F. W. GUEST MEMORIAL LECTURE
JURISPRUDENCE AND THE LEGAL PROCESS: SOME CONTEMPORARY TRENDS

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The F. W. Guest Memorial Trust was established to honour the memory of Francis William Guest, M.A., LL.M., who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.

It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

I am honoured to have been asked to deliver this, the first of the F. W. Guest Memorial Lectures. All members of this audience will know that Professor F. W. Guest was the first occupant of the Chair of Law in this University and the first full-time Dean of the Law Faculty. He came to the Chair during a period of great change in the aims and methods of legal education in the Universities of New Zealand. During his unhappily short tenure of the Chair he laid the foundations upon which his successors will build. His untimely death has been a sad loss to the University, to the legal profession which he served so well, and to a host of friends who knew him with affection and respect. This Memorial Lecture has been established as the result of the efforts of members of the University and the legal profession in recognition of, and in tribute to, his contributions to legal education and to the legal profession generally.

Guest was a man with breadth of vision and of unusually wide training and experience. He was trained in Philosophy as well as in Law. Indeed for a time he lectured in Philosophy in this University before turning his energies to legal practice. He became a skilful and respected practitioner and the regard of the profession for him was marked by his election for a term as President of the Otago District Law Society. His scholarly interests finally, however, brought him back to the world of education to take the Chair of Law. As a teacher and a scholar he was able to combine his philosophical interests and training with his practical knowledge of the law in action. The influence he exerted in the field of legal education has been deep and will be lasting.

It is because Frank Guest was particularly concerned with the philosophical aspects of law that it was thought appropriate that this lecture should deal with a jurisprudential topic. I wish to speak therefore about some developments in legal theory or jurisprudence in so far as they may have some significant bearing upon practical problems of

* Mr P. B. A. Sim, LL.M., then Dean-elect of the Faculty of Law, was invited to deliver the inaugural F. W. Guest Memorial Lecture on Friday, 2 August 1968, and the following is a revised text of that address.

the administration of law—the "legal process" in its widest sense—as well as being of theoretical interest.

The law as a going concern is a complicated institution managed by men who have been specially trained for the task—lawyers, judges and officials who perform the various functions which are required to make a legal system operate. The legal practitioner and the judge are, of course, concerned in their daily work with the problems of individuals. Each transaction or each dispute is a matter between two or more parties and no one else; the lawyer's duty is to look after the interests of his client within the framework of the existing legal system; the judge's duty is to decide the issues, again in accordance with the established law. Because lawyers and judges are concerned at any given moment of time with one and only one individual transaction or dispute, and with the rights and duties of the individual parties to it, the particular rights and duties in issue in the particular case are central to the lawyer's concern. But especially in a system such as the Anglo-American common law system which is based upon the doctrines of precedent, the determination of the particular dispute in itself shapes the law for the future, and the often seemingly humdrum process of the lawyer's daily work may have far-reaching consequences for the whole social order.

As the practising lawyer or judge has his first responsibility to the individual problem he is at the moment dealing with, the emphasis of his work will be upon the solving of specific problems by the application of established legal techniques. Although, as I have said, the effects of the individual case may extend far beyond the establishing of the rights or duties of the particular parties, the working lawyer does not generally have these possible long-term effects in the forefront of his consciousness nor does he regard them as his first concern. As Lord Macmillan once remarked, in the course of deciding an appeal to the House of Lords:[1] "Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalise the law of England. That attractive if perilous field may well be left to other hands to cultivate." The attempt to rationalise and, more broadly, to examine the law in its widest perspectives, is the task that the legal philosopher or jurist takes upon himself. Towards this task the practising lawyer engaged in his usual daily work will often have a somewhat ambivalent attitude. On the one hand, the idea of legal philosophy may attract a certain degree of respect. On the other hand, the lawyer may feel rather like the man who discussed philosophy with Dr Johnson. He had often thought of becoming a philosopher, he said, but cheerfulness would keep on breaking in. If Dr Johnson's acquaintance felt that philosophical concerns were remote from the interests and enjoyments of ordinary life, lawyers may often feel that speculations of jurists are remote from their daily concerns. There are aspects of contemporary juristic thought, however, which seem to me to be not merely philosophically interesting and important but which impinge to a considerable extent upon the daily working of the legal process. It is about some of these aspects of contemporary thought that I wish to speak tonight.

