









# **THE HAMLYN LECTURES**

***NINETEENTH SERIES***

**THE CONTRIBUTION OF  
ENGLISH LAW TO SOUTH AFRICAN LAW;  
AND THE  
RULE OF LAW IN SOUTH AFRICA**

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THE  
CONTRIBUTION OF ENGLISH LAW  
TO SOUTH AFRICAN LAW; AND  
THE RULE OF LAW IN  
SOUTH AFRICA

BY

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*Published under the auspices of  
THE HAMLYN TRUST*

LONDON  
STEVENS & SONS  
SOUTH AFRICA  
JUTA & COMPANY LIMITED

1967

*Published in 1967 by  
Stevens & Sons Limited  
of 11 New Fetter Lane in  
the City of London and  
printed in Great Britain  
by The Eastern Press Ltd.  
of London and Reading*

*Published in the Union  
of South Africa by  
Juta & Co. Limited of  
Regis House, Church Street,  
Cape Town*



*The Hon. O. D. Schreiner*

*1967*

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## **ACKNOWLEDGMENT**

I am very happy to acknowledge the great help I have received from Professor Ellison Kahn of the Law Faculty of the University of the Witwatersrand, who has advised me on various aspects of these lectures and has checked and corrected the material.

**O. D. S.**



## THE HAMLYN TRUST

THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941, at the age of eighty. She came of an old and well known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of strong character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law, and studied the subject. She also travelled frequently on the Continent and about the Mediterranean, and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:—

“The object of the charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and

custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.”

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The Nineteenth Series of Hamlyn Lectures was delivered in November, 1967, by the Hon. O. D. Schreiner at Cambridge University.

J. N. D. ANDERSON,

*Chairman of the Trustees.*

*November, 1967.*

# THE CONTRIBUTION OF ENGLISH LAW TO SOUTH AFRICAN LAW; AND THE RULE OF LAW IN SOUTH AFRICA

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## CHAPTER 1

### INTRODUCTORY

THE title of these lectures substantially reproduces the field of discussion given me in my instructions. I say "substantially" because the instructions speak of the contribution to "the substantive law of South Africa." Some reference must, however, be made to procedural matters, since, whichever, if either, takes logical precedence, the right or the remedy, they cannot be kept quite separate.

Prima facie there are two subjects to talk about—the English law contribution to our law, and the Rule of Law in South Africa. The question may, however, be raised whether in their setting they are wholly distinct or whether they are so connected as to justify treating them as a single theme.

The declared object of the Hamlyn Trust, you will remember, is to further among the common people of the United Kingdom the knowledge of the comparative jurisprudence and the ethnology of the chief European countries and the circumstances of the growth of such jurisprudence, in order that the common people may realise their privileges, in law and custom, compared with those of others and recognise the responsibilities and obligations attaching to

such privileges. How far my country fits into this picture was for the trustees to decide. Interpreting the Trust liberally they have included us, presumably because, although we are not a European country, let alone one of the chief European countries, our system of law has its roots in Europe.

The meaning of the instructions is a separate problem. No doubt one could treat the two subjects mentioned in those instructions as a single theme by reasoning that the extent to which the Rule of Law is maintained in any country depends on how far it has absorbed the law and custom of the United Kingdom, which is predominantly English. For the present, however, and subject to any self-persuasion that I may experience as I go along, I do not find the two subjects to be connected in this way, and I shall accordingly deal with them separately.

Incidentally, as the main object of the Trust is apparently to enlighten the common man of the United Kingdom, to raise his morale and to increase his gratitude to the powers that gave him most-favoured-nation advantages, a lecturer may be excused for failing to display such a width and depth of learning as would be essential if those addressed were primarily expert legal men. Fortunately, however impressively learned the immediate audience may be, the Hamlyn lecturer is obliged to look beyond it to the ordinary layman, who must be regarded as the real target. I only hope that even he will not find the present treatment too superficial and unscholarly.

According to plan, then, I shall deal first with the English law contribution to South African law, and secondly with the Rule of Law in South Africa.

