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

(Continued from page 16)

V

A

In the early stages when legislation was unknown or it covered a very restricted field of human activity, conflicting interests were resolved by judges according to their discretion. It is true they were sometimes influenced by the state of society then in existence, feudal in origin dominated by aristocracy of birth and later, with increasing commercial and industrial prosperity, by that of wealth and a tendency to favour the interest of one economic class against another can be detected.

None the less it was a fruitful period for, unfettered by precedents or legislation, the judges were able to instill into the law the ethical element by granting appropriate remedies. Some of the principles then evolved, such as the doctrine of common employment[1] and *actio personalis moritur cum persona* offend our sense of justice and fairness and these persisted for centuries through legislative inaction.

On the other hand, Maine's famous dictum that the movement of progressive society has hitherto been a movement from status to contract shows a realistic approach to counteract the evil of a mediaeval social outlook. The opposite movement, from contract to status, noticeable today, is mainly the product of reformed social legislation: it prevents antisocial exercise of legal rights and imposes social restrictions limiting the freedom of contract in the interest of society "prompted by the conduct of those who in some manner place themselves in opposition to approved social order."

In the exercise of equitable jurisdiction the Chancery Courts, vastly strengthened by the Statute of Westminister II (13 Ed. 1, st. 1, c. 24) authorising issue of writs in *consimili casu,* struck at all departures from honesty and uprightness under the head of conscience. Lord Evershed M.R. points out: [2] "...there is a great virtue in the general principles and in the system of gradual and expanding exposition, which are characteristics of Equity," and after referring to the important field of human relations "fraud, accident or breach of confidence," observes: "But two points must be made which soon emerged from the impact of Equity upon the English land law, and which are characteristics of all Equities. The first is this. Generally with respect to all the Rules of Equity (as indeed with respect to the Rules of Law), but most particularly in the

1. *Thrussell* v. *Handyside & Co.* (1888) 20 Q.B.D. 359, 364, *per* Hawkins J., "his [the employee's] poverty, not his will, consented to incur the danger."
2. *Aspects of English Equity,* pp. 19 and 22.

case of trusts, the remedy preceded the right." He quotes Holdsworth, "equity is no exception to the general rule that the adjective part of the law is developed before the substantive."[3] The level of commercial morality has been raised by inhibiting conflict of duty and interest. Moral considerations dominate the doctrine that the Statute of Frauds cannot be made an instrument of fraud and this is one of the earliest invasions of judge-made law on legislation.

Pomeroy [4] thus describes the role of the common law, equity and legislation in maintaining high standards of morality and abstract right: " 'Equity' alone does not embrace all of the jural moral precepts which have been made active principles in the municipal jurisprudence. The 'law,' even the 'common law,' as distinct from statutory legislation, has in the course of its development adopted moral rules, principles of natural justice and equity, notions of abstract right, as the foundation of its doctrines, and has infused them into the mass of its particular rules. Unquestionably at any early day the common law of England had comparatively little of this moral element; it abounded in arbitrary dogmas, as, for example, the effect given to the presence or absence of a seal; but this was the fault of the age, and the sin was chiefly one of omission; the ancient law was, after all, rather *unmoral* than *immoral.* But this has been changed, and at the present day a large part of the 'law' is motived by considerations of justice, based upon notions of right, and permeated by equitable principles, as truly and to as great an extent as the complementary department of the national jurisprudence which is technically called 'equity.' " This work of elevating the law has been accomplished by two distinct agencies, judicial legislation and parliamentary legislation. At the present day the latter agency is the most active and by far the most productive; but prior to the epoch of conscious legal reform, which began in England about 1830, and at a considerably earlier day in this country, the great work of legislation within the domain of the private law, except in a few prominent instances, such as the Statute of Uses, of Wills, etc., was done by the law courts. In expanding the law, the judges in later times have designedly borrowed the principles from the moral code, and constructed their rules so as to be just and righteous. The legislature also has conformed the modern statutes to the precepts of a high morality, and their legislation has tended to correct any mistakes and to supply any omissions in the body of rules constructed by the legislative function of the courts."

The principle of natural justice was evolved out of such doctrines as " '*audi alteram partem'* and *'nemo iudex in suam causam'* resorted to by courts to check the proceedings of administrative or domestic *fora."* Where no other remedy is available against an order of a statutory tribunal, bias, fraud, irregularity, error of law on the face of the decision, excess of or defect in jurisdiction or a failure to observe the

3. *History of English Law,* 3rd ed., vol. 9, p. 335.
4. *Equity Jurisprudence,* vol. 1, art. 65.

rules of natural justice enable the court to quash an order by certiorari proceedings: *R.* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw.*[5] Following Denning L.J.'s and Lord Goddard's suggestion if an administrative tribunal (or for that matter an administrative or executive officer) can always be persuaded to make a speaking order, that is, to make a special entry upon the record of the reasons for their judgment or order, public grievances against arbitrary action or unjust can be effectively removed.

In the field of torts the "act" itself ceased to be the ground of liability as in the past. The pre-requisite conditions for tortious liability are not only the act itself which may be neutral in character and damage but also negligence in the performance of a duty to take care, which implies a blameworthy antecedent inadvertence to possible harm. The liability is put on the general ground of *faute.* Scott L.J. in *Read* v. *J. Lyons & Co. Ltd.,*[6] observed: " Historical differences in the forms of action, which gave birth to various rights, have undoubtedly left a legacy of differences in the substantive law of to-day. None the less, there may be some element of unifying principle common to all the above torts," and, in discussing the history of the growth of the law of torts, explained "The argument of those lectures (Holmes, The Common Law, Lectures (iii) & (iv)) is that the theory of torts must be sought somewhere in the debatable land between the crude mediaeval rule that (subject to certain qualifications) the actor acts at his peril, and the ethical view of Austin that the liability rests entirely on moral blames." Prof. Montrose remarks : "in so far as negligence is concerned with what ought to be done, it may be called an ethical concept: in so far it is concerned with what is done with practice, it might be said to be a sociological concept."[7] The concept of duty to one's neighbour has undergone a revolutionary change in recent years in the interest of public safety.[8]

B

The function of law in action was thus stated by Knight Bruce V.C. in *Pearse* v. *Pearse*: [9]

" The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open for them." He opined that questionable

5. [1951] 1 K.B. 711 (D.C.); [1952] 1 K.B. 338 (C.A.). See Lord MacDermott, *Protection from Power under English Law,* p. 95 *ff.*
6. [1945] K.B. 216, 227-9.
7. (1958) 21 M.L.R. 259.
8. *Donoghue* v. *Stevenson* [1932] A.C. 562; *Grant* v. *Australian Knitting Mills Ltd.* [1936] A.C. 85.
9. (1846) 1 De G. & Sm, 13, 28; 63 E.R. 950, 957.

methods employed in obtaining evidence "are too great a price to pay for truth itself."

These words were spoken, it is true, to guard against disclosure of confidential communications passing between a client and his legal adviser. Their relationship was described as similar to that of a penitent and his priest (rather an inappropriate illustration) and putting an advocate to the torture for the purpose of discovering truth was, he felt, hardly a method to be commended in the interest of justice. Confidential communications between husband and wife are protected from disclosure to foster peace and preserve conjugal harmony and the rule is founded partly upon the identity of their legal rights and interests and rests upon public policy. But a statement by a spouse to a third party disclosing marital communications is admissible against the party who made that statement.[10]

Relevancy is said to be the acid test of admissibility. Where evidence is obtained by illegal or unjust means, there is need for exercise of great caution in accepting such testimony. Lord Goddard C.J. in *Brannan v. Peek,*[11] while condemning the practice of the police authorities to "instruct, allow or permit a detective officer or constable in plain clothes to commit an offence so that they can say that another person in that house committed an offence," did not, however, reject the evidence of an *agent provocateur* as being necessarily untrue or inadmissible: but in the U.S.A. in cases of entrapment or where the criminal design originates, not with the accused but at the instigation of law enforcement officers, the government may not use the fruits of that conduct of its officers against the victim. In *Sorrell* v. *United States,*[12] Chief Justice Hughes thus analysed the problem: "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute. This, we think, has been the underlying and controlling thought in the suggestions in judicial opinions that the Government in such a case is estopped to prosecute or that the courts should bar the prosecution. If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice. This view does not derogate from the authority of the court to deal

10. *Daniel Youth* v. *The King,* A.I.R. 1945 P.C. 140.
11. [1948] 1 K.B. 68, 72, (D.C.).
12. (1932) 287 U.S. 435; 77 L. Ed. 413, 420-421.

appropriately with abuses of its process and it obviates the objection to the exercise by the court of a dispensing power in forbidding the prosecution of one who is charged with conduct assumed to fall within the statute." [13]

In other cases [14] it was also indicated that where a judge is confronted with logically probative evidence, not substantial or of trifling weight, having regard to the purpose to which it is professedly directed and which may be "gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible," the decision to admit such evidence is left in the interest of justice to his discretion and sense of fairness. In cases where evidence of "similar facts" affecting the accused has been tendered, the judge, in setting "the essentials of justice above the technical rules," if its strict application operates unfairly against the accused,[15] may intimate to the prosecution that such evidence, though admissible, should not be pressed because of its probable effect.

In *Kuruma* v. *R.,*[16] Lord Goddard remarked that evidence obtained by a trick may not be admitted by a judge in the exercise of his discretion. The writer has not as yet come across any reported decision in England where such evidence was rejected though in Scotland the tendency is to exercise that discretion in favour of the party adversely affected by it in both civil and criminal jurisdiction.[17]

Despite these observations it would appear that, by and large, in the Commonwealth, in the prosecution of suspected offenders relevancy assumes greater importance than the tainted source from which evidence proceeds. In the ultimate analysis, the uneasy feeling of the judge is subordinated to judicial precedent on which our jurisprudence is based.

C

Judges, in the various parts of the Commonwealth, do not all subscribe to the view of the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.,*[18] the Thetis disaster case, that the claim of privilege for a state document or for a communication made in official confidence, on the ground of public interest (except where international politics, military defence or any political communication affecting the question of peace or war are involved or in the absence of express statutory prohibition) is not examinable by a private perusal by the Judge. In the administration of justice individual interest cannot be dissociated from public interest.

13. See also *Butts* v. *United States* (1921) 273 F. 35.
14. *Noor Mohamed* v. *R.* [1949] A.C. 182, 192; *Harris* v. *Director of Public Prosecutions* [1952] A.C. 694, 709: *Kuruma* v. *R.* [1955] A.C. 197 (P.C.).
15. *Harris* v. *D.P.P.* [1952] A.C. 694, 707, *per* Viscount Simon.
16. [1955] A.C. 197, 204. And see (1952) 68 *L.Q.R.* 185 *ff.*
17. See pp. 241-244, post.
18. [1942] A.C. 624.

State activities these days are not exclusively limited to defence, foreign affairs, administration of justice and police but extend to other major activities ranging over all fields of economic and social life: a subject affected thereby may be totally deprived of the means of proof by executive reticence.

In *Odium* v. *Stratton*,[19] the reason was advanced that the production of the minutes of the sub-committees and records of the sub-committees would be detrimental to the public interest "because it might lead to actions for libel" against government officials, in that case the Chairman of the Wiltshire Agricultural Committee against whom such an action was brought. "Public interest" must exclude the private interest of a public official. Atkinson J. was, however, bound by *Duncan's* case and regretted that he had to make up his mind without the aid of the contemporaneous documents which would have thrown considerable light on one or two important matters. Discovery was refused but other evidence against the Chairman of malice was overwhelming and justice was done.

