THE IMPACT OF JUDICIAL CREATIVENESS ON RIGHTS AND LIABILITIES UNDER THE DUE PROCESS CLAUSE

I

The activity of the law is inextricately bound up with the life of a nation: its ultimate aim is to ensure fair treatment for all, the right to equal treatment to all persons similarly situated or circumstanced[1] both in the privileges conferred and in the liability imposed by the laws.

Though class legislation as such may be thought discriminatory in character unless confined to particular enterprises or employments in the interests of the general welfare[2] a modern written constitution must take into account, where necessary, minority interests and safeguard the special position of a particular community and the legitimate interests of all communities "in dealing with diverse problems arising out of an infinite variety of human relations."[3] Part XVI of the Indian Constitution and article 153 read with article 8(2) of the Federation of Malaya constitution are directed to achieve that purpose.

Apart from this solitary exception, political expediency alone requires that discriminatory legislation in other spheres of human activity touching the life, liberty or property of the subject is wholly inappropriate if the primary object of the state is to establish peace and order and create an atmosphere of general contentment and good will.

To that end the constitution of the Federation of Malaya provides fundamental liberties: liberty of the person, prohibition of slavery and forced labour, protection against retrospective criminal laws and repeated trials, equality before the law and equal protection of the laws, freedom of speech, assembly and thought, freedom of religion and prohibition against compulsory acquisition or use of property without adequate compensation; preserving at the same time, in the interests of security, friendly relations with other countries, public order or morality, the right to impose such restrictions as may be deemed necessary or expedient, and the sovereign right of eminent domain.

A cursory glance at the historical growth of law in any territory reveals that for centuries, acute differences of opinion have arisen as to the best method of ensuring liberty, peace, order and prosperity within the realm and friendly relations abroad; law has sometimes taken a determined and sometimes a hesitant stand. In the very nature of things,

1. *Hillsburgh Township v. Cromwell* (1945) 326 U.S. 620, 90 L. Ed. 358, *per* Douglas J.
2. Willoughby, *Constitution of the United States,* vol. 3, ss. 1272 *ff.*
3. *Ameerunnissa Begum* v. *Mahboob Begum* (1953) S.C.R. 404, 414.

law has never been static. Public outcry against the severity or leniency of the law has had its repercussions. It would, however, be wrong to suggest that every public grievance has met with immediate response from the legislature, for remedial legislation is proverbially slow.

The fundamental principles of law, however, which evoke our admiration, derive their source and inspiration from the common law. Whether the origin of law is common consent of mankind as was stated in Plato's Republic 2,000 years ago — "Therefore when men act unjustly towards one another, and thus experience both the doing and the suffering, those amongst us who are unable to compass the one and escape the other, come to this opinion: that it is more profitable they should mutually agree neither to inflict injustice nor to suffer it. Hence men began to establish laws and covenants with one another, and they called what the law prescribed lawful and just" — or whether such a result was achieved by judicial and statutory legislation despite the lack of common assent or in response to minority demand can only emerge from a study of the growth of legal jurisprudence, sometimes imperceptible.

Leonard W. Levy defines the scope and purpose of law in the following terms: "The relation of the individual to the state and of the states to the nation; the role of the government in the economy; the private and public interests deemed important enough to secure a permanent and authoritative form; the comparative valuation placed on different activities and goals, and on liberty and order; the points of tension, growth, and power; and prevailing conceptions of rights, duties, and liabilities: all are exposed in the law." [4]

Primitive law was formal and amoral: it merely took into consideration the word and act of the individual but not his intention, the motive and reasons for his act. Law attempts to achieve a reasonable degree of certainty and sets up a norm or standard of behaviour which governs the relations between individuals *inter se* and the individual and the state. It is not equiparated with morality. Ethical views are largely conditioned by religious belief which has some impact on our legal system. In the present day world, however, having regard to the variety of religious beliefs and moral standards, the law adopts a neutral path in an endeavour to establish a secular state wedded to no formulary system. Even so, it is wrong to assume that the legislature and, in particular, the judiciary, have turned a blind eye to cultural values of paramount human interest and yet the Judge cannot in administering justice "yield to spasmodic sentiment, to vague and unregulated benevolence."[5]

In a democratic state, like England, governed by an unwritten constitution, this safeguard of liberty, "the bulwark of freedom," and its necessary concomitant, legal redress and exemption from legal liability,

4. *The Law of the Commonwealth and Chief Justice Shaw,* p. 304.
5. Cardozo, *Nature of Judicial Process,* p. 141.

