem by making the necessary distinction. The basic theory of judicial capacity and function is evidently here in issue.

Very early in "The Law and Its Compass" Lord Radcliffe stakes out his ground:

"My duty as a judge," said Justice Cardozo, "may be to objectify in law not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of men and women of my time."<sup>37</sup> But then the argument turns round upon itself, because these same men and women, as I believe, want the law to stand to them for something which is not just a reflection of their own philosophies and convictions and aspirations . . . rather the impersonal consensus of wisdom than the excellence of judgment of this lawgiver or that.<sup>38</sup>

Nor does Lord Radcliffe stand alone; there is Lord Devlin:

People do not think of monogamy as something which has to be supported because our society has chosen to organize itself upon it; they think of it as something that is good in itself and offering a good way of life and that it is for that reason that our society has adopted it.<sup>39</sup>

There is, perhaps more cautious, Sir Owen Dixon:

It is an error if it is believed that the technique of the common law cannot meet the demands which changing conceptions of justice and convenience make. . . . The demands made in the name of justice . . . must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice.<sup>40</sup>

Not long ago there was Lord Macmillan;<sup>41</sup> and there is with us, of course, Lord Denning, saying of justice: "It is not temporal but eternal . . . it is what the right-minded members of the community—those who have the right spirit within them—believe to be fair."<sup>42</sup> And of the law: "It must correspond, as near as may be, with justice.

33. *Ibid.*

34. *Cf. R. v. Todd* [1957] S.A.S.R. 305, 321.

35. (1824) 2 Bing. 229, 252.

36. [1961] 2 W.L.R. 871, 923-924.

37. Cardozo, *op. cit. supra* n. 7, p. 180.

38. Radcliffe, *op. cit. supra* n. 12, pp. 11-12.

39. Devlin, *op. cit. supra* n. 14, p. 11; *cf.* Hart, "Treason and Immorality", *The Listener*, 30 July, 1959, p. 162.

40. "Concerning Judicial Method" (1956) 29 A.L.J. 476.

41. Macmillan, "Law and Other Things" (1937), p. 281.

42. Denning, "The Road to Justice" (1955), p. 4.

... This conception of the task of the lawyer finds its finest expression in the words of the judicial oath."<sup>43</sup>

The view expressed in all these *dicta* (and these judges seem to have been left, of late, in virtually unchallenged command of the field of extra-judicial utterance) is a view which sees the judge as active in the formulation and application of legal standards, principles and rules which will translate on to the juristic plane, in particular litigations, those principles of substantive justice which are regarded by him and his society as objectively valid. The aim of the judge—the formal end of his enquiry—is to do justice; and at the same time justice is conceived of, not as a static or purely formal principle of impartiality, but as importing positive dictates of right and wrong. Justice is thus synonymous with natural law, equity or the law of reason;<sup>44</sup> it demands “some vindication of a sense of right and wrong that is not merely provisional or just the product of a historical process”.<sup>45</sup> When all allowance has duly been made for the stringent requirements of legal certainty, as manifested in the doctrine of precedent, it remains true, in this view, that the duties of judge and legislator are at bottom the same—to do right in particular social situations:

*A priori*, the task which is imposed on the judge in determining the law seems to us to be entirely analogous to that imposed on the legislator himself. Apart from the consideration (which is certainly not negligible but is nevertheless of secondary significance in this context) that judicial research is carried on with respect to a concrete fact-situation which the law is called upon to meet, the considerations which ought to guide the judge are, in the last analysis, of exactly the same character as those which govern legislative action. For the principal end sought after is in both cases the same—namely, to satisfy as well as may be, by means of an appropriate ruling, both justice and social utility.<sup>46</sup>

To agree with this general view of Gény's, as those judges we are discussing would seem to, is not to be bound at the same time to carry over into the common law all his particular doctrines of, say, statutory interpretation. The common law indeed rejected one such doctrine in *Magor and St. Mellons Rural District Council v. Newport Corporation*<sup>47</sup> and *Pye v. Minister of Lands (N.S.W.)*.<sup>48</sup>

The duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed.<sup>49</sup>

43. *Ibid.* at pp. 3-4. The judicial oath is: “I do swear by Almighty God that . . . I will do right to all manner of people after the laws and usages of this Realm without fear or favour affection or ill-will.”

44. Radcliffe, *op. cit.* supra n. 12, p. 25.

45. *Ibid.* at p. 78.

46. F. Gény, “Méthode d'Interprétation et Sources en Droit Privé Positif” (2nd ed. 1919, reprinted 1954), Vol. II, p. 77; trans. by J. M. Finnis.