In the internal affairs of public business should routine communications be privileged from disclosure ? Wigmore says: [20] " In any community under a system of representative Government and removable officials, there can be no facts which require to be kept secret with that solidity which defies even the enquiries of a Court of Justice... The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption...to concede to them a sacrosanct secrecy in a Court of Justice is to attribute to them a character which for other purposes is never maintained, a character which appears to have been advanced only when it happens to have served some undisclosed interest to obstruct investigation into facts which might reveal a liability."

The solution suggested by Wigmore is: [21] "The lawful limits of privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest may be to shield a wrong-doing under the privilege. Both principles and policy demand that the determination of the privilege shall be for the Court."

This was precisely the view taken by a very strong Board of the Privy Council comprising Lords Blanesburgh, Warrington, Atkin, Thankerton and Russell in *Robinson* v. *State of South Australia* (*No. 2*),[22] which is of particular interest to Malaya. They held that the court has power to inspect the documents for which privilege is claimed in order

19. See C. K. Allen, *Law and Orders,* App. 2.
20. *Evidence,* 3rd ed., vol. 8, s. 2378a, at pp. 789-790.
21. *Op. cit.,* s. 2379, at p 799.
22. [1931] A. C. 704.

to determine whether the facts discoverable by their production would be prejudicial or detrimental to the public welfare in every justifiable sense; the privilege is a narrow one and is to be exercised most sparingly; that the document is confidential or official is, in itself, no reason for its non-production; the mere fact that the production of the document might in a particular litigation prejudice the Crown's case or assist the other side does not justify any claim of privilege; the fact that the document, if produced, might have any such effect on the fortunes of the litigation is of itself a compelling reason for its production which is only to be overborne by the gravest considerations of state policy or security; in time of peace, the privilege can rarely be claimed in respect of document relating to the commercial activities of the state except when some plain, overriding principle of public interest exists.

In an appeal from Scotland, the House of Lords in *Glasgow Corporation v. Central Land Board*[23] adopted the same view that there would be less injury to the interest of the public than non-production of a particular document may do to that other public interest which is represented by the cause of justice: the Scottish courts must also consider the wider public interest that impartial justice should be done between citizen and the Crown, and on that account override the Crown's objection. Lord Radcliffe hoped that the Scottish courts would continue to assert their right, as they had done in the past, to override such objections in appropriate circumstances. The common law of Scotland has been influenced not only by the English common law but by the Aristotelian definition of equity and the natural law ideal on considerations of fairness and justice against the letter of the law.[24]

The Supreme Court of Canada in *R. v. Snider*,[25] affirming the decision of the court below,[26] where the disclosure of income-tax returns tending to prove or disprove an indictable offence on a *subpoena duces tecum* served either at the instance or on behalf of the provincial Attorney-General or at the instance or on behalf of the accused on the appropriate federal tax official was resisted by the Minister of National Revenue, who stated on oath that in his opinion such evidence and the production of the returns would be "prejudicial to the public interest," held that the court can nevertheless order the production of the returns and require that oral evidence be given relating thereto for the purpose of enabling it to determine whether the facts discoverable by the production would be admissible, relevant or prejudicial, or detrimental to the public welfare in any justifiable sense.

23. 1956 S.L.T. 41; in the Court of Session: 1955 S.L.T. 155. And see (1956) 19 *M.L.R.* 427.
24. Friedmann, *Legal Theory,* pp. 381-382, quoting Stair's *Institutes,* iv, 3.
25. (1954) S.C.R. 479; [1954] 4 D.L.R. 483.
26. *Re Snider* (1953) 16 C.R. 223. See also *Ship* v. *R.* (1949) 8 C.R. 26; 95 C.C.C. 143; Popple, *Canadian Criminal Evidence,* 2nd ed., pp. 193-194.

In Malaya it is most unlikely that the decision in *Duncan's* case will be followed in preference to *Robinson's* case and the *Glasgow Corporation* case. There is only one reported decision in Singapore where the Crown claimed privilege. In *Re Neo Guan Chye (deceased)*,[27] Terrell J. most reluctantly followed the practice of the Inland Revenue Office in England denying a beneficiary the right to inspect the estate duty affidavit on the ground that it was a *quasi-confidential* document filed by the legal representative with the Commissioner of Estate Duties. *Robinson's* case was not cited. He held, however, that the document did not relate to any "affairs of the state" nor was it a document made in "official confidence" within the meaning of sections 124 and 125 of the Evidence Ordinance.

The only privilege available to the Crown in the State of Singapore is under these sections (which have their counterpart in the Federation of Malaya and in India) for section 56 of the Crown Suits Ordinance, cap. 12, provides that the law or practice and procedure applicable in proceedings by and against the Crown shall be the same as between subject and subject.

In the Federation of Malaya the only other material legislation is the proviso to section 36(2) of the Government Proceedings Ordinance, 1956 (which recalls to mind the advice tendered by the Judicial Committee of the Privy Council in *Robinson's* case): "Provided that it shall not be deemed injurious to the public interest to disclose the existence of any document by reason *only* of the fact that such disclosure would or might lead or tend to the success of the opposite party in the proceedings."

This proviso carves out an exception but the use of the word "only" does not clarify the issue — if a state document or confidential communication to an official contains matters of public interest intermingled with those of private interest indicating liability of the state or an official or a third party, which interest is paramount ? In other respects section 36 does not differ from section 28 of the Crown Proceedings Act, 1947.

Three expressions, "affairs of state," "public interest," and "public welfare" have been indiscriminately used. Whether they mean the same thing or one is of wider import than the other has not yet been determined, but underlying all these expressions is the central idea that the safety or security of the state must not be jeopardised by public disclosure.

In India it has been held, under the corresponding provisions of the Evidence Act, that the opinion of the head of department that the document relates to the "affairs of the state" is not conclusive nor is it for the public official to decide whether the document contains a confidential communication : the document must be produced for inspection

27. [1935] S.S.L.R. 336; 4 M.L.J. 271.

by the court. The power and duty of the court to inspect documents, in spite of ministerial objection taken in proper form, is not, however, very clear.

The net result of the Indian authorities appears to be that under both sections of the Evidence Ordinance the court is the judge whether the document in respect of which privilege is claimed is a state document or whether the communication was made in official confidence: in the former case the court cannot inspect the document though it can take other evidence to determine the character attributed to it: in the latter, the court can inspect it to determine the claim of privilege.[28] The power of the courts in Malaya is admittedly much wider than in England and the courts may not find it difficult to apply the principles enunciated in *Robinson, Glasgow Corporation* and *Snider.*

VI

A

Even the most ardent apostle of freedom has failed in his quest to seek out a form of association in which "each individual joins all the others, but obeys only himself and thus remains as free as before," for within the framework of every constitution, written or unwritten, are found necessary safe-guards, which, without reducing freedom of thought, speech and expression to the silence of the graveyard or regimenting action and behaviour of all its citizens, yet set limits and checks on abstract or unbridled individualism.

The path of safety lies somewhere between the extreme poles but the dividing line is not always clear nor constant. One must look rather to the peripheral phenomena than to the equatorial belts. The controversy arises: who is to determine the frontier of liberty — the judiciary or the legislature ? Justice Frankfurter, in a concurring judgment in *Dennis* v. *United States,*[29] remarked that the essential quality of a judge is detachment founded on independence without getting embroiled in the passions of the day and civil liberties draw at best only limited strength from legal guarantees and the role of a judge and that of a legislator are meant to be complementary.

The rule of law in the Commonwealth jurisdictions as often as not depends upon judicial interpretation of statutory language; the task of judicial creativeness begins where the language is ambiguous or uncertain or is capable of a wider or narrower construction having regard to the scope and purpose of the legislation by supplying an omission or engrafting a limitation; where the language brings about a result which is so startling as to produce highly inequitable results, the court may look for some other possible meaning which will avoid such a result.[30]

28. Sarkar on *Evidence,* 10th ed., p. 1073.
29. (1951) 341 U.S. 494, 525; 95 L.Ed. 1137, 1160-1.
30. *Coutts & Co.* v. *I.R.C.* [1953] 1 All E.R. 418, 421 *per* Lord Reid (H.L.)

In such cases interpretation necessarily involves a choice by judges based on their notion of justice as applied to the particular facts before them. The ultimate solution may be influenced either by the common law, the traditional element resting upon the experience of the past in the adjudication of controversy, or, by considerations of public policy as determined by "the felt necessities of the time."

The validity of the former method of interpretation lies in the presumption that law-makers do not intend to alter the common law beyond the scope clearly expressed or fairly implied: the latter method of approach is likely to establish a new head of public policy or considerations of public interest on ethical or political grounds, in derogation of common law rights. It has not yet been settled beyond controversy whether in the application of the rule of public policy in legal controversies the choice is left to the judge to create a new category by analogy.[31]

The danger was pointed out by Friedmann: [32] "But it appears that in times of crisis, when political considerations are more apt than usual to intrude into the administration of the law, public policy can be used and extended to achieve a desired result." On occasions, though infrequent, where the question or issue is not *res integra,* one or the other method has been applied to subserve the ends of justice although the language of itself may not have been sufficiently lacking in clarity.

In *Nokes* v. *Doncaster Amalgamated Collieries Ltd.,*[33] the House of Lords came to the rescue of the employee; under the relevant statutory provision the court was invested with power to transfer from one company to another in the course of statutory amalgamation, all the "property," "undertaking" and "liabilities" of the transferor company. The question at issue was whether such power included a power to transfer the rights and obligations under contracts of service of its employees; it was held by a majority that an employee had a free choice of his employer under the common law and he was not to be treated as a "serf" or a mere chattel: the court refused to include in the order the transfer of a contract of personal service, which is not assignable at common law. A narrower construction of "property" was held to be justified because there were adequate reasons for doubting whether the legislature could have been intending so wide an interpretation as would disregard fundamental principles of the common law. It was equally open to the court to hold that the legislature had, in fact, by use of the expression "property" without qualification intended to deprive the employee of his common law right with a view to preserve the continuity

31. Julius Stone, *The Province and Function of Law,* ch. XX, art. 6 *ff*; *Janson* v. *Driefontein Consolidated Mines Ltd.* [1902] A.C. 484, 500; *contra: Fender* v. *St. John-Mildmay* [1938] A.C. 1, 11-12.

32. *Legal Theory,* p. 341.

33. [1940] A.C. 1014.

and efficiency of the new entity to be formed in the interest of commercial stability.

Lord Romer found himself unable to discover any ambiguity in the expression "property" which included property, rights and powers of every description. In his dissentient speech (at p. 1043) he pointed out that notwithstanding any restrictions (imposed by the common law) upon their assignability "It includes the rights of the transferor company under trading or service contracts, for the transferor company undoubtedly possesses rights under such contracts as well as liabilities and such rights and liabilities become by virtue of the order transferred to and vested in the transferee company," the object being "to enable the court to make a complete substitution of the transferee company for the transferor company as regards the whole of the rights and liabilities of the latter without exception."

The illustrations given by Lord Atkin in the *Liversidge case*[34] sufficiently indicate the method of his approach to the problem of construction of Regulation 18B on the basis of common law principles because of the danger inherent in blind acceptance of the opinion of an executive officer: *Phoenix Assurance Co. Ltd.* v. *Minister of Town and Country Planning.*[35] And as C. K. Allen pointed out,[36] commenting on the *obiter dictum* of the Judicial Committee in *Ross-Clunis* v. *Papadopoullos,*[37] in exceptional circumstances it may possibly be open to the court to hold that there were "no grounds" for an administrative act, even under emergency powers, if it appeared to be completely remote from or alien to, the purpose of the authorising statute. If, however, facts on which the opinion is based can be withheld from the court, how is it possible to discover "exceptional circumstances" to justify intervention ?