"is in the good sense of the people and in the system of representative and responsible government which has been evolved." "But that liberty is a liberty confined and controlled by law, whether common law or statute. It is, in Burke's words, a regulated freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty."[6]

The same noble law lord, Lord Wright, in *James* v. *Commonwealth of Australia,*[7] interpreting the expression "absolutely free" in section 92 of the Commonwealth of Australia Constitution Act, 1900, said that "absolutely" adds nothing and was merely inserted to add emphasis. He added: "'Free' in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech: it means speech hedged in by all the law against defamation, blasphemy, sedition and so forth; it means freedom governed by law, as was pointed out in *McArthur's* case.[8] Free love, on the contrary, means licence or libertinage, though, even so, there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to any one who comes, subject, however, to his condition or behaviour not being objectionable. Free trade means in ordinary parlance freedom from tariffs."

Freedom to profess and practise religion is allowed, but where a religious organisation, in times of emergency, proclaims and teaches publicly defiance of the established government and its laws as being contrary to their tenets and interferes with the due prosecution of the war, the interference by the state to ban such an organisation is not a denial of the right of freedom of religion. Illustrative of this principle is the case of *Adelaide Co. of Jehovah's Witnesses Inc.* v. *The Commonwealth,*[9] where Jehovah's Witnesses formed an association of persons loosely organised throughout Australia and elsewhere and who regard the interpretation of the Bible as fundamental to proper religious beliefs. These beliefs led them to proclaim and teach publicly both orally and by means of printed books and pamphlets that all organised political bodies are organs of Satan, unrighteously governed and identifiable with the Beast in the thirteenth Chapter of the Book of Revelation. They proclaimed complete neutrality in the last war and refused to take an oath of allegiance to the King or other constituted human authority. One of their tenets is that wherever there is a conflict between the laws of

6. *Liversidge* v. *Anderson* [1942] A.C. 260, *per* Lord Wright.
7. [1936] A.C. 578, 627.
8. (1920) 28 C.L.R. 530; as regards preaching communism advocating violence see *Dennis* v. *U.S.,* 341 U.S. 494, 95 L. Ed. 1137; *Australian Communist Party v. The Commonwealth,* 24 A.L.J. 485; *Burns* v. *Ransley* (1949) 79 C.L.R. 101.
9. (1943) 67 C.L.R. 116. See also *Bowman* v. *Secular Soc.* [1917] A.C. 406, 466-7, *per* Lord Summer.

Almighty God and the laws of man the Christian must always obey God's law in preference to man's law. Their activities were prejudicial to the defence of the Commonwealth and the efficient prosecution of the war but otherwise their doctrines or beliefs were but primitive religious beliefs. The High Court of Australia declared that the steps taken by the Governor-General in dissolving the organisation under the Defence Regulations could not be challenged on the ground of constitutional invalidity. Freedom of religion may not be invoked to cloak and dissemble subversive opinions or practices and operations dangerous to the common weal. McTiernan J. pointed out that the possible abuse of the power conferred on the executive is not an argument against the existence of the power.

Freedom of speech is not absolute. In peacetime the state may tolerate expression of opinion and public speeches, which, in times of emergency, might assume a serious aspect. In *Sckenck* v. *United States,*[10] Holmes J. observed: "...the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. Where a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by a constitutional right. It seems to me that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced."

In India, as in the Federation of Malaya, certain exceptions to fundamental rights within the limits imposed by the constitution, in order to strike a balance between a written guarantee of individual rights and the collective interests of the community, are recognised. Although a constitution has to be liberally interpreted, "that construction most beneficial to the wider amplitude of its power must be adopted." It is not, however, permissible "upon any general principle to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority." [11]

Dr. Goodhart points out: [12] "If the force or sanction interpretation of law is the correct one then it is clear that the influence of moral ideas on the law can be regarded as of minor importance." One of the grounds he urges in support of the obligation theory of law is the moral obligation to obey the rule of law born of a realisation that defiance of law will lead to anarchy and that intrinsically law is right and just though he is sceptical of the theory that "the notion of a specific moral law is in-

10. (1918) 249 U.S. 47, 63 L. Ed. 470.
11. *Gopalan* v. *State of Madras,* A.I.R. 1950 S.C. 27.
12. *English Law and the Moral Law,* p. 28.

separably bound up with the policy of mutual tolerance." With the passage of time, every branch of law, in varying degrees, has felt the impact of changing moral values and the need to maintain an "attainable standard of honesty and fair dealing." [13]

Legislation must inevitably cover a wide range in affording relief by way of legal redress and legal immunity; but more significant is the part played for centuries by an independent judiciary to achieve that object either in the interpretation of statutes or in the field of common law, which is the residual law in the Commonwealth as in the U.S.A. The question may be asked "to what extent has the popular urge for liberty, the fundamental right of every person to be let alone, on grounds of expediency, ethical considerations or otherwise, influenced the course of justice?"