But it would be excessively mechanical to suppose that the law already provides with precision for every contingency that may arise, and that there are no gaps which the common law, in the person of the judge, may not seek to fill by appeal to new principles or by the analogical extension of settled principles. Where, then, are new principles to be found, and what considerations are to guide and direct the necessary analogical reasoning? Once again there is little doubt that the judges we have mentioned would for the most part accept the opinion we can trace from Aristotle<sup>50</sup> down to Géný and beyond:

The judge called upon to declare the law, when remedying the deficiencies and filling the gaps in the formal sources of law (and thus, indeed, any interpreter of positive law), ought to reckon with the directions of reason and conscience, in order to scrutinize the mystery of justice, before coming to examine the actual and existing state of affairs [*cette nature des choses positive*], which will make concrete and exact his analysis [*qui précisera son diagnostic*] and put the principles of reason into operation. This all adds up to saying that there are principles of justice over and above the contingencies of facts, and that facts, although they enable the exact realisation of these principles, do not exhaust their content.<sup>51</sup>

This is an opinion consistent with, though limited in its effects by, a strict doctrine of precedent, and with Sir Owen Dixon's insistence on the maintenance of a "strict and complete legalism"<sup>52</sup> in the face of "political or sociological propensities"<sup>53</sup>—as Lord Radcliffe observes:

Natural Law is not likely to be more than a minor formative influence upon the work of the judge. The ground is too fully occupied for him to have much freedom in which to move.<sup>54</sup>

It is an opinion which flows easily and consistently from the notions that the primary purpose of the law, as Lord Wright said, is the "quest for justice";<sup>55</sup> that justice is "an ideal fitness of things"<sup>56</sup> which the law is bound to see prevail in human affairs; that "it is not the black-letter

47. [1952] A.C. 189.

48. (1954) 90 C.L.R. 635.

49. (1954) 90 C.L.R. 635, 648.

50. "Nicomachean Ethics", Book V, c. 10 (1137<sup>b</sup>9-33).

51. Géný, *op. cit. supra* n. 46, pp. 100-101; trans. by J. M. Finnis.

52. Swearing-in of Sir Owen Dixon as Chief Justice of the High Court of Australia, 85 C.L.R. xiv.

53. *Supra* n. 40.

54. Radcliffe, *op. cit. supra* n. 12, p. 94. Cf. also Devlin J. in *Carter v. Minister of Health* [1950] 1 All E.R. 904: "In the administration of justice, the choice always lies between the application of the fixed rule that is designed to be generally fair and to ensure uniformity of treatment, and the investigation of each case on its merits, leaving the result to the length of the Judge's foot."

55. Wright, in "Interpretations of Modern Legal Philosophies" (1947), p. 794; and see Macmillan, *op. cit. supra* n. 41, pp. 47, 281.

56. Radcliffe, *op. cit. supra* n. 12, p. 95.



and the king's arms"<sup>57</sup> nor even the changing will of Parliament, that can exhaust the sources of law; that the drive of law is to discern and make concrete the demands of equity and utility; that the judges are capable, and entrusted with the task, of distinguishing ethical fundamentals from political fashions, of legalistically upholding the one and eschewing the other;<sup>58</sup> and that the judicial mind, constantly measuring the evolving contingencies of social life against those larger principles of justice on which our society seeks to found itself, is entitled and even obliged to adapt and develop the common law:

Then it is sought to show that the term in question cannot exist in law because it has never been heard of before this case. When did it first enter into the relations of employer and employed? Could it really have existed since the Road Traffic Act, 1930, if it did not exist before it? My Lords, I do not know because I do not think I need to know. . . . No-one really doubts that the common law is a body of law which develops in process of time in response to the development of the society in which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another; but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place.<sup>59</sup>

It will be an aid to precision in understanding the implications of the movement of thought outlined above if we now examine a dominant current of academic thinking about the same matters. The contrast between the outlook of those judges whom we have discussed and that of writers such as Prof. H. L. A. Hart, Prof. Alf Ross and the pre-war Gustav Radbruch<sup>60</sup> can best be seen in the analysis of the idea of justice.

It is evident from what has already been said, that in the view so far reported "there is at all times and in all places an ideal fitness of

57. Burke, "Tract on the Popery Laws" (1765; Bohn ed. 1854), p. 22.

58. Cf. the subtle dictum of Lord Penzance in *Combe v. Edwards* (1878) 3 P.D. 142: "Law is, or ought to be, the handmaid of justice, and inflexibility, which is the most becoming robe of the latter, often serves to render the former grotesque."

59. *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555, 591 per Lord Radcliffe (diss.). Cf. Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 583: "I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is obviously a social wrong."

60. To a certain extent Radbruch changed his views after the Second World War. See L. L. Fuller in (1954) 6 *Journal of Legal Education* 457, 481. By treating Ross, Hart and Radbruch together in this context, it is not meant to be implied that the general jurisprudential approach of these authors is identical or even similar—it is not. What is ultimately sought to be shown is the necessary consequence, in an important field of legal philosophy, of a consistently relativist approach even when this proceeds from differing jurisprudential starting-points.

things"<sup>61</sup> which is justice, so that, granted that the aim of the law is the attainment of justice, "our human laws are but the copies, more or less imperfect, of the eternal laws so far as we can read them".<sup>62</sup> Justice is thus a substantive principle, making its own demands on every legislator or judge who seeks to do justice; in every situation there is some principle or course of action objectively just, regardless of what is in the event done under the pressure of subjective beliefs or desires. In every case justice takes sides, and it is the duty of the legislature or tribunal to see that its own decision is in favour of the side with whom justice rests.