The solution suggested by Truepenny C.J., "leave it to the executive," in whom the aggrieved party has lost faith and where reliance is placed on the judiciary for adequate safeguards, drew from Foster J. a devastating reply: "For us to assert that the law we uphold and expound compels us to a conclusion we are ashamed of, and from which we can only escape by appealing to a dispensation resting within the personal whim of the Executive, seems to me to amount to an admission that the law of the Commonwealth no longer pretends to incorporate justice." [38]

Policy decisions shift the burden of ensuring natural justice on to the executive. Freedom of the individual thus becomes an article of faith resting on no more solid foundation than on the shifting sands of hope

34. [1942] A.C. 206.
35. [1947] 1 All E.R. 454, 457, *per* Henn Collins J.
36. "No grounds" and "No reasonable grounds" (1958) 74 *L.Q.R.* 358.
37. [1958] 1 W.L.R. 546.
38. See (1958) 36 *Canadian Bar Rev.* 568-9.

or expectation rather than on enforceable right. In the *Crichel Down* affair[39] the subject had no legal redress: it was only the overwhelming pressure of public and parliamentary opinion that led to a Commission of Enquiry and revealed "bureaucratic malpractice" and political bias.

B

Realism or the application of basic jural conceptions, their logical extension and development in tune with ever-progressive democratic ideas and social changes, find little support in the Commonwealth jurisdictions, where analytical jurisprudence aimed at stability, continuity and certainty of the law is of primary importance.

Two principles in the main block the avenue of a fresh approach: the principle of authority and its counterpart the rule of *stare decisis,* "the Government of the living by the dead" and the unchallenged supremacy of the legislature: the interpretation of the common law or equitable principles or construction of statutes, however unsatisfactory and inapplicable to the modern condition of society, is binding on all inferior courts and where the decision is of respectable antiquity on superior courts as well. And yet a third factor cannot be ignored, the rigid adherence to the literal rule of construction of statutes,[40] and the magic of lexicography which Justice Learned Hand condemned. He said: [41] "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." The fortress is all the more impregnable where judicial precedent in addition sets the seal on its proper interpretation. For over a century legislation has not lacked in fecundity and very few words in the English language have escaped judicial interpretation either in a literal sense or in the context of specific legislation. Rarely, if ever, does it become necessary to depart from the traditional meaning assigned to particular words and expressions unless the scope and purpose of a new piece of legislation makes it obligatory without doing violence to the language.

Judicial idealism or judicial valour must, therefore, find a scope within a very restricted field, "for the political will of the legislator permeates every sphere of law with such force and exclusiveness that such factors as the economic play of forces, personal leanings, business

39. See (1955) 18 *M.L.R.* 557.

40. See Lord Simonds' observations in *Magor and St. Mellons R.D.C.* v. *Newport Corporation* [1952] A.C. 189 on Denning L.J.'s attempt at realism in *Seaford Court Estates Ltd.* v. *Asher* [1949] 2 K.B. 481, 499, following *Heydon's Case* (1584) 3 Co. Rep. 7a, 76 E.R. 637, to supplement the written word so as to give "force and life" to the intention of the legislature from "a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy."

41. *Cabell* v. *Markham* (1945) 148 F. 2d. 737, quoted by Friedmann, *op. cit*., p. 316.

habits, etc. are relegated to a very subordinate function, although they are not entirely excluded. Only where the legislator is comparatively passive and neutral in regard to the social forces at work in the society, can a movement like that of American realism operate and prosper." [42]

Where local legislation (as for example, the Limitation Ordinance, 1953, of the Federation of Malaya) closely follows English legislation without making comprehensive provisions for its application with a special regard to the entirely different system applicable in the Federation (the modified Australian Torrens system), the judiciary is confronted with the unenviable task of summoning all its creative energies to bend words and expressions to fit in with the local legal structure.

Are the courts then obliged to follow mechanically the Court of Appeal and House of Lords decisions on the construction of the English legislation, couched in identical language,[43] although local legislation is intended to be applicable in a different factual context and with a different purpose: are English decisions binding only when "there are no relevant differentiating local circumstances" or when they only fit well into the legal structure in Malaya,[44] or are the courts entitled to proceed on the basis that the legislators did not intend to accept the interpretation placed on them by English courts or that the local legislature was unfamiliar with the English legislation at the relevant date (despite the fact that the objects and reasons reveal its ancestry)[45] or that the language must be so interpreted as would involve the least alteration of the existing law ?[46]

Justice Holmes in his inimitable style summed up: [47] "I recognise without hesitation that judges do and must legislate, but they can do so only interstitially: they are confined from molar to molecular motions:" and the device of distinguishing, explaining or relegating a binding precedent to the category of an *obiter dictum* by ingenious over-refinement is the gentler and more respectable method of relieving a deserving suitor from the tyrannical shackles of the past.

The interpretative function of the judiciary enables it only to fill the legal *vacuum.* But the court does not assist a litigant who places complete reliance on the judgment of an inferior court. "In his case," Cardozo explains,[48] "the chance of miscalculation is felt to be a fair risk

42. Friedmann, *op. cit.*, p. 209.
43. *Trimble* v. *Hill* (1879) 5 App. Cas. 342; *Cooray* v. *R.* [1953] A.C. 407, 419.
44. *Piro* v. *W. Foster & Co. Ltd.* (1943) 68 C.L.R. 313, 320, *per* Latham C.J.; *Robins* v. *National Trust Co. Ltd.* [1927] A.C. 515, 519; *Oyekan* v. *Adele* [1957] 2 All E.R. 785, 789, *per* Lord Denning.
45. *Nadarajan Chettiar* v. *Walauwa Mahatmee* (1950) 66 T.L.R. (Pt. II) 15, 19, *per* Sir John Beaumont (P.C.).
46. *George Wimpey & Co. Ltd.* v. *B.O.A.C.* [1955] A.C. 169, 191, *per* Lord Reid.
47. *Southern Pacific Co.* v. *Jensen* (1917) 244 U.S. 205, 221; 61 L.Ed. 1086, 1100
48. *The Nature of the Judicial Process,* p. 148.

of the game of life, not different in degree from the risk of any other misconception of right or duty. He knows that he has taken a chance, which caution often might have avoided. The judgment of a court of final appeal is left to stand upon a different basis. I am not sure that any adequate distinction is to be drawn between a change of ruling in respect of the validity of a statute and a change of ruling in respect of the meaning or operation of a statute, or even in respect of the meaning or operation of a rule of common law." In so far as any particular legal controversy is concerned, only the highest court is the arbiter of a litigant's fate; when the Judicial Committee of the Privy Council reverses its own previous decision (as it sometimes does, which the House of Lords does not despite *dicta* to the contrary) intermediate transactions entered into on the faith of the previous decision suffer unexpected casualty.

Julius Stone remarks [49] that the separate opinions habitually given by the members of the House of Lords, whether concurring or dissenting, are all productive of numerous versions of the legal category under examination. "Even where," he says, "all the decisions concur for the instant facts, the differing versions are liable to be brought into bitter competition by the slightly different state of facts of a future case. It is essentially from this feature of House of Lords decisions that there derives its wide freedom of action, despite the rule that it is bound by its prior decisions. For since no sanctity attaches to one set of concurring reasons as against another, one may be preferred to another, or even used merely to neutralise it, leaving the field clear... The system of separate speeches merely sets this aspect into relief." The decisions of even the highest courts may hover on the fringe of uncertainty.

A change effected for the better by judge-made law by analogy or extension of a principle is sometimes frowned upon. Lord Macmillan narrates [50] that in *Donoghue* v. *Stevenson*[51] Lord Buckmaster "employed all his mastery of argument in a vigorous, almost violent, demolition of the appellant Mrs. Donoghue's contention which he declared to be insupportable by any common-law proposition" and appealed to those who differed from him "not to disturb with impious hands the settled law of the land" that a manufacturer is only liable to the ultimate consumer, in the absence of any contractual relations, where the article not in itself dangerous is in fact dangerous, by reason of some defect or for any other reason that is *known* to the manufacturer.

VII

A

The malleable language of the constitution of the United States of America, the supreme law of the land,[52] embodying ideological concepts

49. *The Province and Function of Law,* ch. VII, art. 19.
50. *A Man of Law's Tale,* p. 151.
51. [1932] A.C. 562.
52. *Marbury* v. *Madison* (1803) 1 Cranch 137, 2 L.Ed. 60.

in general terms, lends itself peculiarly to the application of socio-ethical philosophy to changing moral values and social needs and the plainest facts of contemporary national life. It "is a declaration of articles of faith, not a compilation of laws."[53] The interpretative function of the court has given rise to a wealth of decisions illustrating how inalienable rights are finally sustained even in the midst of strained and complex human relations.

Unwritten constitutions, long embodied in judicial legislation, recognise the supremacy of the legislature and basic rights may be stultified, in the interests of the state, either by legislative interference or the gradual imperceptible limitations imposed by judicial precedents on a prior doctrine "more embracing in its scope, intrinsically sounder, and verified by experience."

Amendment of constitutional provisions, unlike ordinary legislative measures, is an extremely difficult task[54] (see article 159 of the Federation of Malaya constitution): hence they are expressed in terms of principles capable of wider creativeness of the judicial process. This led Friedmann to conclude:[55] "...recent decisions [in the U.S.A.] abound in which legislative purposes, the history of a statute, or considerations of fairness and justice have completely overshadowed grammatical or literal interpretation." This attitude results in "the exaltation of the present," which denies sacrosanctity to prior decision and the continual process of remoulding and reshaping the law goes on at the sacrifice of certainty.

Cooley quotes[56] the reasoning of Parker Ch.J. in *Henshaw* v. *Foster*[57] why such a method of interpretation is resorted to: "We are to suppose that the authors of such an instrument had a thorough knowledge of the force and extent of the words they employ; that they had a beneficial end and purpose in view; and that, more especially in any apparent restriction upon the mode of exercising the right, ...there was some existing or *anticipated evil* which it was their purpose to avoid. If an enlarged sense of any particular form of expression should be necessary to accomplish so great an object as a convenient exercise of the fundamental privilege or right, ...such sense must be attributed. We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of the rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies, so that words competent to the *then* existing state of the community, and at the same time

53. Douglas J., *From Marshall to Mukherjea,* (Tagore Law Lectures, 1955), p. 332, (an indispensable guide to a comparative study of American and Indian constitutional law).

54. See *Smith* v. *Allwright* (1944) 321 U.S. 649, 665, 88 L.Ed. 987.

55. *Legal Theory,* 3rd ed., p. 316.

56. *Constitution Limitation,* 6th ed., p. 101, n.(1).

57. 9 Pick. 312, 316.

capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and *the true principles of the compact,* they can be extended to other relations and circumstances which an improved state of society may produce. *Qui haeret in litera haeret in cortice* is a familiar maxim of law. The letter killeth but the spirit maketh alive, is the more forcible expression of Scripture."

Justice Story, in *Martin* v. *Hunter's Lessee,*[58] expressed the same view that the constitution was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself.

In Malaya, the States and Settlements entered into the Federation upon certain conditions which formed the very foundation upon which the whole structure was erected: [59] the entrenched provisions embody the "principles of compact."