II

A.

Without being categorical, where preventive measures are taken by the executive authority ostensibly for the safety and security of the state, not necessarily under emergency conditions, the idealist's concept of liberty and the over-riding interest of the party in power to create an atmosphere of stability, according to their own notion, co-exist in discordant harmony. Unless courts can effectively intervene to check executive excesses, the presumption of innocence loses much of its sanctity. Enquiry into the reasons for detention conducted by an *ad hoc* statutory tribunal set up under the regulations is not attended with the glaring publicity of an open trial: furthermore, the enquiry is directed not to an offence already committed for which the proper *forum* is the duly constituted courts; the issue is whether the detenu, if freed, is likely to prove a source of danger to the state and much depends on tenuous grounds and opinion evidence.

In *Cheah Khin Sze* v. *The Mentri Besar, State of Selangor,*[14] it was held that a detenu has no right to be represented by counsel at an enquiry into the reasons for his detention, for the executive officer under whose order he is detained is under no obligation to hold an enquiry; the fundamental liberty guaranteed under the constitution is merely declaratory of existing law, i.e., the law anterior to the constitution, and there is no right of representation by counsel in respect of an executive act; that article 5 of the constitution guaranteeing liberty of the person is restricted to arrest under the Criminal Procedure Code and does not extend to arrest under the Restricted Residence Enactment, and the power of the Court under article 5 (2) to enquire into a complaint of unlawful detention

13. *Op. cit.,* p. 149.
14. (1958) 24 M.L.J. 105.

cannot be invoked under the Emergency Regulations. This decision has been subject to much adverse criticism.[15] By way of contrast, the judgment of Deane J. in *Mundell* v. *Mellor*[16] throws much light in the opposite direction. While holding that counsel has exclusive right of audience in courts, where the liberty or property of a subject is involved, the latter has, in addition, a right at common law to appoint any agent he pleases at an enquiry before any statutory tribunal and, therefore, counsel to represent him.

In war or armed rebellion or widespread subversive activities (which alone can excuse stringent measures),[17] *habeas corpus* has been made almost "executive-proof"; the courts have been reluctant to put a benevolent construction on the wording of a statute.

The reasons are stated in the majority decision of the House of Lords in *Liversidge* v. *Anderson:*[18] "The fact that the nation is at war is no justification for any relaxation of the vigilance of the Courts in seeing that the law is duly observed especially in matters so fundamental as the liberty of the subject. However, in a time of *emergency,* when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the Courts would be slow to attribute to a *peaceful* measure. The purpose of the regulation is to ensure public safety and it is right to interpret emergency legislation so as to promote, rather than defeat, its efficiency for the defence of the realm." Nevertheless, such measures have become a permanent feature post-war mainly due to unsettled conditions. In construing "If the Secretary of State has reasonable cause to believe..." the House of Lords came to the conclusion that the subjective satisfaction of the Home Secretary was sufficient to oust the jurisdiction of the court to enquire into the reasons for detention. The original clause (which was replaced by the new regulation) "the Secretary of State, if satisfied..." and to which attention was drawn by Lord Maugham, might have lent colour to the view that the opinion formed by the Home Secretary on materials gathered from any extraneous source was conclusive. His lordship did not deny that a possible construction of the phrase "have reasonable cause to believe" might postulate the existence of facts which a reasonable person would regard as sufficient to prove that continued freedom of that particular individual would endanger public safety. Nevertheless, he felt that, *having regard to the context,* that was not the only permissible interpretation. However, he stressed the primary need for the executive authority acting in good faith and honest belief entertained on his

15. See 24 M.L.J. xli.

16. [1929] S.S.L.R. 152. And see 24 M.L.J. xxiii.

17. *Adelaide Co.* v. *Commonwealth* (1943) 67 C.L.R. 116, 161.

18. [1942] A.C. 206, 219.

unilateral reaction to such facts as may be in his possession or made available to him. In accepting the Attorney-General's submission that the regulations did not contemplate the substitution of the view of the court for the opinion of the Home Secretary, the majority decision was influenced by two considerations: the responsible position held by the Home Secretary, who is answerable to Parliament; and the effective (though admittedly inadequate) safeguard provided by the regulations to make representations to the advisory committee, which was under a duty to inform the detainee of the grounds (of a general nature) and also to give him such particulars as in the opinion of the chairman were sufficient to enable him to present his case. The grounds and particulars so supplied might enable the detainee, at a later stage, to challenge his detention if he could substantiate want of good faith on the part of the detaining authority in accordance with principles formulated by the courts, to which reference has been made in C.