Legal philosophy has a long history. For several thousand years men have engaged in thinking and speculating about law and its problems. The chapter headings of a short historical treatment of legal philosophy include the names of Plato and Aristotle, Augustine and Thomas

Aquinas, Hobbs and Locke, Rousseau and Kant and many others who stand as leading figures in general philosophy. This is natural enough. Law, as a central institution of organised society, has inevitably demanded consideration by those who have been concerned to understand and evaluate the human condition. And, as a modern jurist, Roscoe Pound, has said: "In all stages of what may be described fairly as legal development philosophy has been a useful servant."[2] How? It has sometimes enabled outworn traditions to be broken; enabled authoratively imposed rules to be bent to new uses; and has brought new elements into law from outside existing legal systems. In a sense, of course, philosophers have asked the same questions and faced the same central problems throughout the ages and the central issues of legal philosophy I take to be threefold: First the question of the ultimate nature of law. Secondly, the problems of legal reasoning. And thirdly, the question of values in law. But if the main problems remain in all ages the same, each age tends to re-think its own answers —and necessarily against the background of changing social circumstances. It would be impossible in the course of a single lecture to indicate even in barest outline what are the main preoccupations of contemporary jurists. There are, however, two lines of development in modern juristic thought, themes concerned with legal reasoning and with values in law, which I would single out as being of particular significance to everybody who is concerned with the law and its application. These themes are a greatly increased awareness of the complexities of language and its significance in reasoning processes, and a greatly enhanced interest in seeking to understand the relationship between law and society. I would like to say a word about each of these themes, in particular as they affect the actual working of the legal process.

First the emphasis on language. Lawyers of course have always had to work with words in the course of their professional tasks, and have always been well aware of the difficulties inherent in doing so. Since the work of Wittgenstein in the 1920s and later, and increasingly since the Second World War, the analysis of language has become a great concern of general philosophy. This concern has carried over into the study of the processes of legal reasoning and the analytical work of modern jurists has, I believe, not only led to a fuller understanding of how the law works but to greater possibilities of its more effective application.

A particular emphasis upon legal analysis begins, as far as the common law world is concerned, with the work of Austin in the 19th century. Austin is largely remembered now for his attempt to find a satisfactory definition of "law" in terms of the command of a sovereign backed by sanctions. But the bulk of his work was concerned with the analysis of the basic legal concepts. Austin believed that a satisfactory analysis of legal concepts would lead to a more truly scientific and rational legal system. Following in his footsteps his successors worked to try and explain the nature of such fundamental legal concepts as the concepts of right, duty, possession, ownership, legal personality and so on. So questions were asked such as "What really is a right?" or "Does a corporation (which in law is a 'person') have a real personality or is it only a fiction?" The answers given to such questions were seldom satisfying except perhaps to the writer who propounded them. The reason was that many of the questions were often wrongly

posed in the first place. They often attempted to explain notions which were used in the framework of the existing legal system as if they could be abstracted from that context and explained in terms derived, as it were, from "outside" the system. The work of Professor H. L. A. Hart of the University of Oxford in particular has shown that the meaning of legal terms requires to be elucidated within the framework of the existing system of law and by reference to their actual use in that system.[3] It is not possible in a brief talk to attempt to survey the arguments supporting this kind of approach or assess its claims to have by-passed many of the traditional puzzles, for the arguments rest upon the work of whole schools of philosophers. But the effects of this approach may be noted. First, it has helped to clear up many of the questions raised in the attempt to give theoretical explanations of concepts such as right, possession, corporation, or indeed "law" itself. I say "theoretical" explanations because lawyers and courts seldom grapple with problems on this level of abstraction or generality. Courts have often, for example, solved problems which raised in different contexts, the question of corporate liability without committing themselves to any one theory of corporate personality. But secondly, theoretical examinations of the nature of language have taught important lessons for practical legal work: the need to appreciate that any word may have many meanings depending upon usage and context and that to attempt to assign a single "proper" meaning to a word (with the assumption that that meaning and no other is the only permissible one) often misleads and stultifies thought. For example, take the word "right" which is constantly in use in legal discourse. Let us not ask, "What is a right?" but rather ask how the term is used. Long ago Sir John Salmond (writing as a jurist and not as a judge)[4] perceived that in the legal system this word had at least two distinct meanings. It can refer to a "right" in the sense which has a correlative duty; that is, when X owes me $100 I have a legal right to payment and he has a correlative duty to pay. But when the courts speak, as they have done, of everybody having a "right" to engage in trade, there is no correlative duty on any person and the term "right" plainly means something different. Salmond called this type of right a liberty. Later an American, Hohfield,[5] elaborated other meanings of the term "right" as used in the legal system. Sometimes it is also used to mean what more accurately can be called a power, as for example when I say that I have a right to make a will, or a right to rescind a contract for breach by the other party. A failure to appreciate these distinctions, and to assume that the word "right" has the same meaning in any context, can be a fruitful source of confusion in legal reasoning, and conversely, an awareness of them may help to clear up many puzzles. For example, in administrative law a leading case long ago decided that where administrative tribunals were under a duty to act judicially the courts could intervene and exercise control over a tribunal if it had the authority to determine questions affecting "the rights of subjects."[6] Subsequently the courts have had to grapple with cases in which the question was whether they could provide remedies in respect of decisions by bodies authorised to grant, refuse or terminate various sorts of licences. Are "rights of subjects" involved here? The result has been a series of cases: *Nakkuda Ali* v. *Jayaratne*[7] in the Privy Council, *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Ltd.*,[8] *New Zealand Licensed Victuallers' Association of Employers* v. *Price Tribunal*[9] and