There is less flexibility in the language of Dominion constitutions like those of Canada and Australia: only on rare occasions have judicial precedents been overruled to meet new situations as they arise. The judgment of Lord Wright in *James* v. *Commonwealth of Australia*[60] — "It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning, can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning," — must be read subject to limitations stated by Viscount Simon in *A.-G. for Ontario v. Canada Temperance Federation:* [61] "But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by Governments and subject;" on occasions the Board has dissociated itself from views expressed in an earlier decision without expressly overruling it. [62]

58. (1816) 1 Wheat. 304, 4 L.Ed. 97, 103.
59. *Re The Regulation and Control of Aeronautics in Canada* [1932] A.C. 54, 70, *per* Lord Sankey.
60. [1936] A.C. 578, 614.
61. [1946] A.C. 193, 206.
62. *Proprietary Articles Trade Association* v. *A.-G.*, for Canada [1931] A.C. 310, 326, per Lord Atkin.

B

Chief Justice Vinson in *Dennis* v. *United States*[63] deprecated any attempt to crystallize a shorthand phrase into a rigid rule to be applied inflexibly without regard to the circumstances of the case.

This attitude of the courts in the U.S.A. has had its repercussions on the doctrine of judicial precedents and *stare decisis.* The Supreme Court and the highest courts of several states have overruled their own prior decisions if erroneous. Justice Douglas[64] explained that "In nations like America and India that have written constitutions the judiciary must do more than dispense justice in cases and controversies because judges are on oath to support and defend the constitution, not the gloss which his predecessors may have put on it: he must formulate his own views and he cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him."

Cardozo[65] in a famous passage defends the stand taken by the Supreme Court of the U.S.A. that the bounds of right and wrong are less preordained and constant: "I know he is a wise pharmacist who from a recipe so general can compound a fitting remedy... I have grown to see that the process in its highest reaches is not discovery, but *creation;* and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, and the pangs of death and the pangs of birth, in which principles that have served the day expire, and new principles are born... The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements... I do not mean to suggest that the product...does not betray the flaws inherent in its origin. The flaws are there as in every human institution. *Because they are not only there but visible, we have faith they will be corrected.* There is no assurance that the rule of the majority will be the expression of perfect reason when embodied in constitution or in statute. We ought not to expect more of it when embodied in the judgments of the court. The tide rises and falls but the sands of error crumble."

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right: it tends to consistency and uniformity of decision: but "the Court bows to the lessons of experience and the force of better

63. (1950) 341 U.S. 494, 508, 95 L.Ed. 1137, 1152.

64. *Op. cit.*, p. 332; *Helvering* v. *Hallock* (1939) 309 U.S. 106, 84 L.Ed. 604.

65. *The Nature of the Judicial Process,* pp. 161 *ff*,

reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function:" but it is not like the rule of *res judicata,* a universal, inexorable command: however appropriate and even necessary at time, it has only a limited application in the field of constitutional law: whether a former decision is to be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.[66] It would be incorrect to say that the common law system has ever recognised all these principles except to a very limited extent in the interpretation of constitutional provisions.

The Supreme Court of India in *Shrinivas* v. *The Sholapur Spinning & Weaving Co. Ltd.*[67] overruled *Charanjit Lal Chowdhury* v. *The Union of India.*[68] Das J. said: " Accepting that the Supreme Court is not bound by its own decisions and may reverse a previous decision especially on constitutional questions, the court will surely be slow to do so unless such previous decision appears to be obviously erroneous."

In Australia, though the High Court normally follows the rule of *stare decisis,* it is not bound by its previous decision but will only review it when that decision is manifestly wrong: [69] such power is not limited to the exceptions set out by Lord Greene M.R. in *Young* v. *Bristol Aeroplane Co. Ltd,*[70] hitherto followed in Malaya.[71]

So long as the Federation Supreme Court is an inferior court to the Privy Council, it is understandable that it will follow Privy Council decisions in all cases, constitutional or non-constitutional. The effect of fundamental rights under the Indian constitution on misuse of legislative power and executive excesses has not been pronounced upon by the Board since the right of appeal to the Privy Council was abolished. The Board has so far dealt with legislative encroachments by the federal and provincial and state legislatures under the Canadian and Australian constitutions.

C

The interpretation put on the Fourteenth Amendment — " nor shall any state...deny to any person within its jurisdiction the equal protection of the laws" — in the gradual course of exposition, shows how the enlightened views of modern judges control state policies and state legislation, which are designed directly or indirectly in their operation, to discriminate between negroes and whites to secure equality.

66. *Burnet* v. *Coronado Oil & Gas Co.* (1932) 285 U.S. 393, 405 *ff, per* Brandeis J., 76 L.Ed. 815; *Hertz* v. *Woodman* (1910) 218 U.S. 205, 212, 54 L.Ed. 1001, 1005; *Helvering* v. *Hallock* (1939) 309 U.S. 106, 84, L.Ed. 604.
67. A.I.R. 1954 S.C. 119, 121.
68. A.I.R. 1951 S.C. 41.
69. *The Tramways Case (No. 1)* (1914) 18 C.L.R. 54.
70. [1944] K. B. 718.
71. *Mesenor* v. *Che Teh* (1953) 2 M.C. 208 (C.A.)

The guarantee of equal protection of the laws had a clear origin in the concern over racial discrimination. The Fourteenth Amendment was introduced into the constitution as the result of *Dred Scott v. Sandford*[72] which denied rights of citizenship to the negro.

Where in pursuance of a state policy, a Chinese laundryman long in the business was denied a licence to conduct a laundry business, because of his race, although the state legislation was *prima facie* applicable to all, the Supreme Court said: "though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." [73]

In interpreting the British North America Act, 1867, the Board decided that the courts are not concerned with the policy of the legislature but with its constitutional validity: [74] if the legislative power is abused the only remedy is an appeal to the electorate[75] but a restriction of legislative power cannot be evaded by a colourable device.[76] No legislation has been declared invalid on the ground that for political, racial or other reasons it is being put to improper use: a party aggrieved has his remedy in *certiorari* and *quo warranto.*

Grovey v. *Townsend*,[77] which decided that exclusion of negroes from participation in primary elections held under state direction and control, is not state action in violation of the Fourteenth and Fifteenth Amendments to the Federal Constitution where such refusal was in virtue of a resolution of a state party convention limiting to white persons membership in the party and the right to participate in its deliberations, was overruled by *Smith* v. *Allwright.*[78]

In *Plessey* v. *Ferguson,* [79] the Supreme Court by a majority relied on the *police power of* the state to prevent racial clash and decided that a state statute providing for separate railway carriages for the white

72. (1856) 19 How. 610, 15 L.Ed. 691.
73. *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356, 373-74, 30 L.Ed. 220. Likewise in India: *Madras* v. *Champakam*, A.I.R. 1951 S.C. 226; *Venkataramana* v. *Madras,* A.I.R. 1951 S.C. 229. In the former case admission of a brahmin student was refused on the ground that the brahmin quota was filled; in the latter provincial legislation which discriminated between castes in the selection of persons for judicial service was declared unconstitutional.
74. *Union Colliery Co. of British Columbia* v. *Bryden* [1899] A.C. 580, 585.
75. *A.-G. for Canada* v. *A.-G. for Ontario* [1898] A.C. 700, 713.
76. *Madden* v. *Nelson and Fort Sheppard Railway Co.* [1899] A.C. 626, 627-8; *Ladore* v. *Bennett* [1939] A.C. 468, 482, *per* Lord Atkin.
77. (1936) 295 U.S. 45, 79 L.Ed. 1292.
78. (1944) 321 U.S. 649, 88 L.Ed. 987.
79. (1896) 163 U.S. 537, 41 L.Ed. 256.

and the coloured races by railway companies carrying passengers in their coaches in the state, and the assignment of passengers to coaches according to their race by conductors does not deprive a coloured person of any rights under the Fourteenth Amendment of the federal constitution: the object of the amendment, in the nature of things, could not have been to abolish distinctions based upon colour, *or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.*

From this was evolved the doctrine of "separate" but "substantially equal" rights to public education and so long as separate schools were maintained and adequate educational facilities provided, the negroes, it was said, enjoyed "equal protection of the laws"[80] as distinct from " protection of equal laws."

In *Missouri ex rel Gaines* v. *S.W. Canada,*[81] the doctrine was extended to the extent that a negro student was entitled to "separate" but "substantially equal" facilities for education *within* the state in which he resided.

In *Sweatt* v. *Painter,*[82] the test of substantial equality in the educational opportunities offered white and negro law students within the same state was applied. It was found that the University of Texas law school, which refused the admission of a negro student, and the negro law school, established pending appeal, were on an unequal footing: for the former was superior "in terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review, and similar activities" and other intangible factors such as "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." "Substantial equality" came to embrace both tangible and intangible advantages in comparable educational institutions.

Once he is admitted to the school he cannot be segregated in the classroom or in the library or in the cafeteria: *McLaurin* v. *Oklahoma State Regents.* [83] An earlier decision, *Sipuel* v. *University of Oklahoma,*[84] held that a state-maintained law school for white students must provide legal education for a negro applicant, and to do so as it does for applicants for any other group: racial segregation in the classroom did not come up for consideration.

80. Willoughby, *Constitution of the United States,* vol. 3, ss. 1267 *ff.*
81. (1938) 305 U.S. 377, 83 L.Ed. 208.
82. (1950) 339 U.S. 629, 94 L.Ed. 1114.
83. (1950) 339 U.S. 637, 94 L.Ed. 1149.
84. (1948) 332 U.S. 631, 92 L.Ed. 247.

It was in 1954 that a little negro girl Linda Brown made legal history. There were altogether four cases involved in which the facts are indistinguishable. In *Olive Brown v. Board of Education of Topeka,* [85] these negro children were denied admission to state public schools attended by white children under state laws requiring or permitting segregation according to race. There were findings below that the negro and white schools involved had been equalized, or were being equalised, with respect to buildings, curricula, qualifications and salaries of teachers and other tangible factors. Such state legislation was held to be unconstitutional for "segregation with the sanction of the law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system" and in so far as *Plessey* v. *Ferguson*[86] formed the main support for the contrary view it was entirely rejected. Chief Justice Earl Warren said : "In approaching this problem we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted or even to 1896 when *Plessey v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the nation." Thus "equal protection of the laws," certainly in the political field and in many other aspects, has now come to mean "protection of equal laws," and the dissentient opinion of Justice Harlan in 1896 in *Plessey* v. *Ferguson* was vindicated. Nearly six decades passed before the original error was rectified: judicial precedent did not preclude a re-examination of a narrow and erroneous interpretation based on police power of the state, which in its turn is equally subject to the 'due process' limitation.

VIII

A

The "due process clause" in the U.S.A. covers a very wide range of judicial activity. As used in the Fifth and Fourteenth Amendments (applicable respectively to the Congress and the States) it is "a source of reserved power for the judiciary which can be called upon to restrain the legislative and executive branches when they go beyond the limits... But the judiciary to-day, however, is the first to recognise that the due process clauses should not be used to substitute its judgment on policy for that of the other two branches of the government." [87]

Its ancestry can be traced back to *per legem terrae* in the Magna Carta, *par due proces de lei* used in Stat. 28 Edw. 3, c.3 (1355) and 'without due process of law' as defined by Coke in his Second Institute.[88]

85. (1954) 347 U.S. 483, 98 L.Ed. 873.
86. (1896) 163 U.S. 537, 41 L.Ed. 256.
87. Mr. Justice Douglas, *From Marshall to Mukherjea,* p. 224-5 (T.L.L. 1955: Studies in American and Indian Constitutional Law).
88. Willoughby, *Constitution of the United States,* vol. 3, ch. XCI.