In *Greene* v. *Secretary of State for Home Affairs,* [19] particulars were supplied to the detainee and disclosed to the court. There was no suggestion that on those facts, if believed, the detention would not be justified: no allegation of *mala fides* was made.

In *Nakkuda Ali* v. *Jayaratne,* [20] the Privy Council, in commenting on *Liversidge's* case, felt that it would be a very unfortunate thing if that decision came to be regarded as laying down any general rule as to the construction of phrases like "reasonable cause to believe" or "reasonable grounds to believe." They must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power.[21] The official must not exercise the power in bad faith. But if a judicial duty is cast on him there must, in fact, exist such reasonable grounds known to him, before he could validly exercise the power. Normally the statutory rules do not require him to act judicially but to take executive action because he believes and has before him ample material to warrant a belief that action is necessary, in which event, he is bound to follow the rules of natural justice by informing the person against whom action is being taken in precise terms what he is suspected of and failing satisfactory explanation from him a heavy cloud of suspicion remains and the executive officer is justified in taking action on the information in his possession.

There is the classic example of the Governor of Nigeria who ordered the successor and head of the family of Docemo, the ruling chief of Lagos, to leave the area specified in an order under the Deposed Chiefs Removal Ordinance which provided "If the Governor shall be *satisfied* that it is necessary for the re-establishment or maintenance of peace, order and good government in such area that the deposed chief (a native) shall

19. [1942] A.C. 284.
20. [1951] A.C. 66.
21. *Krishnasamy* v. *Butler Madden* (1947) 13 M.LJ. 182.

leave such area or any part of Nigeria adjacent thereto" and he was so satisfied, Lord Atkin (who dissented from the majority judgment in *Liversidge's* case 11 years later) said "It is only necessary for this Board to decide that it is the duty of the Courts to investigate the whole of the questions and come to a judicial decision" and added "But as applied to acts of the executive (as distinct from acts of the state) directed to subjects within the territorial jurisdiction it has no special meaning and can give no immunity from the jurisdiction of the Court to enquire into the legality of the act." The Solicitor-General agreed that the allegation that the secretary of state abused the powers given to him under the order to use them for a collateral purpose to depose a criminal, who, it was suggested was no danger to the state, was cognisable by the courts.[22] It is not easy to reconcile these decisions except on the footing that a war emergency created a situation which called for extraordinary measures which could not otherwise be justified under peaceful conditions.

B.

In India *Liversidge* v. *Anderson (supra)* has been followed in many cases.[23] But in *Basanta Chandra Ghose* v. *King Emperor,*[24] as in *Re A. K. Gopalan,*[25] it was held that it is open to a detenu to show that an order which purports to have been made by an executive officer was not in fact made by him or that he merely accepted a view formed by another executive officer[26] or that it was a fraudulent exercise of his power. The burden of establishing these pleas lies, however, on the detenu, for once the order "*ex facie* regular" is proved or admitted, the burden of proof, if any, on the state is discharged and it must be taken *prima facie,* that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the executive officer was complied with. Persons exercising such power cannot be held responsible and exercise of such power by them cannot be held invalid except on proof of *mala fides* or indirect motive or some improper conduct materially affecting such exercise. This appears to be implicit in the judgment of Goddard L.J. in *Ex parte Greene,*[27] approved by Lord Maugham on appeal,[28] and in *K.E.* v. *Bencari Lal Sharma.*[29] It is not enough for the

22. *Eahugbayi Eleko* v. *Government of Nigeria (Officer Administering)* [1931] A.C. 662, 670-72.
23. *Machindar Shivaji* v. *The King,* A.I.R. 1950 F.C. 129; *Gopalan* v. *State of Madras,* A.I.R. 1960 S.C. 27.
24. 1946 F.C.R. 81.
25. (1952) 2 Mad. L.J. 690, 699.
26. *E.* v. *Sibnath, Banerji* (1945) 8 F.L.J. 222 (P.C.).
27. [1942] 1 K.B. 87, 116.
28. *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284, 295.
29. 49 C.W.N. 178 (P.C.), *per* Viscount Simon L.C. And see *E.* v. *Vimlabai Deshpande,* A.I.R. 1946 P.C. 123; *Basanta Chandra Ghose* v. *K.E.* (1944) 7 F.L.J. 208.

detenu to say "I have been wrongfully detained. I do not know why." No assumption can be made that the powers conferred on the executive by statute will be abused.