But for a growing school of academic jurists, "justice, like legal certainty, is a non-partisan postulate".<sup>63</sup> As Radbruch said:

Justice demands that equals be treated equally, different ones differently; but it leaves open the two questions, whom to consider equal or different, and how to treat them. Justice determines only the form of the law. In order to get the content of the law, a second idea must be added, viz. expediency . . . or suitability for a purpose. . . . However, any answer to the question of the purpose of the law other than by enumerating the manifold partisan views about it has proved impossible.<sup>64</sup>

Radbruch here expresses lucidly the essentials later explored by Professors Ross and Hart. Prof. Ross agrees with Radbruch that "justice is the specific idea of law"<sup>65</sup>—in this their view is the same as that of Lord Radcliffe and like thinkers. But it is for Ross and Radbruch a purely formal idea, and needs a supplement before it can make substantive demands on the law or guide the process of legal reasoning:

Justice is equality. But the formal demand for equality as such does not mean much, and . . . the practical content of the demands of justice depends on presuppositions lying outside the principle of equality, namely the criteria determining the categories to which the norm of equality shall apply. . . . The demand for equality is reduced to a demand that all differentiation shall be contingent on general criteria (irrespective of which they are). . . . Justice is no guide for the legislator. . . . The idea of justice resolves itself into the demand that a decision shall be the result of the application of a general rule.<sup>66</sup>

The most complete and subtle exposition of such a conception of justice is to be found in Prof. Hart's recent book, "The Concept of Law". There are differences of emphasis and detail, but the fundamentals remain the same:

We may say that [the idea of justice] consists of two parts: a uniform or constant feature, summarised in the precept "Treat like cases alike [and different cases differently]" and a shifting

61. Radcliffe, *op. cit. supra* n. 12, p. 95.

62. Lord Macmillan, quoting J. A. Froude, in *op. cit. supra* n. 41, p. 281.

63. G. Radbruch, "Legal Philosophy" (1932; trans. by K. Wilk, 1950), p. 108.

or varying criterion used in determining when, for any given purpose, cases are alike or different. . . . It might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest or caprice. . . . [But] when we turn from the justice or injustice of the administration of the law to the criticism of the law itself in these terms, it is plain that the law itself cannot now determine what resemblances and differences among individuals the law must recognise if its rules are to treat like cases alike and so be just . . . and the criteria of relevant resemblances and differences may often vary with the fundamental moral outlook of a given person or society.<sup>67</sup>

Prof. Hart defends his restriction of the word "justice" to this purely "formal principle" by an appeal to English linguistic usage;<sup>68</sup> as against the classical usage of the word "justice" to import something like "giving to each his due",<sup>69</sup> Prof. Hart contends that it would be linguistically "strange" to describe a father's disregard of his moral obligation or duty to his child as an injustice. But the departure from ordinary usage involved in such a restriction of the meaning of "justice" becomes apparent in Prof. Hart's account of "compensatory justice":

. . . outside the law there is a moral conviction that those with whom the law is concerned have a right to mutual forbearance from certain kinds of harmful conduct. Such a structure of reciprocal rights and obligations proscribing at least the grosser sorts of harm . . . [creates] among individuals a moral and, in a sense, an artificial equality to offset the inequalities of nature . . . the strong and cunning are put on a level with the weak and simple. Their cases are made morally alike. Hence the strong man who disregards morality and takes advantage of his strength to injure another is conceived as upsetting this equilibrium or order of equality, established by morals; justice then requires that this moral *status quo* should as far as possible be restored by the wrongdoer. . . . Thus when laws provide compensation where justice demands it, they recognise indirectly the principle "Treat like cases alike" by providing for the restoration, after disturbance, of the moral *status quo* in which

64. *Ibid.* at pp. 90, 108, 116.

65. A. Ross, "On Law and Justice" (1958), p. 268; Radbruch, *op. cit.*, p. 73.

66. Ross, *op. cit.*, pp. 268, 272, 274, 280.

67. H. L. A. Hart, "The Concept of Law" (1961), pp. 156, 157, 158.

68. *Ibid.* at p. 153; and see H. L. A. Hart, "Justice" (1953) 28 *Philosophy* 348, 350. Hume would seem not to agree with Hart: see "Treatise of Human Nature" III, ii, I.