The primary object of the U.S.A. constitution and the Amendments was to carry out the directive under the Virginia Declaration of Rights of June 12, 1776: that object was attained in two stages. Courts could declare impugned legislation, which conflicts with the written constitution, invalid and render void any executive action thereunder, as in the Federation of Malaya. Secondly, the due process clause relates to substantive as well as procedural rights, that is, reasonable law and reasonable procedure (the reasonableness of which is adjudged by the court). The latter doctrine was not definitely accepted until 1897 though from 1854 onwards there were *dicta* supporting that view. Only two clauses in the Federation constitution, referred to later, can be said to confer similar powers on the Supreme Court. Principles of natural justice, in determining reasonableness of legislation and procedural rights, play a much more important role in the U.S.A. than in the three Commonwealth countries with written constitutions guaranteeing fundamental rights — India, Pakistan and the Federation. The application of the principles of natural law or reliance on natural rights to invalidate legislation has never been accepted.

The "due process clause" is not incorporated either in the Indian or the Federation constitution : in the former "except according to procedure established by law" and "save by the authority of law" and in the latter "save in accordance with law" are used. So long as procedural rights — the manner and form of enforcing the law — are kept within the framework of permissible legislation, they cannot be declared invalid on the ground of unreasonableness.[89] Nevertheless express prohibitions and prohibition by implication in the constitution equally invalidate legislation, for "no distinction can be drawn between a prohibition in so many words and a prohibition clearly implied:" *Tinsa Maw Naing* v. *The Commissioner of Police, Rangoon and anor.*[90]

And yet the "due process clause" with all its implications must be recognised in the interpretation of articles 8(2) and 13 of the Federation constitution: the court has the right to determine whether in regulating rights conferred by these articles, the regulations are reasonable and require some minimal procedural safeguards.[91] Article 8(2) guarantees the right to acquire or hold any property or carry on any trade, profession, vocation and employment: article 13 forbids expropriation or acquisition of any property without adequate compensation, that is, a fair market value at the date of acquisition which a willing purchaser would pay to a willing vendor. In respect of the latter the powers of the Federation Supreme Court are more extensive than those in India today (ever since article 31 was amended in 1955 to abolish the Zemindary

89. *Gopalan* v. *State of Madras,* A.I.R. 1950 S.C. 27.

90. (1950) Bur. L.R. (S.C.) 1, 28.

91. Justice Douglas, *op. cit.*, p. 225.

system and make land available to the *ryots*[92]) for the rate of compensation cannot be fixed by legislation.[93] In stray instances the test of reasonableness has also been applied in India upon principles of natural justice: *Krishnappa* v. *Bangalore City Co-operative Bank Ltd.*[94] and *Harla* v. *The State of Rajasthan.*[95]

In criminal trials only some of the vital principles of due process are preserved — the right to consult and be defended by a legal practitioner of his own choice, the right to be informed of the nature and cause of the accusation upon arrest, the rule of double jeopardy and invalidity of retrospective criminal law. Paradoxical as it may seem, other fundamental rights of a person to life or personal liberty are subject to the vagaries of legislation.

In India article 20(3) (unlike in the Federation) specifically provides, "No person accused of any offence shall be compelled to be a witness against himself," a principle established by the common law long before *Wilkes* v. *Wood,*[96] which, by and large, finds statutory recognition in the Federation. "To be a witness" is an expression of wide import[97] though, having regard to other legislative provisions to which it is subject, not so comprehensive as the rule against testimonial compulsion in the U.S.A.

The constitution of the Federation seems to visualise a concept intermediate between the "rule of law" and "due process of law." The unorthodox use of the "due process clause" becomes unavoidable in any attempt to deal with the subject on a comparative basis in the context of a written constitution which possesses at least some of its characteristics.

B

Bearing this distinction in mind, the problem must be faced whether guaranteed rights require a re-assessment or different interpretation of existing legislation in the broad spirit of the constitution.

Nowhere does the U.S.A. constitution in terms provide for inadmissibility of relevant evidence procured by violation of constitutional provisions. And yet admissibility is denied in the interest of fundamental liberties: to quote Lord Shaw of Dunfermline in *Scott* v. *Scott,*[98] "to remit the maintenance of constitutional rights to the region of judicial

92. The effect of article 31A was considered in *Raja Bhairabendra Narayan Bhup v. The State of Assam* (1956) S.C.R. 303.
93. *Chicago, Burlington and Quincy Railroad Co.* v. *Chicago* (1897) 166 U.S. 226, 41 L.Ed. 979.
94. A.I.R. 1954 Mysore 59.
95. A.I.R. 1951 S.C. 467.
96. (1763) 19 St. Tr. 1153, 1162.
97. *Sharma* v. *Satish* (1954) S.C.R. 1077, 1087.
98. [1913] A.C. 417, 477.

discretion is to shift the foundation of freedom from the rock to the sand." In the U.S.A. this right to reject relevant evidence has been applied to disobedience of mandatory provisions as violative of the due process clause.

Does disobedience of an express or implied prohibition under valid legislation equally remit an action to the category of an infringement of a fundamental right ? Is such action "in accordance with law" as envisaged by article 5(1)? In principle is there any insuperable difficulty in applying the rule in *Smurthwaite* v. *Hannay* [99] that "if unwarranted by any enactment or rule, it is...much more than an irregularity?"

That liberty is the rule and restraint the exception is inherent in every democracy. The right of a police officer to search and seize incriminating material evidence is meticulously laid down in the Criminal Procedure Code. Outside the ambit of those powers the right of a police officer, in common with others, cannot legitimately be expected to exceed "the right of every person to swing his fist, [which] must at least stop short where another person's nose begins." [1]

The divergence of opinion between the U.S.A. and England cannot solely be attributed to "certain articles of the U.S.A. constitution:" the differing rules of public policy adopted by the courts appear to be the dominating factor. The choice lies between two evils both of which cannot be avoided. Does public policy require that government officers must not resort to illegal methods "under colour of their office" and evidence discovered by illegal means, subversive of human liberty, treated as wholly inadmissible?[2] Indeed, such a view is no more destructive of the police power of the state than proof beyond reasonable doubt or the confession rule. The dissentient judgment of Holmes J. (with whom Brandeis J. concurred) in *Olmstead* v. *United States* [3] presents one side of the picture: "...it also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crimes I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits." On the other hand, is unlawful conduct of public officers to be excused by the fruitful result of illegal activity in the interest of public security?[4] This presents the other side of the shield where the interest of society is viewed in the mass and not in

99. [1894] A.C. 494, 501, *per* Lord Herschell.

1. Corwin, *The Constitution and What It Means Today,* 10th ed., pp. 168-9.
2. *Weeks* v. *United States* (1914) 232 U.S. 383, 393, 58 L.Ed. 652; *Silverthorne Lumber Co.* v. *United States* (1920) 251 U.S. 385, 64 L.Ed. 319.
3. (1928) 277 U.S. 438, 470, 72, L.Ed. 944.
4. *Pringle* v. *Bremer & Sterling* (1867) 5 Macph. (H.L.) 55, 60; *Elias* v. *Pasmore* [1934] 2 K.B. 164, 173; *Dillon* v. *O'Brien and Davis* (1887) 16 Cox C.C. 245.

relation to each component unit. It is evident that the Scottish courts have of late radically departed from the earlier doctrine laid down in *Pringle's* case by the House of Lords.[5] Certainty is not achieved by delegating to the trial judge an absolute discretion, subject to no judicial review, nor is the cause of liberty promoted.

It may be worthwhile recalling what Viscount Birkenhead L.C. said in *Rutherford* v. *Richardson*[6] (a divorce action): "The issues pronounced upon by Court in criminal, and, indeed civil matters are attended with such decisive consequences that the adoption in matters of evidence of a *standard of* admissibility which is so cautious as to be meticulous may not only be defended but is, in fact, essential." To achieve an acceptable standard, discretionary power has been exercised by the courts to reject evidence of a prejudicial nature having regard to its slight evidential value: [7] the logical and philosophic basis of relevancy as the true test of admissibility has long been questioned and there are many other instances of exclusion of facts logically relevant and apparently unobjectable traceable both to judicial decisions and legislative provisions.

In England the confession rule has not remained static for in a recent decision, *R.* v. *Barker,*[8] the Court of Criminal Appeal held that if books and documents are disclosed by the accused on an inducement conditional upon such disclosure they cannot be put in evidence. "These documents stand on precisely the same footing as an oral or a written confession which is brought into existence as the result of such a promise, inducement or threat."

Is evidence discovered by use of violence to compel submission still admissible under the common law? In *Rochin* v. *California,*[9] evidence of trafficking in drugs obtained by stomach pumping to discover narcotic capsules swallowed by the accused was held inadmissible in the U.S.A.: the same result would follow in Scotland.[10] In Canada, evidence of analysis of the blood of an accused taken at the relevant time to prove intoxication was held admissible even though it was obtained by a person in authority and without his consent or without a warning being given. [11] Search of the person, incidental to lawful arrest, has never been questioned. What is therefore significant in *R.* v. *Brezack*[12] is the toleration by the court of use of excessive force in effecting arrest and search even though no incriminating evidence is found. The essential

5. See ch. IX, section B, *post.*
6. [1923] A.C. 1, 5.
7. *R.* v. *Cole* (1941) 28 Cr. App. Rep. 43, 51; *R.* v. *Christie* [1914] A.C. 545, 559, *per* Lord Moulton.
8. [1941] 2 K.B. 381, 385.
9. (1952) 342 U.S. 165, 96 L.Ed. 183.
10. *McGovern* v. *H.M. Advocate,* 1950 S.L.T. 133.
11. *R.* v. *McIntyre* (1951) 2 W.W.R. (N.S.) 552; *cf. Imre* v. *Mitchell,* 1959 S.L.T. 13.
12. [1950] 2 D.L.R. 265.

facts can be stated within a short compass. The accused was lawfully arrested on suspicion of peddling in drugs. During the struggle that ensued when one of the police officers at last succeeded in searching the interior of his mouth and failed to discover any narcotic capsules, the accused bit his fingers. In dismissing the appeal against conviction and sentence on a charge of assaulting and obstructing a police officer in the lawful execution of duty, Robertson C.J.O. said: "...while, therefore, it is important that constables should be instructed that there are limits upon their right of search, including search of the person, they are not to be encumbered by *technicalities* in handling the situation with which they often have to deal in narcotic cases, which permit them little time for deliberation and require the stern exercise of such rights of search as they possess."

In the U.S.A. searches and seizures are only permissible when made under a valid search warrant, as they are unconstitutional, because unreasonable when made without them, whether entrance to a house or office be obtained by stealth or in the guise of a business call or under a false claim of possession of search warrant and whether the owner be present or not at the time of the entry.[13]

The Fourth and Fifth Amendments embody the common law rule and clothe them with the dignity of a fundamental law.[14] The Fourth Amendment (as to unreasonable searches and seizures),[15] enacted to carry out the directive laid down in section 10 of the Bill of Rights, derives its source from *Entick* v. *Carrington,*[16] where Lord Camden held that general search warrants were illegal. Such warrants give the King's messengers a discretionary power to arrest or search wherever their suspicion might chance to fall.[17] Lord Camden said, *inter alia*: "What would the parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority...? That would be, not judgment but legislation... Lastly it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process... In the criminal law such a proceeding was never heard of...But our law has provided no paper-search in these cases to help forward the conviction." These remarks may still be logically applicable where legislation provides no specific authority to search without warrant. Inadmissibility of evidence procured by illegal search was incidentally raised by counsel in *Leach v.*

13. *Gouled* v. *United States* (1921) 255 U.S. 298, 65 L.Ed. 647; *Flint* v. *Stone Tracy Co.* (1911) 220 U.S. 107, 55 L.Ed. 389; *Go-Bart Importing Co.* v. *United States* (1931) 282 U.S. 344, 75 L.Ed. 374.
14. *Boyd* v. *United States* (1886) 116 U.S. 616, 29 L.Ed. 746; *Amos* v. *United States* (1921) 255 U.S. 313, 65 L.Ed. 654; *Weeks v. United States, supra.*
15. Willoughby, *op. cit.*, vol. 2, article 720, and cases cited therein.
16. (1765) 19 St. Tr. 1030.
17. *Wilkes* v. *Wood* (1765) 19 St. Tr. 1154, 1167.