A distinction must be made between the validity of delegated legislation and measures taken by an executive officer in purported exercise of the powers vested in him under statutory rule. In *Rex* v. *Comptroller-General of Patents,*[30] as in *King Emperor* v. *Benoari Lal Sharma,*[31] the right of His Majesty in Council in the one case and of the Governor-General in the other to enact rules or ordinances was challenged on the ground that the conditions required to bring them into operation were not then in existence. In fact the courts were asked to investigate the reasons which moved His Majesty and the Governor-General in coming to the conclusion that an emergency existed at the time when the rule or the ordinance was made and published. In the latter case it was held that the provisions of the ordinance which was promulgated by the Governor-General did not amount to a delegation of legislative power. In India, section 311 read with section 72 of the Government of India Act, 1935, enabled the Governor-General to issue an ordinance as "the Act of the appropriate legislature." In the earlier case, Scott L.J. stated: "...the principle on which delegated legislation must rest under our Constitution is that legislative discretion which is left in plain language by Parliament is to be final and not subject to the power of the Courts. In my view, the sub-section clearly conferred on His Majesty-in-Council that ultimate discretion." Even without such delegated authority, the prerogative right of the Crown in Council to legislate independently of Parliament cannot be questioned.[32] These decisions are probably capable of being explained on the ground that the act of a sovereign legislature cannot be impeached on any ground whatsoever[33] and is not, therefore, subject to judicial scrutiny. The remedy lies in repealing the rule or the Act.

In *Liversidge* v. *Anderson*[34] the validity of the legislation was never questioned. The dispute centred round the proper construction of the relevant rules and whether the Home Secretary's action was within the precise ambit of that rule. No lack of *bona fides* on his part was alleged.

However highly placed an official may be, if, in relation to the acts of the executive, the canon of interpretation in *Liversidge's* case is followed in its original with such devastating faithfulness, the effect in the Sargasso Sea of human rights is bound to be lethal.

Under the Australian constitution the doctrine that in an emergency constitutional limitations may be ignored has not been accepted for even

30. [1941] 2 K.B. 306 (C.A.).
31. (1944) 72 I.A. 57 (P.C.).
32. Anson, *Law and Custom of the Constitution,* vol. 1, p. 258.
33. Craies on *Statute Law,* p. 554; *Labrador Co.* v. *R.* [1893] A.C. 104, 123 (P.C.).
34. [1942] A.C. 206.

legislation passed in exercise of the defence power must be read as governed by the words "subject to the constitution." [35] In *Andrews* v. *Howell*[36] it has been recognised that an emergency does not increase granted powers or remove or diminish the restrictions imposed upon powers granted or reserved, but while an emergency does not create power, an emergency may furnish the reason for the exercise of the power (a principle not applicable where the legislature is supreme or the constitution does not limit such power). Hence, in Australia, as in the U.S.A., it has been held that the regulations made by the executive in the exercise of delegated authority must be reasonably connected with the object sought to be achieved under the enabling power. Dixon J. (at p. 275) came to the conclusion that changing circumstances may not justify the continued existence of a rule which was applicable at an earlier stage. He said: "In dealing with that constitutional power, it must be remembered that, though its meaning does not change, yet unlike some other powers its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law. In the same way the operation of wide general powers conferred upon the Executive by the Parliament in the exercise of the power conferred... is affected by changing facts. The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the *extent* of the operation of the power. Whether it will suffice to authorise a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto." Lord Wright in *Liversidge's* case (at p. 261) expressed the view: "If extraordinary powers are given, they are given because the emergency is extraordinary and are *limited to the period of emergency."* By "limited" obviously the noble law lord meant "during the period prescribed by the rules." Article 4 (2) (b) of the F.M. constitution makes it abundantly clear that even if the restrictions imposed by legislation under article 10(2) are not, in fact, necessary or expedient, the validity of such law cannot be questioned on that ground.

C.

Want of good faith as constituting a ground of investigation into the reasons of detention has been the subject of many Indian decisions other than those already mentioned.

(i) Where only one of the reasons given is outside the scope and ambit of the Act and there are other valid reasons, the whole order has been held to be vitiated because something may have operated upon the mind of the detaining authority which is foreign and extraneous to the purposes of the Act. [37]

35. *Gratwick* v. *Johnson* (1945) 70 C.L.R. 1.
36. (1941) 65 C.L.R. 255.
37. *Re Rajdhar Kaul Patil,* A.I.R. 1948 Bomb. 334.