69. See, *inter alios*, Plato, "Republic", 331; Aristotle, "Rhetoric", 1, 9; Cicero, "De Finibus", V, 23, 65; Augustine, "De Civitate Dei", XIX, 24; Inst. 1, i; Aquinas, "Summa Theologica", II-II, 58, 11; Hume, "Treatise of Human Nature", III, ii, II; J. S. Mill, "Utilitarianism" (1863; 1910 ed.), pp. 42, 46; Macmillan, "Law and Other Things" (1937), p. 14; J. Stone, "The Province and Function of Law" (1946), p. 784; G. Del Vecchio, "Justice" (1952), p. 67 n. 13, p. 75 n. 29; Hailsham, 1960 Rectorial Address to the University of Glasgow, p. 12.

victim and wrongdoer are on a footing of equality and so alike.<sup>70</sup>

The very weak, almost metaphorical, sense in which a moral order puts persons "on a level" or "on a footing of equality", the difficulty of applying such an analysis to the types of compensation-situation usually referred to under the rubric of "unjust enrichment", and the overall admitted "indirectness" with which Prof. Hart's formal principle is recognized by the common understanding (and thus the common usage) of "justice" in even those compensation-situations that he discusses might well be thought to cast doubt on his view that "the specific form of excellence attributed to laws which are appraised as just"<sup>71</sup> is *primarily* contained in that formal principle. Another observation which might be made about the primacy of that formal principle, which without a "moral *status quo*" remains an "empty form",<sup>72</sup> is that it denies full meaningfulness to criticism of a *moral* system as unjust—for if a set of moral principles must be granted before we can describe any rule as unjust, there must always be one set of moral principles beyond the reach of justice. We are thus involved in an infinite regression, or are forced to adopt a relativist position whereby a rule (moral or legal) is unjust only from the point of view of another moral rule, which may equally itself be unjust from the point of view of the first. One might indeed say, after Radbruch, that there is thus no true justice nor even any hope of discovering it, but only manifold partisan views about it. One may doubt, however, whether the English language is really as obviously wedded to such a view as Prof. Hart would have us believe.

It becomes plain, moreover, that this conception of justice is incapable of forming the dynamic principle of legal reasoning and development postulated as the ideal of law by the judicial thinkers whose views we first examined. As a necessary consequence of restricting justice to a confessedly empty form, the emphasis in Prof. Hart's analysis is on justice as "*maintaining or restoring* a balance or proportion"<sup>73</sup> already *given* by an existing social-moral order and upset by a violation due (though this part of Prof. Hart's analysis does not seem to follow inevitably from his premisses) to force or fraud. The emphasis in the opposing point of view is on justice as *imposing* a rightful order on conflicting human interests which are by their nature legitimate opposites not easily reconcilable<sup>74</sup>—and *only then* as maintaining the established moral order. Prof. Hart recommends Sidgwick's discussion of justice as one of the two best modern elucidations of the idea;<sup>75</sup> but while his own discussion embraces three of the four

70. Hart, *op. cit. supra* n. 67, pp. 160-161.

71. *Ibid.* at p. 161.

72. *Ibid.* at p. 155.

73. *Ibid.*

74. Cf. J. Pieper, "Justice" (1957), p. 63.

75. Hart, *op. cit. supra* n. 67, p. 251.

elements of justice enumerated by Sidgwick<sup>76</sup>—namely, Equality or Impartiality, Reparation for injury and Conservative Justice—he seems to find no place, even in a linguistic analysis, for Sidgwick's "Ideal Justice", the principle of which is that "Desert should be requited".<sup>77</sup> It is this view of justice as ultimately "desert" (understood in a broader sense than in the context of retributive punishment) which is at the heart of any view proposing justice as a practical guide to legislator and judge.<sup>78</sup> "Give to every man his due"—the principle brings us immediately face to face with the rational and social nature and status of man, from which flow his rights<sup>78a</sup> and interests which it is the purpose of society and its officers to respect and promote. Justice, in this view, is not, as it is for Professors Ross and Hart, a segment of morality primarily concerned with the ways in which *classes* or *categories* of individuals are treated.<sup>79</sup> For the quest for justice is not primarily a quest for equal treatment as between persons inside given classes. It is, rather, a repeated effort to give to every man what ought to be given to *him*, what he can rightfully claim, what is due or owed to him as a rational and social animal. The "proportion" to be imposed and observed is not principally between persons,<sup>80</sup> but between a man and his own.<sup>81</sup> Of course, if justice is everywhere attained—if the quest is successful—a proportionate equality between persons follows as an inevitable but nevertheless incidental corollary. Behind the just claims of the particular man whose case has arisen for consideration can be discerned the claims of all men in like case. To reduce justice to a consideration of classes of persons is to evacuate it of its force as the ideal of—the idea giving content to—the law. For classes, *qua* classes, have no rights or duties; justice (as conceived by, say, Lord Radcliffe) grounds in a man, and only derivatively, and in a weak sense, in the class of like men of which that man is a member. Justice looks to the likeness of like claims only after it has recognised the principal claim.

It might be thought that this dispute about the meaning of "justice" and its status in the critique and formation of law is simply terminological—that the function of "justice" in the jurisprudence of the

76. See H. Sidgwick, "The Method of Ethics" (1890), p. 293.

77. *Ibid.* at p. xxiii.