Three of the King's Messengers[18] but was not decided. Search without a regular warrant, required by law, must necessarily be "unreasonable." The Fifth and Fourteenth Amendments, *inter alia,* adopt the common law rule of *"nemo tenetur seipsum accusare." "A* moment's thought will show that a perfectly innocent person may expose himself to accusation and even condemnation, by being compelled to disclose facts and circumstances known only to himself but which, when once disclosed, he may be entirely unable to explain as consistent with innocence:" *Brown v. Walker.*[19] The principle against self-incrimination originated in a protest against the exercise of arbitrary power. The difference in outlook appears to have been accentuated by later decisions under the common law since *Entick* v. *Carrington* and the principle hitherto applicable to civil cases has been applied to criminal cases by logical extension or on analogy. Wright J.'s observations in *R.* v. *Lushington, Ex parte Otto*[20] indicate that a search *ab initio* illegal cannot be retrospectively validated by its fruitful result. The end does not justify the means. He held "It is undoubted law that it is...the duty of constables to retain for use in Court things which may be evidence of crime and *which have come into the possession of the constables without wrong on their part."* Horridge J. in *Elias* v. *Pasmore*[21] did not deal with the judgment beyond stating that the criminal trials had already been concluded before the civil action tried by him was heard.

Most of the earlier decisions deal with admissibility of evidence illegally obtained from third parties. In *Jordan* v. *Lewis,*[22] an action for damages for malicious prosecution, the plaintiff was allowed to tender in evidence copies of the indictment against him and an order of acquittal obtained without the authority of the court. The Chief Justice, however, was careful to point out that if the defendant had applied sooner, when the action was first brought, the court would have *"staid proceedings."*

The wide observations made by Crompton J. in *R.* v. *Leatham*[23] during counsel's argument, "It matters not how you get it: if you steal it even, it would be admissible," it is respectfully submitted, were *obiter.* The charge against Leatham, a candidate at the Wakefield parliamentary election in May 1859, was under the Corrupt Practices Act, it being alleged that he himself bribed and paid money to his agents to bribe voters. The admissibility of a letter written by him to Wainwright, one of his election agents, before the commission of enquiry was appointed, and which showed his complicity, and was forwarded to the commission by Wainwright at the request of the Commissioner during

18. (1765) 19 St. Tr. 1002, 1010.
19. 161 U.S. 591, 628, 40 L.Ed. 819, 837.
20. [1894] 1 Q.B. 420, 423.
21. [1934] 2 K.B. 164, 174.
22. (1728) 14 East 306 (*n*), 104 E.R. 618 (*n*).
23. (1861) 8 Cox C.C. 489, 501.

the enquiry, was objected to at the hearing of the criminal trial: the existence of the letter had been disclosed by Leatham before the commission : reliance was placed on a statutory provision, "No statement made by a person in answer to any question put by a commission shall, except in cases of indictment for perjury committed in such answers, be admissible in any proceedings, civil or criminal." That submission was overruled for the letter was a voluntary statement made to and produced by a third party: it had an independent prior existence, and which, when proved, would be a speaking fact against him: he never made the statement to the commission: that "statement" within the meaning of the section meant an oral statement and did not extend to documents, papers and writings.

The evidential user of incriminating things discovered by methods which bear the impress of fraud, improper inducement, violence to compel submission or illegality has been the subject of grave discussion during recent years. The careful analysis made by Cowen and Carter in "The Admissibility of Evidence Procured Through Illegal Searches and Seizures" [24] and by Dean R.W. Baker in "Confessions and Improperly Obtained Evidence" [25] makes it totally unnecessary to refer to any other decisions except those in India both before and after the constitution came into force. They are of the opinion that the discretionary power of the court to exclude evidence obtained by unfair trick ought to be logically applicable to evidence obtained by illegal search: "...the exclusion of confession is based upon a policy of restraining improper method of criminal investigation and not because the confession is likely to be untrue."

It is clear that when a person is illegally arrested and brought before a competent court for trial, the court still retains jurisdiction to try him and that irrespective of the fact that the prisoner was illegally and forcibly arrested [26] in a foreign territory: [27] it was so held earlier in *E.* v. *Savarkar,* [28] which distinguished *Muhammad Yusuf ud-din* v. *Q.-E.,* [29] where the Board set aside the warrant of arrest and the proceedings thereon against a Hyderabad subject who was arrested at a station on a railway line at Hyderabad over which the Queen-Empress had no general criminal jurisdiction.

24. *Essays on the Law of Evidence,* pp. 72-105.
25. (1956-57) 30 *Australian Law Journal* 59.
26. *Emp.* v. *Ravalu Kesigadu* (1903) 26 Mad. 124.
27. *Per* Lord Macmillan in *Parbhu* v. *Emp.,* A.I.R. 1944 P.C. 73, quoting with approval *Ex parte Susannah Scott* (1829) 9 B. & C. 446, 109 E.R. 166, and Lord Cockburn's charge to the jury in *R.* v. *Nelson and Brand.*
28. (1911) 35 Bom. 225.
29. (1897) L.R. 24 I.A. 137.

But that is a problem entirely different from admissibility of improper evidence as the foundation of or lending a superadded strength to criminal liability:[30] exclusion of such evidence may lead to acquittal for lack of proof or illegality in search and seizure may vitiate the proceedings, in which case the question of admissibility is of no practical importance.

Courts in the Federation of Malaya have hitherto followed the common law rule and Indian decisions [31] and are now absolutely bound by the Board's decision in *Kuruma's* case (which was an appeal from East Africa). It is most unlikely, although the rules of evidence and criminal procedure are governed by statutes, that the Board will take a different view in construing section 422 of the Federation of Malaya Criminal Procedure Code or the effect, if any, of article 5(1) on that section and the provisions relating to search and seizure.

C

It is sufficient to note the movement in India since the new constitution and the abolition of the right of appeal to the Privy Council in 1950, the courts being no longer bound by decisions of the Privy Council.[32] So far, it would appear, only section 27 of the Evidence Act has received a restricted interpretation and section 94 of the Criminal Procedure Code[33] been declared unconstitutional. From the trend of judicial opinion it is apparent that on both questions — as to the admissibility of relevant material evidence improperly obtained and the application of the omnibus curative provision as to irregularity in the mode of police investigation, except where it is shewn that a miscarriage of justice has occurred — the traditional view will prevail. There is, however, some indication that, where the method adopted in a police investigation to collect evidence is tainted with illegality, the court has jurisdiction to pass "appropriate orders" in the interest of justice before the commencement or conclusion of the trial "to obviate the prejudice that may have been caused" or, as the Privy Council has declared, that the trial judge may have a discretion not "to overlook the irregularity." In other respects the Indian constitution has had no other appreciable effect on the rules of evidence and criminal procedure.

Section 27 of the Evidence Act, which provides, "when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether such information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved," has not fully survived the assault made by article 20 (3). It was held in

30. *Kuruma* v. *R.* [1955] A.C. 197.
31. *Saminathan* v. *P.P.* (1937) 6 M.L.J. 39: *Wong Lian Nguk* v. *P.P.* (1953) 19 M.L.J. 246.
32. *State of Bihar* v. *Abdul Majid* (1954) S.C.R. 786, 795-6.
33. S. 51 of the F.M.S. and s. 57 of the Singapore Criminal Procedure Codes.

Re Madagula[34] that the discovery of material evidence to be admissible, must be on information voluntarily supplied to the police by an accused and not as a result of information extracted from him under compulsion, thus bringing the law in line with *R.* v. *Barker, supra,* for only in that way can the guarantee against testimonial compulsion be reconciled with section 27. On the other hand, a permissible interpretation of "information" having regard to article 5(1) may limit its operation to voluntary and volunteered information given to any person, if section 27, which is inartistically worded,[35] is not regarded as a proviso to section 26 and cutting down the operation of sections 24 and 25. "Information" had hitherto been construed *sub silentio* as extending to any information which leads to discovery.

The Supreme Court in India has held that the provisions for search and seizure do not offend article 19(1)(*f*) or 20(3) of the constitution though there is an element of compulsion implicit in the process. Nevertheless article 20(3) extends to any compulsive process for production by an accused person of evidentiary documents which are reasonably likely to support a prosecution against him. "Indeed," said Jagannath Das J. in *Sharma* v. *Satish,*[36] "every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person as opposed to the negative attitude of silence or submission on his part." In the result section 94 of the Criminal Procedure Code has been held to be unconstitutional.

The issue of a search warrant by a magistrate for the search of a man's house and the production of all papers and books in it for the purpose of an enquiry as to whether he had used or sold articles with a counterfeit trade mark, in the absence of some information or evidence prior to the issue of the warrant that the documents are believed to exist and are desirable or necessary for the purposes of inquiry before him, has been quashed and all articles seized and brought to the court ordered to be returned. It was so held in *V.S.M. Moideen Brothers* v. *Eng Thaung & Co.,*[37] which stigmatised a search warrant, intended for fishing-of evidence, as a gross perversion of the law, *ultra vires* and improper exercise of judicial discretion. The same principle was applied in *T.R. Pratt* v. *Emp.*[38]

The *Moideen Brothers* case was distinguished in *M.I. Mamsa* v. *Emp:*[39] while holding that the search warrant had been illegally issued,

34. A.I.R. 1957 Andh. Pra. 611. In Malaya the trend in judicial opinion to limit. the application of s.27 can be detected: *Hamiron bin Mat Udin* v. *P.P.* (1947) 14 M.L.J. 50 (C.A.).
35. *Pulukuri Kottaya,* A.I.R. 1947 P.C. 67.
36. (1954) S.C.R. 1077; and see *Re Madagula, supra.*
37. (1916) 17 Cr. L.J. 543 (Lower Burma).
38. (1926) 47 Cal. 597.
39. (1937) 38 Cr. L.J. 983 (Rangoon).

if the search revealed documents or things incriminating the accused in whose possession they are found, they cannot be returned to him because the warrant was issued on a faulty basis. The only reason given by Spargo J. was: "...when things have been seized in virtue of a search warrant, they are to be regarded as in the same position as though they had been found on the person of the accused, when a search was made." No distinction was drawn between a valid and an illegal search warrant.

In *Malak Khan v. Emp.*[40] Lord Porter, after referring to section 165 of the Indian Criminal Procedure Code, meant to be used in cases where a search warrant would be made use of in the ordinary course, but lack of time renders it impolitic to use it, and to the right of a police officer, after recording in writing the grounds of his belief and specifying in such writing so far as possible the thing for which search is to be made, to search or cause search to be made for such thing in any place within the limit of his police station, said: "...if the section did apply, proof of the search might be inadmissible for other reasons," *i.e.* reasons other than the absence of two or more respectable inhabitants of the locality as provided in section 103(1) and (2).[41] It is at least permissible to read into these lines an implication that if reasons for the search are not recorded in writing by the police officer prior to the search, the evidence discovered thereby would be inadmissible. It has also been held that in a densely populated town like Rangoon, if search witnesses present at the search are not persons in the immediate vicinity but friends of the police officer engaged in the search called from a long distance, the provisions of section 103, intended to operate in favour of the accused, are contravened and conviction would be quashed on appeal.[42]

Possibly the earliest case which decided that evidence procured by illegal search is admissible is *Crown* v. *Nabu.*[43] In *Emp.* v. *Allahdad Khan*[44] no reasons were vouchsafed. The only observations made by Griffin and Chamier JJ. were: "whether the search was legal or not, we have, however, the evidence of the finding in the accused's house of a certain quantity of cocaine..." A catena of cases thereafter, *Emp.* v. *Sayeed Ahmed,*[45] *Emp.* v. *Kutru,*[46] *Emp.* v. *Abasbhai,*[47] *Rure Mal* v. *Emp.,*[48] *Legal Remembrancer* v. *Mamtaz Uddin Ahmed*[49] and others proceeded on the basis that illegal search and seizure like illegal arrest cannot oust the jurisdiction of the court to try an offender.