(ii) If the object of the detention is to facilitate carrying out of investigation unhampered and unrestricted, that would be an abuse of the power conferred under the emergency rules.[38]

(iii) Where there is a refusal to grant an interview or afford facilities to the detenu to place his case before the courts, for this is an additional ground for suspecting the good faith of the authorities.[39]

In an exhaustive review of English and Indian authorities, in the same case Bose and Sen JJ. of the Nagpur High Court deduced the following propositions:

(a) If a person exercises powers conferred on him in bad faith, or for a collateral purpose, it is an abuse of the power and a fraud on the statute and is not really an exercise of the power at all, and the court can interfere with such colourable exercise of the power;

(b) When the issue is raised that any particular order has been made in bad faith or for a collateral purpose and therefore not made in the exercise of the power, the court is bound to enquire into the facts;

(c) The right to the writ of *habeas corpus* and the corresponding guarantee of liberty under section 365 of the Criminal Procedure Code are living realities and form one of the most fundamental and powerful forces in the constitution. It also shows with what extreme zealousness the right is guarded and upheld by the courts.

The second principle deduced is not so obvious because good faith on the part of the executive authority must be presumed until the contrary is proved by the detenu. Subject to this qualification it does not appear that the Indian authorities are (nor are the local decisions likely to be) in conflict with English decisions and *Liversidge's* case decides nothing to the contrary. Indeed *Nakkuda Ali's* case *(supra)* goes much further. The term "fraud" as applied to the exercise of a power conferred by an instrument and, *a fortiori,* by statute does not necessarily imply dishonesty or immorality. Lord Parker of Waddington in *Vatcher* v. *Paull*[40] explained: "It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."

III

In a progressive community, the judiciary, though not always successful, endeavour to secure social justice and social equality. The greatest contribution to the cause of humanity (and liberty) was made by the Judges in England when they refused to recognise the status of slavery. In England slavery as such was unknown but in 1547 a statute[41] was passed which ordained "that all idle vagabonds should

38. *Dilbagh Singh* v. *Emperor,* A.I.R. 1944 Lah. 373.
39. *Vimalabai Deshpande* v. *Crown,* I.L.R. 1945 Nag. 6, 59; see also footnote 37.
40. [1915] A.C. 372, 378.
41. 1 Edw. 6, c. 3.

be made slaves, and be fed upon bread, water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile..."[42] But this statute was repealed two years later.[43] Lord Mansfield in the case of *James Somersett,*[44] upon a writ of *habeas corpus ad subjiciendum,* in freeing a negro slave the instant he landed in England, said: "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion and time itself from whence it was created, is erased from memory. It is so obvious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law in England; and therefore the black must be discharged." In *Smith* v. *Brown,*[45] the negro slave, the subject matter of the sale, was not in England but in Virginia, where slaves were saleable but the seller's action in *indebitatus assumpsit* for £20 for the price of the negro was dismissed for the sale was by parol and not by deed. Holt C.J. made the categorical assertion that as soon as a slave comes to England he becomes free and added "one may become a villein in England but not a slave." The distinction between villeinage and slavery was pointed out by Powell J.: "In a villein the owner has a property, but it is an inheritance; in a ward he has property, but it is a chattel real; the law took no notice of a negro." As regards personal status, the villanus of the time of the Conquest was probably a free man but the terms on which he held his land bound him to constant labour on his lord's demesne.[46] He was a mere tenant-at-will and could not obtain redress in the King's courts. He was subject to chastisement in the hands of his lord but maiming was punishable.

In Malaya the mui-tsai system, i.e., procuring an unmarried female below the age of eighteen years on payment of money to a third person was rampant among the Chinese and, it is believed, among the Indonesian immigrants. Trafficking in such girls was also a common feature. The problem was first tackled in the former Settlements by the Women and Girls Protection Ordinance, No. 26 of 1914, which made it an offence to buy, sell or traffic in or import into the Colony for the purpose of such traffic any girl as a female servant and the Protector of Chinese was entrusted with considerable powers to prevent them from being lured or forced into prostitution. In the former Federated Malay States, the Female Domestic Servants Enactment, 1926, prohibited the employment of a female domestic servant under the age of ten years and the

42. Blackstone's *Commentaries,* vol. 1, p. 424.
43. 3 & 4 Edw. 6, c. 16.
44. (1771-72) 20 How. St. Tr. 1, 82.
45. 2 Salk. 666, 91 E.R. 566 (c. 1700).
46. P. & M., *H.E.L.,* i, 359, 412-15; Challis, Real *Property,* pp. 25-26.

supervisory jurisdiction of the Protector to ensure that they were neither overworked nor ill-treated, paid wages and provided with sufficient food, clothes of a reasonable kind and proper medical attendance was then thought sufficient to cope with the situation. Without going into details it may be said that not until January 1933 was provision made for compulsory registration of such mui-tsais as were previously acquired and total prohibition thereafter of acquiring mui-tsais, but liberty was given upon the death of the employer to transfer a mui-tsai to another employer with the sanction of the Protector. Provision has also been made to restore her to her parent or guardian. A mui-tsai is fully relieved of her obligations to her employer when she attains the age of eighteen years or marries whichever first happens. Occasionally the acquisition of a mui-tsai was thinly disguised as a *de facto* adoption. Article 6 of the constitution puts a total ban on slavery and all forms of forced labour but Parliament is enabled by law to provide for compulsory service for national purposes.