78. Cf. Del Vecchio, *op. cit. supra* n. 69, p. 73 n. 24.

78a. It is difficult to agree with Profs. Olafson and Hart in their contention that most pre-seventeenth century natural law thinkers did not work with the notion of natural rights, but rather with the notion of natural duties. See F. A. Olafson, "Society, Law and Morality" (1961), p. 22, and H. L. A. Hart, "Are there any Natural Rights?" (1955) 64 *Phil. Rev.* 175, 182, reproduced in Olafson, *op. cit.*, p. 173, 178. The idea of natural human rights was much closer to the surface of mediaeval thinking than the above contention implies. See Aquinas, "Summa Theologica", II-II, 57, and Pieper, *op. cit. supra* n. 74, ch. 1.

79. See Hart, *op. cit. supra* n. 67, p. 163; Ross, *op. cit. supra* n. 65, pp. 272-273.

80. Cf. Hart, *op. cit.*, pp. 155, 251.

81. Cf. Aquinas, "Summa Theologica", II-II, 58, 10 resp.; and see *infra* at n. 89.

judges could be fulfilled in the jurisprudence of the academics by, say, "common morality",<sup>82</sup> "accepted social morality and wider moral ideals"<sup>83</sup> or some such principle more general and potentially less formal in character than their notion of "justice". But in fact we have used the discussion about justice only as a pointer to the more fundamental disagreements between the two schools of thought. For the one view is dependent on its contention that there is an "ideal fitness of things" which can in some sense be read off from the "nature of things", in particular the "rational and social" nature of man<sup>84</sup>—otherwise it quite fails to give content to the principle "To each his due", and begs the question when it speaks of imposing a "rightful order" on conflicting human interests; it fails, moreover, in its attempt to go beyond the "convictions and philosophies of men and women of my time" into the realm of the "impersonal consensus of wisdom", the "good in itself", the "eternal". And the other view of justice, likewise, depends for its cogency on its contention that the content of the "moral *status quo*" is indeterminate and variable, that we can hope for nothing more than "manifold partisan views" about the purposes which (as all sides admit) give content to the law; for if the criterion used in determining when cases are alike or different were not by its very nature shifting, varying and "open to challenge even in relation to a single type of subject",<sup>85</sup> the empty and formal principle "treat like cases alike . . ." could have no claim to be peculiarly "the general principle latent in [the] diverse applications of the idea of justice".<sup>86</sup> In other words, any view like that of Lord Radcliffe stands or falls (if it is consistent) with the view that ethical judgments are rational and verifiable in character, while the opposing view here discussed stands or falls, professedly in the case of Radbruch and Ross and by necessary implication in the case of Prof. Hart,<sup>87</sup> with the view that ethical judgments are, shortly, subjective, relative or noncognitive. And this is not an issue for the jurist, *qua* jurist, to decide.

We can use the problem of justice to throw still more light on juristic debate. In Prof. Hart's interpretation, Aristotle exhibited justice as specifically concerned with the maintenance or restoration

82. Hart, *op. cit.* supra n. 4.

83. Hart, *op. cit.* supra n. 67, p. 199.

84. See Radcliffe, *op. cit.* supra n. 12, p. 95.

85. Hart, *op. cit.* supra n. 67, p. 156; the phrase "open to challenge" is, of course, ambiguous; any truth is open to challenge in its ("accidental") aspect as proposition, though in its ("essential") aspect of truth it is not open to challenge. In the present context Prof. Hart appears to mean, like Radbruch and Ross, that the criterion is *essentially* open to challenge, i.e. that there is no true criterion to be found.

86. *Ibid.* at p. 155.

87. Cf. Prof. Hart's reluctance to associate positivism in law with relativism or noncognitivism in ethics: "Positivism and the Separation of Law and Morals" (1958) 71 *Harv. L. R.* 591, 624-629.

of a balance or proportion *between persons*.<sup>88</sup> Like Prof. Hart, St. Thomas Aquinas claims the support of Aristotle, but he interprets Aristotle as exhibiting justice as specifically concerned with balance or proportion *between a person and some act or thing due to him*.<sup>89</sup> An examination of the Nicomachean Ethics indicates that both interpretations are, in a sense, right. Aristotle's analysis is indeed concerned with equality as between persons; persons in like case have a right in justice to an equal share of any whole. But this is only *after*, he has said:

Awards should be "according to merit"; for all men agree that what is just in distribution must be according to merit in some sense, though they do not specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with excellence.<sup>90</sup>

Because Aristotle does not here look beyond the manifold partisan views, he concentrates on describing the division of the "good" or "loss and gain" or other whole into parts which are to one another as are the *given* merits or *given* equality of the persons concerned. It is a description that Aquinas would doubtless accept; but because Aquinas thinks he is capable of going beyond manifold partisan views and finding the objective merits of a man, the emphasis of his discussion shifts to the question "What *does* this man merit; what *is* due to him"? The point of view is no longer simply that of the observer describing the usage of "justice" among men with manifold partisan views; it has become that of the man who has to decide what *is* just in a certain situation. Over and above Aristotle's account (which we shall call "external") of men doing justice according to their own specifications of merit, we have Aquinas's account (which we shall call "internal") of the problem of justice as it must be resolved by everyone who would do justice, the problem of determining the *true* merits of a man. It is not that the "external" account is wrong or superseded as an account of the meaning of "justice", but that the meaning of "justice" in the understanding of someone doing justice has additional elements which the "internal" account seeks to explore.