others—which are difficult to reconcile with each other and from which it is difficult to extract a clear cut series of principles. But the seeds of a greater appreciation and use by courts and lawyers of the analytical distinctions with regard to the meanings of the term "rights" were sown perhaps by Mr Justice Cooke (following Salmond's lead) in both the *Okitu* and *Licensed Victuallers'* cases. The essence of the argument is this. In the licence cases the question was whether the refusal or withdrawal of a licence which permitted the holder to undertake certain kinds of trading activity interfered with a "right" of the subject. The courts have discussed this question with reference to the principle that every person has a right to engage in trade or other lawful occupation. But the right to trade that the common law recognises is not the same thing as a right granted by licence to do something which is totally prohibited in the absence of such a licence.[10] The same word—right—can be used to cover both situations, but the situations themselves are quite different and may need to be dealt with differently by applying different legal rules to them. It is the possibility of using a single word to describe them both which may disguise the necessity of developing different rules for different situations.

Now the work of jurists who have been concerned with a close analysis of language in the law has been criticised as trivial, a mere playing with words which says nothing of importance for the solution of the real problems that lawyers have to deal with. It seems to me that on the contrary the sharpened awareness of the way in which language works can lead to the means of solving substantive problems much more effectively. A clarification of the situations in which the courts can intervene in the licence cases is obviously one instance. But let us take another example. The concept of illegality in contracts has caused some trouble in recent years. The doctrine in essence is a simple one. If parties enter into a contract to do something which is, for example, a crime, the courts obviously enough will not assist either party to the contract by enforcing it for him. In these days, however, there are very many regulations, of what we may call a social welfare type, to the breach of which penalties are attached. The courts have, quite understandably, taken the view that a contract involving the breach of any statute or regulation the breach of which is subject to a penalty must be treated as illegal and therefore unenforceable. But the results have sometimes seemed harsh. In a recent case[11] a builder was employed to do some alterations to commercial premises. By-laws required that a building permit must first be obtained before any person erected, or commenced to erect, any building. The building permit was required by the by-law to be in writing. The builder in fact obtained approval of the plans from the local authority's officers and they inspected and approved the work as it proceeded. A written permit however was not issued. Apparently this is quite usual, at any rate for certain kinds of building work. It is more convenient for a local authority to give verbal approval but to delay the issuing of the formal written permit until the work is well advanced or even completed. The reason is that very often as building proceeds, minor changes will be made and the final permit can incorporate these changes thus saving the necessity of the issue of a fresh permit for every minor alteration or extra made or added during the course of the work. But in this case the permit in the end never was issued. The reason seems to have been that the owner of the building decided to use it for purposes which

the local authority would not approve. The owner refused to pay for the work that the builder had done. The builder sued and was met with the defence that the contract was illegal because of the absence of a written building permit. The defence succeeded. The Magistrate before whom the case was first heard, the Supreme Court, and members of the Court of Appeal before whom the case was ultimately argued, expressed considerable sympathy for the builder. He had done the work; his failure to obtain a permit had been known to or even encouraged by the officials administering the by-law, and it was obviously unjust that the owner of the building should obtain the benefit of the work but escape having to pay for it. All the judges concerned in the case, however, felt that on the authorities they had no option but to hold that the contract must be treated as illegal and unenforceable. Mr Justice McCarthy in the Court of Appeal remarked that "it may be, as some writers urge, that the time has come when the Legislature might look carefully at this subject and consider doing something to remove the over-severe consequences which sometimes flow from a breach of one of the less important of the very large number of regulations which a managed welfare State seems to require."[12] No doubt the judges in 1968 were justified in finding that the line of authorities which required them to hold this particular building contract illegal left them no escape from so doing. But where a strong line of authorities leads to undesirable or unjust consequences it may mean that somewhere along the line of development adequate conceptual distinctions have not been made. The term "illegality" in fact, even when referring to conduct which may be penalised as criminal, does not refer to only one kind of conduct. Just as some of the animals in George Orwell's Animal Farm were "more equal than others" so some sorts of conduct may be—and are—thought of as more illegal than others. A great deal of social welfare legislation contains provisions which while penal in form, are not commonly thought of as dealing with criminal nor even morally reprehensible behaviour. Possibly this is an instance where courts in the past might have distinguished between different forms of illegality for purposes of the law of contract and rendered unnecessary the legislative intervention which seems bound to come in some form.[13] So the challenge to the courts and lawyers of having an adequate appreciation of the nature of the language they use in their work—and in particular the avoidance of the "one word one meaning" fallacy—is not merely a challenge to linguistic accuracy prized for its own sake. It can be a means of finding better and more just solutions to real problems. The older type of analytical positivism was accused of being overmuch concerned with conceptualism and mere logic — a self enclosed system divorced from life. The newer analytical positivism—by showing the nature of what Professor Hart calls the open texture of the law—helps us, I think, to relate the law more closely to life.