IV

The doctrine of *mens rea,* as an essential ingredient in crimes, has been applied even in statutory or quasi-criminal offences. In *Harding v. Price,*[47] the driver of a lorry was charged with failing to stop or report an accident caused by the attached trailer. His defence was that because of the noise caused by the trailer he was unaware of the accident. The word "knowingly" did not appear in the section under which he was charged, whereas it appeared in the corresponding section of the repealed Motor Act, 1903. The effect of the omission of that word in the re-enacting section, it was held, merely relieved the prosecution from the burden of proving knowledge, the reason being that a court ought not to adopt a construction which would mean that a person is called on to do the impossible or suffer conviction if he fails to do so. Even where the statute imposes what is apparently an absolute prohibition, an absence of guilty knowledge may in some cases be a defence. It all depends upon the intention imputed to the legislature having regard to the scope and purpose of the Act.

In interpreting "carrying any fire-arm or ammunition," an offence punishable with death under the Emergency Regulations, their lordships of the Privy Council held that "carries" means "carries to his knowledge,"[48] mistake of fact being a defence. "Lawful excuse" as distinct from absence of "lawful authority" in the same regulations was held to arise as a result of a subsequent supervening situation, namely, an invitation contained in the government pamphlet to surrender arms and ammunition with an assurance that unlawful possession thereof would not entail criminal liability.[49] It was also held that the "General

47. [1948] 1 K.B. 695.

48. *Sambasivam* v. *P.P.* (1950) 16 M.L.J. 145 (P.C.), [1950] A.C 458.

49. *Wong Pooh Yin* v. *P.P.* (1954) 20 M.L.J. 189 (P.C.), [1954] 3 All E.R. 31.

exceptions" in the Penal Code which declare that no offence is committed in circumstances contemplated by them are expository of "lawful excuse" though the Regulations do not specifically include such a defence.[50] These may indeed be regarded in a sense as illustrations of benevolent construction of statutes in accordance with well-established principles but do not necessarily militate against the view that ethical considerations influenced by pragmatism and empiricism determine the pattern of law in the interest of fair play.

To take other instances at random. Travelling outside the ambit of immediate words specifically employed by the legislature, judicial legislation has given protection even to a person possibly not then even suspected but eventually accused of an offence against the admissibility of any statement made by him to a police officer during the course of investigation.[51] He is protected by law in Malaya against the disclosure of a confession made while in the custody of a police officer, or of a confession caused by inducement, threat or promise proceeding from a person in authority. A witness is protected against arrest or prosecution where his answer to a relevant question tends to incriminate him.

In the United Kingdom and a few other countries in the Commonwealth, where the basic standard of literacy is comparatively high and the common man is made aware of his legal rights and where language difficulties do not intervene so as to leave little room for misunderstanding the pre-requisite condition as to the admissibility of his statement, admission or confession made to a police officer is a warning that he is under no obligation to make any statement and is entitled to take refuge in silence. That was not always the law in England. Lord Denning points out[52] that between 1837 and 1844 in many cases the judges ruled that the confession made by a prisoner after a warning was inadmissible until in 1852 when "public apprehension" gave way "to public confidence in the police."

Corroboration in treason, perjury, breach of promise, bastardy, offences against women in case of rape or of indecency, claims against the estate of deceased persons, testimony of *socii criminis,* retracted confession, *de recenti* statements of children and young persons and in suspicious circumstances, whether required by statute or common law are but instances of abundant caution or judicial valour: the doctrine of estoppel,[53] the newly developed doctrine of equitable estoppel, as a logical sequence of the fusion of law and equity,[54] and the Scottish rule of approbation and reprobation, *"allegans contraria non est audiendus"*[55]

50. *P.P.* v. *Chin Kiang Yin* (1956) 22 M.L.J. 217; *R.* v. *Leong Wing Cheung* [1958] H.K.L.R. 49 (C.A.).
51. *Narayana Swami* v. *R.,* L.R. 66 LA. 66, A.I.R. 1939 P.C. 47.
52. *Freedom under the Law,* p. 80.
53. See *Cairncross* v. *Loriman,* 3 Macq. (H.L. Sc.) 829, 123 R.R. 906; *Swat* v. *Gopal,* 19 I.A. 203; *Pickard* v. Sears, 6 A. & E. 460.
54. *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* [1947] K.B. 180.
55. *Pittman* v. *Cram Ewing* [1911] A.C. 217, 233, per Lord Shaw.

are based on a high standard of honesty. The exceptions engrafted in the rule that there can be no estoppel against law or statute [56] or against persons under disability [57] or to defeat a prohibition of law or where the party, having full knowledge of the true facts, was not misled and other instances of the like nature, are designed to maintain in the first instance the supremacy of the law and secondly to prevent a litigant from taking unfair advantage of his own illegality or conduct amounting to an imposition.