**PART I**

**THE CONTRIBUTION OF ENGLISH LAW  
TO SOUTH AFRICAN LAW**



## CHAPTER 2

### THE COMMON LAW OF SOUTH AFRICA— WHAT AND WHERE IT IS

BEFORE I begin to speak of the contribution of English law, it is necessary to refer briefly to the main components which have gone to make up the common law of South Africa. Like other allied systems that arose on the continent of Europe, our law rested on Germanic custom, substantially modified and supplemented by Roman law, as represented for the most part by the compilations of Justinian. Our system was developed during the seventeenth and eighteenth centuries through the writings of practising lawyers and teachers of law and the decisions of the courts in Holland and its associated provinces of the United Netherlands. Jurists from other parts of the Continent contributed their thoughts and from time to time the law was altered or reinforced by legislation, which later became overlaid by comment and was then treated as part of the common law. This legal system of the Netherlands or rather of Holland, the principal province, received wide recognition as a distinct and important branch of the civil law family and acquired the name of *Roomsche-Hollandsche reg*, which we translate as Roman-Dutch law. It was the system brought to South Africa by the early European settlers, the first of whom arrived in 1652.

When in the course of the nineteenth century, under the influence in the first place of Napoleon, most European countries introduced general codes, the Netherlands were

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among the first to fall in with the trend. But in the three Dutch overseas possessions that became British as a result of the Napoleonic wars the old uncodified Roman-Dutch law persisted and remained the foundation of the local common law. In Ceylon and South Africa this is still the position, but in British Guiana, now called Guyana, the English common law was substituted for Roman-Dutch law in 1917. Early in the nineteenth century a commission recommended the gradual adoption in South Africa of the English common law other than the law of property, but instead it was decided only to encourage the introduction by degrees of certain portions of the English law.

Part of the encouragement consisted of the appointment of judges from Britain. Among these was Mr. Justice Menzies—pronounced with us as spelt—a Scot, who became an expert in and staunch upholder of the Roman-Dutch legal system. The Bench soon came to be recruited from the Cape Bar. We had received the divided legal profession from Holland and retain it to this day. Only Natal, generally said to be the most British of the colonies, now provinces, until about thirty years ago used the undivided system, though some Natal advocates (the South African term for barristers) confined themselves to barristers' work. While at an early stage South African advocates began to provide reinforcements for the Bench, they had at that time to be members of the English Bar before they could be appointed as judges. It may accordingly be supposed that they had some acquaintance with English law. At the same time most of these early nineteenth-century advocates had also studied Roman-Dutch law in Holland.

The introduction of English law elements into our law, whether done designedly, as a policy measure, or casually,

in the ordinary course of the administration of justice, was widespread throughout the nineteenth century and has continued, though more slowly, up to the present stage of the twentieth century. Until recently, at any rate, it would have been generally agreed that these elements had become integral parts of our law. Their presence, I think, is an important, perhaps the chief, reason why it has become increasingly the practice to call our common law, not Roman-Dutch law, but South African law, adding, if the occasion requires it, that it is based on Roman-Dutch law. In so far as this varying usage is more than a mere matter of taste, I shall return to it later. Generally in these lectures I shall call our common law South African law.

In South Africa the physical sphere of operation of our common law was originally limited to the south-west corner of the sub-continent, which was the first area of European settlement. During the Dutch occupation it was called the Cape of Good Hope after a beautiful promontory of that name. When the British took possession they called the country the Colony of the Cape of Good Hope, a name which was retained until Union in 1910, when it was changed to the Province of the Cape of Good Hope. The shorter forms Cape Colony and Cape Province have always been in common use. By successive steps the sphere of our common law was extended to include Natal, the Transvaal, the Orange Free State, Southern Rhodesia (Rhodesia), Basutoland (now Lesotho), the Bechuanaland Protectorate (now Botswana), Swaziland and South West Africa. The language of the different constitutional documents that provided what the common law was to be in each of the countries varies appreciably, but it would not repay the time spent in dealing with them separately here. In general

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it may properly be said that the Roman-Dutch law, as applied in the already settled parts of southern Africa—and this qualification is most important—was to be the common law in the new area to which the document in question related. Although in 1964 a Penal Code was introduced into the Bechuanaland Protectorate and abolished the unwritten substantive criminal law, substituting statutory law, it is generally correct to say that today the common law of the whole of Southern Africa south of the Zambezi, excluding the Portuguese territories of Angola and Mozambique, is the same, namely, Roman-Dutch law as applied in South Africa, with its various developments and modifications, or, in other words, South African law.

Throughout the area covered by South African law a measure of recognition has been accorded by statute and judicial decision to the customary law of the African tribes of Southern Africa, especially in regard to the law of the family and the law of succession. In some cases local inferior courts have sufficient knowledge of this customary law to apply it without requiring it to be proved in each case, but otherwise this has to be done. The African customary law has major similarities throughout the whole area, but there are variations. It is treated as a personal law, the applicability of which to Africans who are emerging or have emerged from the tribal system creates problems. Its recognition does not affect the general position of South African law as the common law of southern Africa, outside Angola and Mozambique.