Now failure to distinguish between "external" and "internal" accounts of the same matter has long confused jurisprudential thought. Everyone is agreed that "law" imports "obligation"—but discussions of the nature of obligation (and thus of law itself) have too often bogged down because one side was giving an "external" account while the other was attempting an "internal" account of the same idea. The

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88. Hart, *op. cit.* supra n. 67, p. 251.

89. *Supra* n. 81.

90. Aristotle, "Nicomachean Ethics", V, 3 (1131<sup>a</sup>27). But cf. Aristotle's later view in "Rhetoric", I, 9, 13, 15.

“external” account is an answer to the question “When, in a given society, are rules conceived and spoken of as imposing obligations?”<sup>91</sup> The answer will be in some such descriptive terms as “when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”<sup>92</sup> Other *phenomena* characteristic of obligation may also be referred to; thus Prof. Hart shows that statements of obligation (e.g. “A has an obligation to do X”) have an external aspect (in terms of observable regularities in the conduct of A and of officials in the society, predictions of probable social reaction against A if he fails to do X, etc.) and an internal and more characteristic aspect (asserting, not a prediction, but that A’s case falls under a certain rule of the given system).<sup>93</sup> But such an account of the social and linguistic phenomena associated with the word “obligation” remains an “external” account; it rests content with description, and does not pretend to be a guide or justification to anyone who wishes to know whether and why *he* has an obligation to do X. But the “internal” account, while not necessarily questioning the adequacy or accuracy of the “external” account as a description, seeks to assist the person to decide whether or not he really has an obligation to do X. It seeks to answer the question “Why does this law manage to impose an obligation to do X on me? How is it that I am not just asked or under pressure or forced but also under an obligation to do X?” This question cannot be answered simply by describing linguistic usage or social phenomena of command or custom, or by referring to the fact that the jurist can postulate a *Grundnorm* from which the legal rule commanding me to do X can be deduced,<sup>94</sup> or to the fact that a “rule of recognition” identifying that rule as legal is accepted and used as a guide to conduct by any person or number of persons.<sup>95</sup> The question means “Why ought I to do X?” and it is hardly necessary to call in Hume to remind us that no conclusion in ethical form can follow immediately from a simple recital of empirical facts—something more is required. Nor can the question be answered by pointing to a set of moral rules and saying “those moral rules require me to obey the law” or “X is in accordance with those moral rules”. For the question means “*What is it about* those moral rules and about the law which requires me, in conscience, to do X?” The answer can only be in some such terms as that the purpose of the legal system is to promote the purposes of society, and that society ought to be preserved and developed for the good of man and that I ought not to subvert the good of myself or my fellow men.

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91. Cf. Hart, *op. cit.* supra n. 67, p. 84.

92. *Ibid.*

93. *Ibid.* at p. 86.

94. Cf. H. Kelsen, “General Theory of Law and State” (1949), pp. 110-124.

95. Cf. Hart, *op. cit.* supra n. 67, pp. 92-107.



It follows that if X is indubitably inimical to the purposes of society or the good of man, any legal direction to do X will lack the quality of obligation imported by conformity with social purposes which promote or are consistent with the good of man. In this *purely "internal"* sense the legal direction will lack a quality which laws normally have for their subjects, and *to this extent* will not be law. From the "external" point of view it is certainly a fruitful and revealing tautology<sup>96</sup> that "the existence of law is one thing; its merit or demerit is another."<sup>97</sup> The statement, *lex injusta non est lex*, is certainly absurd if taken as part of an "external" account of the nature of law, and misleading if regarded as a definitional *fiat*; but it is not in fact, and was never meant to be, more than a forceful, almost hyperbolic way of expressing the necessary consequence of any "internal" inquiry into the source of obligation and of law.<sup>98</sup> For it is plainly impossible for me to regard myself as being at one and the same time under an objective obligation (arising from a legal rule) to do X and under an objective obligation (arising from a moral principle) not to do X. There is only one way to escape such a dilemma; that is by denying that law has any of that obligatory character which the "internal" inquiry would lead us to suppose that it has. No grounds can be adduced for such a denial of the objective moral justification and force of law that will not lead also to the denial of objective or cognitive status to morality itself. Once the question is asked and the "internal" inquiry begun, the logic of its answer is inexorable unless it can be shown that the question is one which permits of no *rational* answer. Once again we stray beyond the bounds of jurisprudence into philosophy, and our meta-ethics will determine the matter.