I have emphasised the present pre-occupation with linguistic analysis in jurisprudence because it is certainly one of the main themes of contemporary juristic work, and I have tried to show in a broad way its relevance to the working of the legal process. To suggest that a sharpened awareness of the nature of language may lead to a better understanding of and dealing with reality by lawyers and courts leads me to a second major theme in twentieth century jurisprudence, namely, the relationship between the realities of society and the law. It is, of course, self evident that law grows in a social context and is shaped by

the ways of life and the ideals of the society in which is functions. Two influences in particular are at work upon both law and jurisprudence in our era. On the one hand it is plain that we are living in an age of enormous social change, change that is, in social, economic, technical and cultural organisation and ideals. There is a consequential demand upon the law to keep pace and to be effective in dealing with new demands and new social attitudes. Moreover, an increasingly efficient technological society tends to demand increased technical efficiency in the law. On the other hand, recent jurisprudence has been much concerned to bring home the ways in which social considerations do in fact influence the legal process—a major theme of sociological jurisprudence. Between law as an established system of rules, based upon precedent and statute, and the demand to keep pace with rapid social change there is an inevitable tension. It is the old problem of the need for certainty and clarity as against the need for flexibility and the capacity to adapt. In an era of rapid change one might expect to find the law searching for means of adaptability in ways perhaps more apparent than in times of less rapid change, and this search is, I think, easily discernible as a characteristic of the present era. I would instance three matters in particular: first, an apparent loosening in the practice with regard to precedent, if not its formal doctrines, to allow greater play to policy considerations; secondly, a change in attitude to the formal doctrines of precedent in some higher courts; thirdly, a marked increase in discretions being vested in the courts by statute.

First, the doctrine of precedent itself: the orthodox theory of the common law was, of course, that judges do not make law but merely declare it.[14] The common law was conceived as in some sense existing complete in form and detail. The judge's task was merely to find and declare the appropriate pre-existing rule. A more realistic appraisal of what judicial decision-making actually involves, emanating in particular from work done in the United States of America in the 1930s and onwards, has led to a recognition of the extent to which the courts actually make law—actually legislate. This view, once a heresy,[15] would probably now be accepted by all lawyers. Jurists have detected more and more the extent to which considerations of policy underlie decisions which, on the face of it, are given on purely technical grounds. The extent to which this happens must not be exaggerated. Some of the so-called American realists have argued that the whole apparatus of the traditional form of judgment is merely a facade, that the type of argumentation used by judges to justify their decisions is merely an *ex post facto* rationalisation of a decision arrived at for other reasons. This is obviously overstating the case and would I am sure, be repudiated by those who have had the experience of serving in judicial office. But I should imagine that the experience of many judges would tally with that of the great American, Mr Justice Cardozo. In describing his experience as a judge he wrote:[16]

> I was much troubled in spirit in my first years upon the Bench to find how trackless was the ocean upon which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile . . . As the years have gone by and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reach is not discovery but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth in which principles which have served their day expire, and new principles are born.