40. A.I.R. 1946 P.C. 16.
41. There is no corresponding provision in Malaya.
42. *Ma Htway* v. *K.-E.*, A.I.R. 1925 Rang. 205.
43. 11 Punj. Rec. Cri. 1906.
44. (1913) 35 All. 358.
45. *Ibid.*, p. 575.
46. (1925) 47 All. 575.
47. (1926) 27 Cr. L.J. 503.
48. (1930) 31 Cr. L.J. 35.
49. (1947) 1 Cal. 439.

Section 537 of the Criminal Procedure Code[50] was for the first time mentioned in *Rash Behari Lai Mondal* v. *K.-E.*[51] Stephen and Holmwood JJ., while holding that the warrant did not justify the seizure and retention of the papers that were seized, remarked *obiter*: "Further it does not seem possible to read section 537 as giving a legal effect to a defective warrant, as its highest effect is to validate a finding, sentence or order which is defective for an antecedent defect in procedure." Nothing was said there as to the effect of search without warrant where it is required by law.

The Privy Council has so far dealt with section 537 mainly in relation to violation of mandatory provisions under the criminal procedure. In *Nazir Ahmad* v. *K.-E.,*[52] where oral evidence of the magistrate relating to a judicial confession was admitted, the Board remarked that if oral evidence were allowed in such a case, "all the precautions and safeguard laid down by sections 164[53] and 364[54] would be of such trifling value as to be almost idle."

In *Zahiruddin* v. *K.-E.,*[55] the Board held that if a witness has before him and consults the statement made by him during investigation that renders his evidence *incompetent* because of the categorical prohibition for such use in section 162.[56] In the words of Lord Sumner in *Crane* v. *D.P.P.,*[57] the accused has been deprived of the protection given by essential steps in criminal procedure which has resulted in a miscarriage of justice. Some very pertinent observations were made by Lord Normand (at p. 87): "It follows that in the opinion of their Lordships the learned judges of the High Court erred in law when they treated Mr. Roy's evidence as admissible. Section 537 of the Code of Criminal Procedure, to which they made reference, requires a Court of Appeal, subject to the earlier provisions of the statute, to affirm an order of a Court of competent jurisdiction when there had been an irregularity in the proceedings unless the irregularity has in fact occasioned a failure of justice. *The section cannot apply to a case like the present, in which the Magistrate has refused to overlook the irregularity and has acquitted."* At the very least the trial judge appears to have a discretion to deny the effect of evidence obtained in contravention of express or implied statutory prohibitions enacted for the protection of the accused.

High Courts in India both before and after the constitution have held that (i) the absence of a search warrant, where it is required by law, is a mere irregularity not vitiating trial and (ii) relevant material

50. S. 422, F.M.S., s. 440, Singapore.
51. (1907-8) 12 C.W.N. 1075.
52. A.I.R. 1936 P.C. 253, 257.
53. S. 115, F.M.S., s. 123, Singapore.
54. There is no corresponding provision in Malaya.
55. (1946-47) 74 I.A. 80, 87.
56. S. 113, F.M.S., s. 121, Singapore.
57. [1921] 2 A.C. 299, 331.

evidence procured by such search is admissible. In *Barindra Kumar Ghose* v. *Emp*.,[58] apropos the latter rule, Jenkins C.J. commented: "As Jimutavahana with his shrewd common sense observes: — 'a fact cannot be altered by 100 texts,' and as his commentator quaintly remarks: — 'If a Brahmana be slain, the precept "slay not a Brahmana" does not annul the murder.'"

Not very many cases were decided after the constitution: reliance was mainly placed on the first rule to let in evidence: *P.K. Subbiah* v. *The State;*[59] *The State* v. *Nilam Das.*[60] These are decisions of single judges sitting on appeal.

Prior to the abolition of right of appeal, so far as the writer is aware, the Board, in dealing with various irregularities under the criminal procedure, had no occasion to consider the effect of section 537 on search instituted without a warrant, where it is required by law, though it condoned irregularity in the issue of a search warrant unless there had been a miscarriage of justice.[61] In *Lumbhardar Zutshi* v. *The King*[62] the Privy Council, while rejecting both submissions that sanction was necessary before a public servant could be prosecuted for an offence under section 161 of the Penal Code and that the magistrate was bound before making an order for the police to investigate a non-cognisable case to give the accused an opportunity for explanation, made the cryptic observation that had there been a fault in procedure, it "might have important consequences but it could not in their Lordships' judgment deprive the Chief Presidency Magistrate of his jurisdiction to try the appellants." What important consequences may flow from any irregularity were not further elaborated. In *H.N. Rishbud and Inder Singh* v. *The State of Delhi*[63] it was held that an investigation conducted by the police in violation of the specific provisions under the Prevention of Corruption Act, 1947-52, which are mandatory and not directory, is illegal but proceeded to observe: "If, therefore, cognisance is in fact taken on a police report vitiated by the breach of mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the legality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and jurisdiction of the Court for trial is well settled as appears from the cases in *Prabhu* v. *E.*[64] and *Lumbhardar Zutshi* v. *The King.*[65] These no doubt relate to the illegality of arrest

58. (1910) 37 Cal. 467, 500.
59. A.I.R. 1952 Trip. 1, (1952) 53 Cr. L.J. 1201.
60. A.I.R. 1952 Him. Pra. 74, (1952) 53 Cr. L.J. 2712.
61. *R.* v. *Nat Bells Liquor Ltd.* [1922] 2 A.C. 128, 165-6.
62. 77 I.A. 62, A.I.R. 1950 P.C. 26, 27.
63. (1955) S.C.R. 1150, 1163.
64. A.I.R. 1944 P.C. 73.
65. *Supra.*

in the course of investigation while we are concerned in the present case with the legality with reference to the machinery for collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the court. We are, therefore clearly, also, of the opinion that where the cognisance of the case has in fact been taken and *the case has proceeded to termination* invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

The later observations in the judgment are important, *"when the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage* but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under section 537 of the Code of Criminal Procedure of making out that such an order has in fact occasioned a failure of justice... To ignore the breach in such a situation when brought to the notice of the Court would be virtually to make a dead letter of the peremptory provision which has been enacted on grounds of public policy for the benefit of such an accused." The only alternative the court suggested is a re-investigation but nothing definite emerges from the judgment whether the fruits of prior illegality can form the basis of proof following a re-investigation. Would the accused be entitled, upon an application to the court before or pending trial, to the return of all papers, documents, books, etc. illegally seized as in *Weeks* v. *United States*? [66]

It is of interest to note that eminent judges, jurists, practising lawyers, teachers of law and politicians alike, *inter alia,* from Great Britain, Canada, Australia, India, Pakistan, Malaya, Burma and Ceylon, in associating themselves with *The Declaration of Delhi,* 1959, at the conference held under the aegis of the International Commission of Jurists, unanimously advocated a dynamic concept of the rule of law to provide procedural due process and safeguards whereby freedom of life and liberty can be given effect and protected. Clause VII of the Report of Committee III (*The Criminal Process and the Rule of Law*): "The search of the accused's premises without his consent should only be made under an order of an appropriate judicial authority. Evidence obtained in breach of any of these rights ought not to be admissible against the accused," shews that the existing law no longer fulfils its proper function in a changed society, when it denies to the individual the same safeguards as in the U.S.A. where — or so it appears — neither the Fourth Amendment nor the due process clauses in the Fifth and Fourteenth Amendments (which have suffered no change since 1791 and 1868) have endangered state security, public safety or the maintenance of law and order.

66. (1914) 232 U.S. 383, 58 L.Ed. 652.

IX

A

In Malaya illegal wire-tapping and sound recording have not yet been the subject of any controversy.[66a]

Evidence of direct telephone conversation and tape-recording (not involving an element of fraud) cannot obviously be objected to: the weight and credibility to be attached to such evidence of voice identification is a matter for the judge or the jury.

In *R.* v. *John James Louis and Arthur Hickman*[67] Darling J. observed: "both in civil and criminal cases voice recognition[68] in the dark is admissible in evidence and that as science improves and wrong-doers make use of scientific means, one may make use of any of the modern discoveries." In admitting tape-recordings the Court will naturally be guided by *Police* v. *Chappel*[69] and *Buxton* v. *Gumming*.[70] Since it is susceptible to interference and can be doctored,[71] any evidence throwing doubt on its reliability will naturally receive the serious attention of the court.

Subsequently to *Olmstead* v. *United States,*[72] article 605 of the Communication Act, 1934, was passed. It provided: "no person not being authorised by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person." It was held in *Nardone* v. *United States*[73] that evidence procured by a federal officer's tapping telephone wires and intercepting messages was inadmissible for "to recite the contents of the message is to divulge the message" contrary to the Act. Inadmissibility of surreptitious tape-recording and wire-tapping not only extends to intercepted conversation but also to evidence procured through the use of knowledge gained by such conversation.

In this instance, at any rate, though neither municipal legislation nor constitutional rights did in terms debar admissibility, the violation of the law, by itself, achieved the desired result to safeguard liberty. The principle in the U.S.A. would appear to be that whether the constitution is flouted or power under a competent legislative measure illegally exercised (and, therefore, not in accordance with the due process of law) the same consequences follow.

66a. See, now *P.P.* v. *Ng Yan Pee,* noted in (1959) 25 M.L.J. xv. (Ed.).
67. (1920) 84 J.P. 64.
68. *R. v. Keating* (1909) 2 Crim. App. Rep. 61.
69. (1956) 120 J.P.Jo. 493.
70. (1927) 71 *Sol. Jo.* 232.
71. See "Tape Recordings as Evidence" 1954 98 *Sol. Jo.* 794; "The Use and Abuse of Tape Recordings" (1958) 108 *LJ.* 503.
72. (1927) 277 U.S. 438; 72 L.Ed. 944.
73. (1937) 302 U.S. 379, 82 L.Ed. 314.

Geoffrey W. Davey[74] draws attention to certain English statutes, such as the Justices of the Peace Act, 1361 (which renders eaves-dropping an offence), and the Telegraph Act, 1868, section 20, and the Wireless Telegraphy Act, 1949, section 5, which make it an offence for post office officials to disclose or make use of such communications. The cumulative effect of sections 54 and 56 of the Post Office Act, 1908, is to impose a penalty on any person who divulges the contents of postal and telegraph communications. These are indeed potentially heavy artillery ready to hand and must not be allowed to lie in slumberland: rights granted under a statute cannot be taken away by a side-wind: deliberate disobedience of law cannot be regarded as a "curable irregularity" not affecting the merits of a case.

The parallel legislative provisions in the Federation of Malaya are section 80 of the Post Office Ordinance, 1947 (No. 34), and sections 7(2)*(b),* 25(6) and rule 54 of the Telecommunications Ordinance, 1950 (No. 28), and in Singapore sections 79 and 80 of the Post Office Ordinance (Cap. 105) and sections 25(*b*) and 26(*a*) of the Telegraph Ordinance (Cap. 108). The only exception is that the government is entitled to make appropriate orders under statutory powers on the occurrence of a public emergency or in the interest of public safety to intercept or divulge a message to an officer *named* in the order.