Of course, attempts might be made to deny the relevance of the "internal" inquiry. It is easy enough for the observer analysing the phenomenon of law, and for the advocate whose purpose and justification is established for him,<sup>99</sup> to disregard the "internal" inquiry. But the legislator, the judge on the frontier of legal development, and the citizen called upon to submit himself to the law—all these will want to ask what the law ought rightly to be or to become, in the light

96. See Hart, *op. cit. supra* n. 87, p. 600.

97. J. Austin, "The Province of Jurisprudence Determined" (1832; ed. H. L. A. Hart 1954), p. 184.

98. It is not to be forgotten, when considering the phrase, *lex injusta non est lex*, that that dictum is not intended to deny either that the benefit of any doubt ought to rest with the State, or that an unjust law may in certain circumstances remain obligatory by virtue of the moral need to preserve the peace and order of the State by obedience. The claims made on conscience may be very complex.

99. Cf. Ross, *op. cit. supra* n. 65, p. 377: "Like other technologists [the lawyer] simply places his knowledge and skill at the disposal of others, in his case those who hold the reins of political power". And that is the end of Ross's book.

of its purpose, and whether and why it ought rightly to be obeyed.<sup>100</sup> To such questions the "bare dissections"<sup>101</sup> and descriptions of the "external" analyst will give no answer.

The two movements of thought we have been discussing could fairly be regarded as representing two conceptions of the nature and status of what Roscoe Pound, after Josef Kohler,<sup>102</sup> called the jural postulates of a society.<sup>103</sup> Lord Radcliffe would say that the jural postulates of a society are rather ideal than pragmatic;<sup>104</sup> that they are not accepted or acted upon for their own sake, but rather because they are thought to reflect as best as men can an objective rightness of things grounded in the nature of men and discernible by rational inquiry. But in the other conception, the jural postulates which give content to the idea of justice and which guide the "creative activity"<sup>105</sup> necessitated by the "open texture of law"<sup>106</sup> are indeed *postulates*, to be recognised by the jurist simply because they *are* the received aspirations and convictions of the society; their existence is pragmatic, a question of observable social-psychological facts, rather than ideal.

What we are looking for is the ideal relation among men which, when we have formulated it as an idea, will give a guide for legislation, a sure ground for choosing from among conflicting or competing starting points for legal reasoning, a touchstone of interpretation and a pathfinder in the application of legal standards. The nineteenth century had such a formula but we are giving it up.<sup>107</sup>

In this both sides would agree; but whereas the one would regard the search as truly inspired by the belief that there *is* an ideal relation and a sure ground to be found, the other would contend that the search cannot end, even in theory, in anything more than manifold partisan views. One might be excused for thinking that, in the long run, the search is likely to be prosecuted with greater vigour by those

100. Cf. Radbruch's view that obligation cannot be founded on power, but only on a value inherent in the law; only compulsion can be founded on power. Radbruch held this view both before and after the Second World War (see Radbruch, *op. cit. supra* n. 63, p. 84 and *supra* n. 60). The shift in his views involved simply the elevation of "justice" above "certainty" and "expediency" in the hierarchy of elements of the idea of law. The general significance of this shift can easily be over-emphasised; cf. Radbruch, *op. cit. supra* n. 63, pp. 107-112.

101. Radcliffe, *op. cit. supra* n. 12, p. 9.

102. J. Kohler's *Rechtspostulate*; discussed by Stone, *op. cit. supra* n. 69, pp. 331-340.

103. See R. Pound, "Jurisprudence" (1959), Vol. 3, pp. 1-17; Pound, "The Ideal Element in Law" (1958) pp. 176-195; Stone, *op. cit.*, pp. 355-368.

104. Stone, *op. cit.*, pp. 359-360, appears to over-emphasise the pragmatic character of jural postulates in Pound's conception; cf. Pound, "The Ideal Element in Law", p. 186. The truth may well be, however, that Pound's conception is essentially ambiguous as between the alternative ways of consistently defining jural postulates, discussed in the text above.

105. Hart, *op. cit. supra* n. 67, p. 200.

106. *Ibid.* at pp. 124-132, 200.

107. Pound, "The Ideal Element in Law", p. 175.

who regard its end and object as not utterly beyond the power of human reason; that the law will more confidently relate itself to fundamental assessments of human values (and eschew the shifting impulses of popular will and judicial eccentricity)<sup>108</sup> if it regards those assessments as valid and right as well as fundamental; that the function of the law as moral guardian will be more confidently upheld by judges who think they can see, behind the *de facto* moral *status quo*, the real moral *welfare* of the State; and that the common law doctrine of public policy will be applied with greater assurance, awareness and (it may be) sophistication by judges who believe that there are true and accepted ends and values to be found independently of current political and social doctrines concerning means and method. If this is indeed so, then the implications of the movements of thought we have discussed are not solely academic.