That law is uncertain, and that judges make law, has, as I have said, really become commonplace in today's juristic thinking. But I would ask the further question, whether this recognition has detectably carried over into the work of the courts in the sense that the courts themselves are more prepared to be explicit about what Mr Justice Holmes once called the "inarticulate major premises" of their decisions? There are signs, perhaps, that they are. The recent history of the rule about Crown Privilege is very instructive. The story begins with *Duncan* v. *Cammell Laird & Co. Ltd.*[17] The widow of a civilian employee of the Admiralty sued for damages arising from her husband's death. He had lost his life in the submarine Thetis which sank while undergoing trials. To obtain damages the widow had to prove negligence on the part of the builders of the submarine. For this purpose it was important to her case that she should have access to the plans of the vessel. When it was sought to obtain production of the plans for the purposes of her case the Minister placed an affidavit before the court stating that it was contrary to the public interest that the plans should be produced. The House of Lords held that the statement by the Minister was conclusive and said also that in every case where such a statement was produced to the court, the courts must accept such Ministerial claims of privilege, and were not entitled to examine the disputed documents for themselves to determine whether or not their production would be against the public interest. While obviously there are many documents in the hands of government officials the nature of which require that they should not be made public (the plans of the Thetis were clearly in this category), there have always been suspicions that claims of Crown Privilege were in many cases made in circumstances where there was no such real necessity to protect the documents from disclosure. In *Ellis* v. *Home Office*,[18] for instance, Crown Privilege was claimed in respect of certain documents relating to an incident that had occurred in a prison. These documents had therefore not been produced at the trial. When the case finally came before the Court of Appeal, counsel for the Crown, at the prompting of the court, obtained permission to show one of the documents to the court. And one of the members of the court, after the document had been produced, said of it (and one detects an air of triumph in the remark): "There is nothing in it. We all thought that there might not be . . . there was no reason why it should not have been produced, nothing which could affect the public interest in any degree." But after *Duncan* v. *Cammell Laird* the courts in England thought that their hands were tied and that they were never free to scrutinise the documents and themselves make the determination on the question of public interest. In other Commonwealth countries the situation was different. Prior to *Duncan* v. *Cammell Laird* the Privy Council had held that the court had at least a residual power to examine the documents for itself and determine the question whether it should be allowed to be produced or not.[19] *Duncan* v. *Cammell Laird,* of course, had considered this decision and refused to follow it. Thus the escape from an undoubtedly unpopular rule, for the New Zealand and other Commonwealth courts, was through the existence of the Privy Council decision.[20] The English courts had no such escape route. But in three cases in 1964[21] the Court of Appeal in England tackled the question head on. They simply refused to follow the law as it had been enunciated in *Duncan* v. *Cammell Laird*. They were able to justify this technically by treating the statement of the law in that case to the effect that the

Minister's statement was always conclusive as *obiter*. In substance the reasons were, plainly enough, simply the unsatisfactory nature of the rule. The court in all three cases of 1964 consisted of Lord Denning, Master of the Rolls and Harman and Salmon L.JJ. But then in 1967 came *Conway* v. *Rimmer*[22] where the point again arose. This time the court was differently constituted. It consisted of, again Lord Denning, Master of the Rolls, but the other two members were Lords Justices Davies and Russell. Lord Denning naturally enough followed what he himself had said in the earlier cases, but the other two Lords Justices took the opposing view. They held that they were bound by the House of Lords decision. And each of the two who took what might perhaps not unfairly be described as the legalistic view, began their judgments in a revealing way. Davies L.J. began by saying: "My Lord has, most understandably, discussed in some little detail the merits of this case. For my part, I propose to confine my observations to what I believe to be the law," and Russell L.J. began in the same way: "I also confine myself to my view of the law, which makes irrelevant what have been referred to as the merits of the case." (The same Lord Justice, incidentally, obviously thought that the three judges in the three earlier cases had been overbold: he likened them to the Three Musketeers by describing those cases as having been decided by "Athos, M.R., Porthos and Aramis L.JJ.") At this point, then, the law was inconclusive, with conflicting decisions, though with a preponderance of authority against the earlier House of Lords decision. The House of Lords had the last word for, on appeal from *Conway* v. *Rimmer*,[23] the House finally decided not to follow *Duncan* v. *Cammell Laird*. This case history exemplifies the way in which courts may strive, more or less explicitly, to establish new rules or change old ones for reasons of policy—an instance of a rule being overtly disposed of by one court at least in a manner which showed plainly enough that dislike for the substance of the rule was the crucial factor. There are indications, too, that courts are more prepared than in the past to lay bare the formative influences underlying legal rules. Perhaps no more frank instance can be found than Lord Wilberforce's explanation of the reason for the development of the new discredited "deserted wife's licence" to continue occupying the matrimonial home after desertion. "My Lords, the doctrine of the 'deserted wife's equity' has been evolved by the courts during the past 13 years in an attempt to mitigate some effects of the housing shortage which has persisted since the 1939 - 45 war."[24] I know of no clearer instance of a Court laying bare the social basis of a common law doctrine, as distinct from discussing or justifying it on purely logical or technical grounds.