Section 52 of the Federated Malay States Criminal Procedure Code (corresponding to section 58 of the Singapore code) requires an order from a designated court or Public Prosecutor directed to the postal or telegraph authorities to produce a postal article, telegram or other document for the purpose of any investigation, inquiry, trial or other proceedings. Section 54 (section 60, Singapore) enables the court to issue a general search warrant when the summons or order is disobeyed or where the property or document is not known to be in the possession of any person: a search warrant can only be issued by a judge against the postal or telegraph authorities.

Section 51 (section 57, Singapore) is the omnibus section which enables a court to issue a summons or a police officer a written order directed to any person in whose possession or power any property or document relevant to any investigation, trial or other proceeding is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons or order. It has been held in India that an accused person served with such an order is under no obligation to produce a self-incriminatory document in his possession for the guarantee against "testimonial compulsion" is available to him under article 20(3).[75]

74. "Wire-tapping" (1957) 107 *L.J.* 564.
75. *Sharma* v. *Satish* (1954) S.C.R. 1077.

The dissenting judgment of Holmes J. in *Olmstead's* case (in which he concurred with Brandeis J.) emphasised the importance of social need that law shall not be flouted by the insolence of office. He said: [76] "...we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained... We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part" — a principle that permeates the whole system of criminal jurisprudence that the prosecution must be fair, to be conducted *par fas* not *par nefas.*

In *Goldman v. United States,*[77] a dictaphone was placed in a room by federal officers for the purpose of listening in to conversation between persons suspected of a criminal conspiracy: the dictaphone did not work: so the next morning they attached another device, a detectaphone on the outer wall, having a receiver so delicate as, when placed against the partition wall, could pick up sound waves originating in the room and the means for amplifying and hearing them. The only evidence of criminal conspiracy was the conversation heard on the detectaphone. The New York Circuit Court of Appeals, following *Olmstead's* case, held by a majority that such evidence was admissible. Chief Justice Stone and Justices Frankfurter and Murphy dissented and were prepared to overrule *Olmstead* while Justice Jackson took no part. *Nordone's* case, though referred to by counsel, was not discussed in the majority judgment which proceeded on the footing that the dictaphone having been out of action, the use of the detectaphone *outside* the room was no violation of the Fourth Amendment, there being no trespass or unlawful entry or unreasonable search and seizure. There was, however, provision in article 1, section 12, of the New York constitution (1938) to devise a warrant which would have permitted the use of a detectaphone: no such warrant was obtained and the court's attention was not invited to the relevant article. It was pointed out by Justice Murphy that search of one's house or office no longer requires entry "for science has brought forth far more effective devices for the invasion of a person's privacy" and physical entry may be wholly immaterial. Referring to the Fifth Amendment he said: "Rights intended to protect all must be extended to all, lest they so fall into desuetude in the course of denying them to the worst of men as to afford no aid to the best of men in time of need."

In Texas, the Court of Criminal Appeal held that since the incriminating evidence (the spoken word) was "produced" by the accused himself, and not "obtained" from him (as in the case of fingerprint

76. (1927) 277 U.S. 438, 470; 72 L.Ed. 944, 952-3.
77. (1940) 316 U.S. 129, 86 L.Ed. 1322,

evidence), the action of the police officers constituted a violation of the defendant's privilege against self-incrimination [78] and was in the nature of testimonial compulsion.

But some other courts have held that the evidence is of a physical nature and not testimonial compulsion of the type which the constitutional privilege was designed to protect.

G. W. Davey[79] opines: "so far as the private use of wire-tapping is concerned, there would appear to be no case for thinking that this is a problem of any magnitude in this country, and, in any event, evidence so obtained would already be deemed to be inadmissible." If this is correct, it would equally apply to police officers who listen in to a telephone conversation or peruse private mails or divulge the contents of postal or telegraphic communications without the prior sanction of proper authorities strictly in terms of the relevant legislation.

The recent instance in England where police officers, without the knowledge or permission of the Secretary of State for Home Affairs, listened in to private telephone conversation of a barrister to obtain evidence of criminal association with Soho gangsters raised a storm of protest: in the disciplinary enquiry held by the General Council of the Bar as to whether he should be disbarred no objection appears to have been taken as to its admissibility.

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Wigmore observes:[80] "The facts protected from disclosure are distinctly facts involving criminal liability or its equivalent. Hence, facts involving a civil liability are entirely outside the scope of the privilege."

The Scottish courts have favoured the enlargement of judicial discretion by the formulation of the broad standard to do "justice" in a particular case, irrespective of whether the liability is criminal or whether such evidence supports a civil right or tends to prove a civil liability.

The Lord Justice-General Clyde in *Manuel* v. *H.M. Advocate*[81] said: "The law of Scotland goes further than many other legal systems in protecting a person who is detained by the police from any risk of being driven or cajoled or trapped into admissions of guilt, even though this may complicate the quite legitimate detection of crime by the authorities. So anxious is our law to secure that such persons get fair play under our system of criminal administration, and so firmly rooted in our law is the principle that no man is bound to incriminate himself."

78. Fred E. Inbau, *Self-Incrimination,* p. 50-51.
79. "Wire-tapping" (1957) 107 *L.J.* 564.
80. *Op. eit.,* vol. 8, s. 2254, p. 327.
81. 1959 S.L.T. 23, 28.

The High Court of Justiciary in Scotland have taken the view that whether any given irregularity in the obtaining of evidence ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed: the gravity and deliberateness of the irregularity is the crucial test. Evidence is not necessarily admissible because it is relevant: illegality in the mode of procuring such evidence may affect its admissibility.

In *Lawrie* v. *Muir*[82] a shopkeeper was convicted of using milk bottles (which did not belong to her), contrary to the Milk (Control and Maximum Prices) Order, 1947. The sole evidence against her was that of two inspectors, employees of a milk-bottle collecting organisation, acting in association with the Milk Marketing Board who were authorised by contract with distributors to inspect the premises of any contracting distributor upon production of warrant cards. The accused was *not* a contracting distributor, but submitted to a search when the warrant cards were produced by the inspectors. The search of the premises and seizure of the milk-bottles were obviously illegal and the consent of the accused was obtained by implied coercion and misrepresentation. Lord Justice-General Cooper in delivering the unanimous judgment of himself, the Lord Justice-Clerk, Lords Mackay, Carmont, Jamieson, Russell and Keith, considered that the inspectors ought to have known the precise limits of their authority and *should be held to exceed those limits at their peril:* they obtained the assent of the appellant to the search of her shop by means of a positive misrepresentation made to her, that is, holding out that they had authority to search. In setting aside the conviction on the ground that the evidence was inadmissible he remarked, "In particular, the case may bring into play the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with crime. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted *deliberately* with a view to securing the admission of evidence obtained by an unfair trick."

In *Fairley* v. *Wardens of the City of London Fishmongers* [83] discretion was not exercised to exclude similar evidence for the departure from the procedural rules as to search of premises was not deliberate. An illegal search of premises revealed salmon taken in Scotland during annual close times in contravention of the Salmon Fisheries (Scotland) Act, 1868. Lord Justice-General Cooper stressed the fact that the inspector could have applied for and obtained a proper warrant to search the premises for suspected infringement of the law in relation to salmon for the price and distribution of salmon were then controlled by the Salmon (Maximum Price and Distribution) Order, 1944. He held that the

82. 1950 S.L.T. 37. See *Amos* v. *United States* (1921) 255 U.S. 313, 65 L.Ed. 654.
83. 1951 S.L.T. 54, 58.

evidence was admissible remarking: "I can find nothing to suggest that any departure from strict procedure was deliberately adopted with a view to securing the admission of evidence obtained by an unfair trick and in the circumstances of this case the appellant's (the convicted person's) assumption of the guise of a champion of the liberties of the subject failed to elicit my sympathies."

In *McGovern* v. *H.M. Advocate*[84] the appellant was convicted of breaking into premises and by means of explosives forcing open a lockfast safe with intent to steal therefrom. A warrant was obtained to search the accused's premises and while this was being executed, the police obtained the contents of his fingernails by scraping them. It was held that the evidence derivable from the analysis of the contents of the fingernails was improperly obtained without his consent and was inadmissible : it was a most material link in the chain of circumstantial evidence and was of such a nature as to prejudice the fair trial of the accused. Lord Justice-General Cooper, with whom Lords Carmont and Russell concurred, observed: "irregularities of this kind always require to be 'excused' or condoned, if they can be excused or condoned, whether by the existence of the urgency, the relative triviality of the irregularity or other circumstances. This is not a case where I feel disposed to 'excuse' the conduct of the police... It would have been a very simple procedure in relation to the search of his person." For himself he found it difficult to draw a distinction between the taking of fingerprints and the taking of scrapings from fingernails.

The next case, *Imre* v. *Mitchell,*[85] is of even greater importance, not for any *ratio decidendi* laid down but for the observations made by some of the judges. It shows their reluctance to admit real evidence obtained from a person without his consent even for the purpose of a civil litigation.

The court had to deal with litigation involving unusual features. In 1951 Alexander Mitchell married a girl with whom he had for some time been enjoying sexual relations and who some three weeks before the marriage had given birth to a daughter. Unknown to him, she had been enjoying sexual relations with a Pole as well as with Mitchell. The marriage was not a success. Mrs. Mitchell was divorced in 1951 on the ground of her adultery with a Mr. Imre, and in the divorce suit Lord Guthrie held that the daughter had been legitimated *per subsequens matrimonium* by the 1951 marriage and awarded custody of the child to Mr. Mitchell. The mother married Mr. Imre and *then* brought this action for the custody of the child alleging that her own daughter was in fact illegitimate, the natural father being the Pole.

84. 1950 S.L.T. 133: cf. *Rochin* v. *California* (1952) 342 U.S. 165, 96 L.Ed. 183.

85. 1959 S.L.T. 13; to the contrary: *R.* v. *Mclntyre* (1951) 2 W.W.R. (N.S.) 552 (Canada).

Blood samples were taken from Mr. Mitchell, the child and Mrs. Imre but Mitchell was not told *why* his blood sample was required. The expert evidence was to the effect that MN test revealed that the child's blood contained none of the factors found in the sample taken from Mr. Mitchell and it was, therefore, considered that he was not the father. It was, however, conceded that in rare instances the factors in a child's blood may change, the chance of which was 1 in 100,000. In the appeal the judges felt that in the circumstances they could not regard the blood test evidence as sufficient to displace the presumption of legitimacy.

But Lords Carmont and Russell further held that the blood test evidence ought not to have been admitted at all by reason of the circumstances in which the blood samples had been taken. It was clear that Mitchell did not appreciate the possible results of submitting to the taking of samples and was not told that he was entitled to refuse. It was clear that no one who had the legal right to do so had consented to samples being taken from the child. Her *curator ad litem* had no *locus standi* to give any permission. The Lord President, Lord Clyde, while not ruling that the evidence thus obtained was inadmissible, expressed considerable hesitation about its admissibility. Lord Sorn did not express any opinion.

The view thus expressed by the learned judges goes to show that the method of procuring evidence for the discovery of truth at any price may not after all be in the interest of justice according to law, which reminds one of Knight-Bruce V.-C.'s remarks in *Pearse* v. *Pearse*.[86] It has also the merit of discouraging both the Crown and litigants alike from resorting to dubious methods to obtain evidence.

These cases and *Glasgow Corporation v. Central Land Board*[87] indicate a marked tendency of an earnest attempt on the part of the Scottish courts to formulate principles based on moral considerations.

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86. (1846) 1 De G. & Sm. 13, 28; 63 E.R. 950, 957.

87. 1956 S.L.T. 41.

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