The fifth amendment of the constitution of the United States, which provides "Nor shall any person be compelled, in any criminal case, to be a witness against himself," merely reiterates the common law principle, which has now, by and large, a statutory basis in the Commonwealth. Wigmore opines: [58] "Its origin was local, in the other legal systems of the world it had no original place." Perhaps the best explanation for its existence is given by Jeremy Bentham as quoted by Wigmore: *"The fox-hunter's reason."* "This consists in introducing upon the carpet of legal procedure the idea of "fairness" in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called "law" — leave to run a certain length of way for the express purpose of giving him a chance to escape. While under pursuit, he must not be shot: it would be "unfair" as convicting him of burglary in a hen-roost in five minutes' time, in a court of conscience. In a sporting code, these laws are rational, being obviously conducive to the professed end... the use of a fox is to be hunted; the use of a criminal is to be tried ..." The privilege exists for the sake of the innocent. "The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby." This is the underlying principle of fair dealing inherent in the privilege against self-incrimination. In *Twining* v. *New Jersey* [59] Justice Moody said: "It came into existence not as an essential part of due process but as a wise and beneficent rule of evidence developed in the course of judicial decision... The wisdom of the exemption is best defended not as an unchangeable principle of universal justice, but as law proved by experience to be expedient." He added that the exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become

56. *Barrow's Case* (1880) 14 Ch.D. 432; *Maritime Electric Co. Ltd.* v. *General Diaries Ltd.* [1937] A.C. 610, 621.
57. *Corporation of Canterbury* v. *Cooper* (1908) 99 L.T. 612.
58. *Evidence,* s. 2251.
59. 211 U.S. 78: 63 L. Ed. 97.

embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions."

Even in jurisdictions where voluntary extra-judicial inculpatory statements are admissible, judges have been extremely cautious in accepting them. In *H.M. Advocate* v. *Rigg*[60] Lord Justice-Clerk Cooper observed: "I am bound to say that I have viewed with growing uneasiness and distaste the frequency with which in recent years there have been tendered in support of prosecutions alleged voluntary statements said to have been made to the police by persons charged, then or subsequently, with grave crime," an uneasy feeling more vehemently expressed by Cave J. in *R.* v. *Thompson:* [61] it is not that law presumes the statements to be untrue, but from the danger of receiving such evidence, judges have thought it better to reject it.[62]

In Scotland, extra-judicial confession is not by itself sufficient proof,[63] and in India Judges have felt it safer not to convict an accused person on a retracted confession unless corroborated by independent evidence. Channel J. in *Rex* v. *Knight and, Thayre,*[64] which was quoted with approval by Darling J. in *Rex* v. *Booth and Jones,*[65] put the problem in a nutshell. He observed: "The moment you have decided to charge him and practically got him into custody, then inasmuch as a Judge even cannot ask a question, or a Magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask a question, it is inadmissible; what happens is that the Judge says it is not advisable to press the matter." Judicial confessions where chances of threat, inducement or intimidation are remote, stand on a different footing as a result of statutory sanction: nevertheless, when a confession is attacked, judicial investigation into all the surrounding circumstances leading to such confession, in order to ascertain whether it is voluntary and volunteered, becomes imperative, for it is contrary to human nature for an accused to act on a momentary impulse of "penitence and remorse" and thus place his life and liberty in dire jeopardy.

S. K. DAS. *

(to be continued)

60. 1946 J.C. 1, 3; *Stark*, 1938 J.C. 170; *Wade* v. *Robertson,* 1948 J.C. 117.
61. [1893] 2 Q.B. 12.
62. *R. v. Ibrahim* [1914] A.C, 599, 614.
63. *Banaghar* (1888) 15 R. (J.) 39, 1 Wh. 566.
64. (1905) 20 Cox C.C. 711.
65. (1910) 5 Cr. App. Rep. 177, 179.

* M.A., LL.B. (Cantab.); of Gray's Inn, Barrister-at-Law; of the Federation of Malaya and of Singapore, Advocate and Solicitor.