The second way in which I suggest that the law in this second half of the twentieth century has developed an increased capacity for change lies in changing policies in certain higher courts towards the formal doctrines of precedent. The repudiation by the House of Lords itself, in *Conway* v. *Rimmer*, of its own earlier decision in the *Cammell Laird* case marks a change in the legal process which is of fundamental importance. In the *London Street Tramways* case of 1898[25] the House of Lords had held itself to be absolutely bound by its earlier decisions, a ruling which only re-stated earlier established practice. In 1966 the Lord Chancellor announced that this practice would no longer be necessarily followed. The terms of the announcement are significant. In particular the Lord Chancellor, while recognising that the doctrine

of precedent provides a degree of certainty in the law, went on to say that "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."[26] It appeared to them right to do so with regard to Crown Privilege in *Conway* v. *Rimmer*. It seems plain that the intention is that the House must be prepared to depart from the rigid doctrine of precedent either where an established rule has been shown in practice to work badly, or where social circumstances have so changed as to make an earlier ruling inappropriate. A parallel development is the signs of increasing independence in the doctrines of precedent in some Commonwealth courts. A growing independence of Commonwealth courts from English decisions is, of course, explicable simply as a reflection of the rise of former colonies to the status of self-governing independent nations. But in recent years it has also been explicitly exercised simply upon the footing that an English decision, which in an earlier period would probably have been regarded as binding and conclusive, is simply wrong, not merely because the technical reasoning appears to the Court unsatisfactory but because the result seems morally or socially undesirable. The High Court of Australia's decision in *Parker* v. *The Queen*[27] is a turning point in this greater freedom of Commonwealth courts. In that case Sir Owen Dixon said of a House of Lords decision:

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept.

These are significant trends but their significance must not be exaggerated. Judges may take differing views of the weight of policy against strict interpretation of precedent—as different judges in the Court of Appeal did in *Conway* v. *Rimmer*. The House of Lords will continue, obviously, to follow earlier decisions in most cases; and the High Court of Australia has emphasised in later cases the basic adherence of Australian Courts to House of Lords decisions.[28] Nevertheless, the trends I have described are readily discernible and obviously significant.

The third characteristic I have mentioned is in the realm of statute law. If it is a characteristic of the present era of legal development that the creative aspects of the judicial process and the social foundations of the rules they develop have been not only recognised by legal theorists but have come to be more openly recognised by the courts themselves—and I have been trying to suggest that this is in fact the case—it seems to me to be a further and in a sense parellel characteristic of the law of our time that the legislature has tended to vest in the courts increasingly great freedom in many areas to solve certain kinds of problems without itself laying down explicit rules or even guide lines for their solution. I am thinking particularly of what appears to be an increasing use of statutory discretions. It is true of course that in our legal history the pendulum has tended to swing between extremes of rigidity of rules on the one hand and untrammelled discretions on the other. As all lawyers know, the very existence of the Courts of Chancery,

and the development of the rules of Equity which they came to apply, arose as a reaction to the rigid and technical state of the common law system as it had developed in the 12th and 13th centuries. The rules of Equity themselves in due time hardened into a set of rules in many respects as rigid and technical as the rules of common law had been, though a residue of discretion was always maintained in the equitable jurisdiction, especially through the retention of the rule that the granting of equitable remedies, such as injunction or specific performance, was always discretionary and not as of right. But the part played by Equity as a separate set of doctrines, administered originally in separate courts, was that of infusing a measure of flexibility into a hitherto rigid system. The system of Equity was particularly concerned with areas where it thought that moral evaluations of the parties' conduct were relevant to the determination of a dispute or the establishment of rights and duties—areas where the common law system was unable to introduce a moral evaluation in terms of its own technical rules. In our own day, it seems to me, the legislature, through statute, is in many respects providing for the function that the Courts of Chancery through the development of Equity performed in the past. A most obvious area is family law, and in relation to property interests affecting members of the family, where courts in many situations are now invested with the widest discretions to deal with the individual cases that come before them untrammelled by rigid rules. Nor is it only in the fields of personal law that the legislature has acted to increase the discretionary powers of the courts. Even in commercial law the New Zealand Parliament has enacted a provision under which the court may in its discretion absolve parties from the consequences of breaches of the technical requirements of the Money Lenders Act under which a money lending contract may, apart from the exercise of the absolving discretion, be void because of the most technical breach of form.[29] (A similar discretionary solution to the problems of illegality in contract may be the answer to the problem raised earlier.) In land law the courts now have a discretion to cancel encumbrances such as restrictive covenants or easements where the original purpose would be no longer served by maintaining them upon the title,[30] discretionary powers with regard to accidental encroachments by buildings,[31] discretionary powers to direct the cutting down or trimming of trees.[32] It would be possible to enumerate literally hundreds of similar instances where courts are invested with the power to act in effect upon a basis of "equity and conscience" untrammelled by specific rules. In so far as the courts, when invested with wide discretionary powers by statute, themselves develop and establish principles under which they exercise the given discretion, this is another instance of a demand for judicial creativeness. The legislature, in such cases, has in effect delegated to the courts the task of creating rules appropriate to the situation for which the legislature itself has preferred not to attempt to legislate in detail. In so far as these situations require the courts to find an answer to each case on the facts as they arise the process is parallel—as I have suggested—to equity in its original form.