If we follow up the quotation from Pound made above, we find a clue to further implications in the thinking of the judges. Pound continued:

In the past the ideal relation among men has been thought of successively in three ways. . . . Third, the ideal relation among men has been put as liberty. . . . Now that after a century of substantial agreement on the third we are agreeing to give it up we may hardly expect to find a generally acceptable substitute at once.<sup>109</sup>

It is certainly the aim of Lord Radcliffe in his discussion both of public policy and of censorship to discountenance any view which sees freedom of contract as the "master freedom overshadowing all others"<sup>110</sup> and freedom of expression as an inalienable and unfettered human right.<sup>111</sup> "For there are manifestations of freedom of contract that prejudice and even defeat other freedoms no less important to a civilized and fruitful life."<sup>112</sup> Once the liberty of the free-willing individual,<sup>113</sup> which so dominated the nineteenth century theory of contract (and indeed of society and justice), is replaced as the received social ideal by a positive conception of the civilized life, and, one might say, of "social justice" (the content of which we need not here stay to consider, and as a means towards which individual liberties may of course be indispensable),<sup>114</sup> a theoretical basis is established for contractual doctrines to develop unfettered by the need to postulate fictitious "implied" terms "agreed upon" by contracting parties en-

108. Cf. the demand of Lord Atkin that public policy be invoked only "in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds": *Fender v. St. John-Mildmay* [1938] A.C. 1, 12.

109. Pound, "The Ideal Element in Law", p. 175 .

110. Radcliffe, *op. cit.* supra n. 12, p. 61.

111. See n. 17 supra.

112. Radcliffe, *op. cit.* supra n. 12, p. 60.

113. See Stone, *op. cit.* supra n. 102, pp. 241-264.

114. See Radcliffe, *op. cit.* supra n. 12, p. 95.

dowed with a notional omniscience. It is wholly significant that Lords Radcliffe and Wright, whose general jurisprudence of law and justice we have discussed above, should in their judicial capacity have led the attack on the theory that frustration of contracts proceeds on the basis of an implied intention of the contracting parties. In *Denny, Mott and Dickson Ltd. v. Fraser*,<sup>115</sup> Lord Wright said:

It is not possible, to my mind, to say that if they had thought of it they would have said: "Well, if that happens, all is over between us." On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations. As to that the Court cannot guess. What it can say is that the contract either binds or does not bind.<sup>116</sup>

Outside the court he was more outspoken:

The truth is that the Court or jury as a judge of fact decides the question in accordance with what seems to be just and reasonable in its eyes. The judge finds in himself the criterion of what is reasonable. The Court is in this sense making a contract for the parties, though it is almost blasphemy to say so.<sup>117</sup>

Lord Radcliffe was perhaps even more forthcoming in *Davis Contractors Ltd. v. Fareham Urban District Council*:

By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man, and the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.<sup>118</sup>

It is equally significant that it should have been Lords Wright and Denning who have consistently formulated and sought to expand the shaky common law doctrine of quasi-contract in terms of unjust enrichment.<sup>119</sup> And, on the other hand, it cannot but be noticed that Lord Sumner, who at the height of judicial positivism poured scorn on "that vague jurisprudence sometimes attractively styled justice between man and man",<sup>120</sup> did his best in *Sinclair v. Brougham*<sup>121</sup> to stifle the notion of quasi-contract; and that Scrutton L.J., who seemed to allow in *Luther v. Sagor*<sup>122</sup> unrestricted omni-

115. [1944] A.C. 265.

116. [1944] A.C. 265, 275.

117. Wright, "Legal Essays and Addresses" (1939), p. 259.

118. [1956] A.C. 696, 728. But cf. Radcliffe, *op. cit. supra* n. 12, p. 8: "Some writers have claimed to find in the legal norm of the 'reasonable man' an anthropomorphic embodiment of the Law of Reason. For myself I doubt it: I think him too earth-bound at many points."

119. Wright, *op. cit. supra* n. 117, pp. 1-33; *Fibrosa Case* [1943] A.C. 32, 61 per Lord Wright; *Nelson v. Larholt* [1948] 1 K.B. 339, 343 per Denning J.

120. *Baylis v. Bishop of London* [1913] 1 Ch. 127, 140.

121. [1914] A.C. 398, 452.

122. [1921] 3 K.B. 532, 559.

potence in the English sovereign, carried on in *Holt v. Markham*<sup>123</sup> the attack on Lord Mansfield's doctrine of quasi-contract.

Wherever we look, whether to criminal law, contract or tort, the movement of thought manifested in the extra-judicial utterances we first noticed has notable ramifications in the living development of the common law. It is the same Lord Denning who says that justice is eternal and who promises that, given the opportunity, he will announce a right of action in tort for invasion of privacy.<sup>124</sup>

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123. [1923] 1 K.B. 504, 513.

124. 229 Lords Debates, 637-640 (13 March, 1961). And see now the trenchant comments of Lord Denning, on the bases of equity jurisdiction, in *Campbell Discount Co. Ltd. v. Bridge* [1962] 2 W.L.R. 439, 458, a case casting the gravest doubt on the validity of one of the most frequent provisions in the ordinary hire-purchase contract. And compare the cautious reservations of Lords Radcliffe and Devlin, at 455 and 463, with the outright opposition to Lord Denning's views of Viscount Simonds and Lord Morton of Henryton, at 442 and 445. A comprehensive, but analytically unsatisfactory, study of the attitudes of English common lawyers to justice is to be found in a book which reached me after this article was written: see F. E. Dowrick, "Justice according to the English common lawyers" (1961).