Now the existence of these tendencies in the law towards a greater freedom of action in the courts in relation to the established body of legal doctrines raises, of course, what is perhaps the most fundamental question of all. That question is the question of legality or the significance of the idea of the rule of law. To say that the law appears to be in an

era when flexibility and discretion have increased, for any of the reasons I have tried to explain, is immediately to raise the further question whether the necessary corollary of this is that the law is less certain than it would otherwise be and whether, if this is so, the result is a desirable one. All jurists today would, I am sure, agree that the quest for anything like absolute certainty in law is impossible of achievement. All would agree that in the very nature of things legal rules will clearly cover a range of cases in such a way that there is no possibility of dispute, but that these areas of certainty shade off into a borderland where the application of the rule to particular facts is inevitably uncertain. Insofar as older generations of analytical jurists thought that by a more elaborate and sophisticated analysis and more rational harmonisation of legal rules there was a prospect of attaining absolute or near absolute certainty in law, that hope can now be seen to have been impossible of attainment. Nor, if a system of rules which could be mechanically applied with absolute certainty were able to be attained, would the result be a desirable one. On the contrary an excessively rigid system of law must of its own nature tend to become divorced from the realities of life and it is, after all, life and not law for its own sake that lawyers are concerned with.

If I am right then in suggesting that our age exhibits the tendencies towards greater freedom of action vested in the courts, how can this be reconciled with the demand for legality—that is to say the rule of law and not of men, the demand for the direction of legal rules known in advance as against the possibilities of arbitrariness and unpredictability in decision making?

The best discussion in the literature of the significance of legality seems to me to be the recent work of Professor Lon Fuller of Harvard published under the title of *The Morality of Law*. The law, of course, reflects and seeks to give effect to, the aims and ideals of the society in which it operates. In other words, the values that come to be incorporated in law are drawn from many sources, including philosophy and knowledge of society's existing values. Fuller has argued in addition, however, that the law has an "inner morality"—a set of values which pertains to the law itself. The law's "inner morality" stands apart from the external values held by the society in which it functions and upon which the law also draws. Fuller has been taken to task by many critics on the ground that in speaking of the law's "inner morality" he is not really dealing with a question of morality at all. But that point need not detain us. I am content to regard Fuller's so called "inner morality" of law as a discussion of the utmost value of what we may call "legality". The argument in essence begins with a definition of law as "the enterprise of subjecting human conduct to the governance of rules". To achieve success in this enterprise, Fuller argues, there are eight requirements of legality: the requirement of generality, that is there must be general rules; the rules must be effectively promulgated; the rules must be made so as to operate prospectively and not retrospectively; there must be clarity in expressing the rules; contradictions between rules must be avoided; the law must not demand the impossible; though the law must change, changes must not be too sudden and too frequent; and there must be a congruence between official action and the declared rules, that is, legality requires the avoidance of discrepancy between the laws declared and the law as actually administered. Fuller's concern with the notion of legality seems to have begun or been stimulated by his

consideration of what happened in Germany in the Nazi era. In earlier writings he showed how the Nazi legal system departed so far in many respects from the principles of legality as he understands them that in his view the system of social control then operating in Germany could not be regarded as being a "legal" system at all.[33] Fuller's eight *desiderata* of legality are not absolute. An occasional departure from one or more of them may be insignificant or sometimes even necessary. We all know, for instance, that there are in our own law instances of retrospective legislation, and that there are areas in which there are discrepancies between the law as declared and the law as actually administered. But I have raised the question of legality particularly in connection with what I have been arguing is an increased flexibility achieved through various means as a characteristic of the law of our own times. How does this square with the demands of legality and with the principle that clarity and certainty is one of the essential characteristics of legality? Fuller's answer in essence is that sometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law commonsense standards of judgment that have grown up as he puts it, "in the ordinary life lived outside the legislative halls". This may be done, as our law does, by incorporating standards—standards of reasonableness, the reasonable man, fairness and so on. And it can be done by investing courts with wide powers—as so many statutes do—under which they will either deal with each case as it comes upon a completely free basis, or will develop principles to guide the exercise of the discretion. These devices are necessary. Though lawyers are dealing with rules formulated in words and dealing with them within the framework of established legal techniques, the subject matter of legal discourse, human behaviour, cannot be pinned entirely within a framework of verbal description or regulation. As Fuller remarks, we can never be more exact than the nature of the subject matter with which we are dealing admits, and a specious clarity can be more damaging than an honest open-ended vagueness. We should, I think, welcome the increasing recognition of areas of freedom of decision which I have suggested are detectable both in judicial process and in certain forms of legislative action. What has come to me to seem an increasing freedom within the total legal process is in the last resort merely a reflection of the fact that we live in times in which the speed of change in technology, in social and economic arrangements, and social and economic ideals, has enormously increased and that this circumstance demands that the capacity of the law to adapt itself should keep pace.

1 *Read* v. *Lyons & Co. Ltd.* [1947] A.C. 156, 175.
2 *An Introduction to the Philosophy of Law* (Revised Edition 1959), 1.
3 "Definition and Theory in Jurisprudence" (1954) 40 L.Q.R. 37; *The Concept of Law* (1961).
4 See *Salmond on Jurisprudence* (9th Ed.), Chapter X.
5 Hohfeld, W. N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923).
6 *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171.
7 [1951] A.C. 66.
8 [1953] N.Z.L.R. 366.
9]1957[N.Z.L.R. 167.
10 Compare J. A. Farmer, "Natural Justice and Licensing Applications: Hohfeld and the Writ of Certiorari" (1967), 2 N.Z.U.L.R. 282.
11 *Carey* v. *Hastie* [1968] N.Z.L.R. 276.

12 *ibid.* 262. Compare the remarks of Devlin J. in *St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, 288.
13 In tort cases involving illegality the interpretation of the principle of illegality has not been so stringent. Compare e.g. *Green* v. *Costello* [1961] N.Z.L.R. 1010 and *Lane* v. *Holloway* [1967] 3 W.L.R. 1003 with *Bondarenko* v. *Sommers* [1968] 1 N.S.W.R. 488; *Ridgeway* v. *Hilhorst* (1967) 61 D.L.R. 398. See also *Mills* v. *Baitis* [1968] V.R. 583.
14 See Cross, *Precedent in English Law* (1961), 21-30.
15 When Cardozo was considering publication of his lectures stressing the creative nature of the judicial process he remarked humorously "If I were to publish them I would be impeached.": A. L. Corbin, in his Foreword to Cardozo's *The Growth of the Law* (1924), vii.
16 *The Nature of the Judicial Process* (1921), 166.
17 [1942] A.C. 624.
18 [1953] 2 Q.B. 135. See also *Spigelman* v. *Hocken* (1933) 150 L.T. 256.
19 *Robinson* v. *State of South Australia* (No. 2) [1931] A.C. 704.
20 e.g. *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878; *Bruce* v. *Waldron* [1963] V.R. 3; and the other Commonwealth decisions collected by Denning M.R. in his judgment in *Conway* v. *Rimmer* [1967] 1 W.L.R. 1031.
21 *Merricks* v. *Nott-Bower* [1965] 1 Q.B. 57; *Re Grosvenor Hotel, London* (No. 2) [1965] Ch. 1210; *Wednesbury Corporation* v. *Ministry of Housing and Local Government* [1965] 1 W.L.R. 261.
22 [1967] 1 W.L.R. 1031.
23 [1968] A.C. 910.
24 *National Provincial Bank Ltd.* v. *Hastings Car Mart Ltd.* [1965] A.C. 1175.
25 *London Street Tramways Co. Ltd.* v. *London County Council* [1898] A.C. 375.
26 *Practice Statement* (*Judicial Precedent*) [1966] 1 W.L.R. 1234.
27 (1963) 111 C.L.R. 610. Compare *Barker* v. *Barker* [1924] N.Z.L.R. 1078 in which Sir John Salmond felt obliged to follow the decision of an English Court—a decision certainly not technically binding in New Zealand—while expressing personal disagreement with the rule enunciated.
28 See *Skelton* v. *Collins* (1966), 115 C.L.R. 94.
29 Statutes Amendment Act 1936, s. 55.
30 Property Law Act 1952, s. 127.
31 *ibid.* s. 129.
32 Fencing Act 1908 s. 26A (as added by the Fencing Amendment Act 1955 s. 2).
33 See Fuller, L., "Positivism and Fidelity to Law—A Reply to Professor Hart" (1957), 71 Harv. L.R. 630.