In regard to the common law of those parts of southern Africa that have recently become or are in the process of becoming independent of British rule, no automatic change of the common law to the local customary law would be

deemed to have taken place with the ending of the colonial régimes. But the common law could be changed by an Act of the new legislature. As stated above, the Bechuanaland Protectorate before independence substituted a penal code for South African substantive criminal law. A penal code has practical advantages for some countries, but it is to be hoped that such codes, if introduced, will rather follow the lines of the 1886 Transkeian code, which embodies much of our common law, than depart radically from the latter. There are great advantages in keeping the substantive, as well as the procedural, law of the whole of what was once British South Africa south of the Zambezi as nearly identical as possible. If the further step were to be taken by any newly independent country of changing the whole of the common law to some other system, this would probably be the outcome of political considerations rather than of any view that the substituted common law, whatever it might be, would be juster, more reasonable or more convenient than South African law.

## CHAPTER 3

### THE ENGLISH LAW CONTRIBUTION IN GENERAL

THE extensive additions to and modifications of our common law since the beginning of the nineteenth century are what we are mainly concerned with in the first part of these lectures, for it has been during this modern period that the influence of English law has come strongly into play. It has happened in various ways, some more direct than others. Sometimes there has been express statutory introduction of the English law; this has been very extensively done in relation to the law of evidence. We have provisions that where in respect of certain subjects, such as the admissibility of evidence and the examination of witnesses, our existing law is silent, English law is to be applied.

Close to the law of evidence in this context is the law of procedure, civil and criminal, where we have taken over with modifications from time to time substantially the whole of the English system, without copying all the detailed rules to be found in *Archbold* or the *Supreme Court Practice*.

In other branches of the law important English statutes, such as those on company law, merchant shipping, insurance and negotiable instruments, have been copied by our legislatures, with only such minor changes as have seemed to be necessary to suit local conditions or to fit into existing South African law. Much of the subject-matter of these statutes was part of the law merchant and common to most civilised countries and legal systems, but it was in their

English form that, with a few exceptions, they became part of our law.

But of far greater importance than legislative copying has been the use made of English case law and legal writings by South African judges in deciding cases where the South African law had not already been settled by authoritative decision.

Mention of the latter brings us to what is surely the greatest contribution of English law to our law, namely, the principle of binding precedent. While the courts of the Netherlands paid considerable respect to prior decisions, our treatment of the *rationes decidendi* of such decisions as positively binding on courts dealing later with the same legal problems came to us from English law. We adopted it in a form less rigid than that applied in 1898 by the House of Lords and thereafter copied by the Court of Appeal and divisional courts. The rigid form, I need not tell you, has recently been abandoned in these islands.

The Supreme Court of South Africa is divided into provincial and local divisions, with the Appellate Division at the top. Within this system the divisions other than the Appellate Division tend to follow the decisions of their own province, in preference to those of other provinces. Subject to this preference the decisions of courts higher in the judicial scale bind courts lower down absolutely. They may only be departed from by courts higher than the court that gave the earlier decision, when the power to depart is unrestricted, or by the same or an equivalent court, when the second court must be satisfied that the earlier decision was wrong. No particular form of words is sacred in describing the second court's approach in such cases. The use of the word "satisfied" may suffice to show that the

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second court's view of the wrongness of the earlier decision must substantially be beyond doubt. Sometimes its reluctance to depart from what had already been decided is heavily stressed. Sometimes it is said that the wrongness of the earlier decision must be clear, or quite clear. Support for the departure may be found in the brevity or insufficiency of the argument before the first court. The nature of the case and the possibility or probability of rights and expectations having been built up on the hitherto accepted view may influence the second court's decision. Presumably similar considerations operate in all British courts now that the rigid form no longer applies.

It does not seem to be crucially important to the principle of *stare decisis* whether the form adopted is rigid or qualified. What is vital is that precedents are binding save when they may be departed from in accordance with law. With us this binding quality finds its most fundamental expression in the recognition that unequivocal *rationes decidendi* of the decisions of the Appellate Division state the law, which, except when the legislature hurls in its trident, can only be departed from by the Appellate Division itself, and then only in the exceptional circumstances mentioned above. Legislation apart, no other source of law has potency comparable to that of precedent. Only error can result from failing to adhere firmly to this principle, which is basic in the South African law of today. On it depends the future stability and development of our common law. And we owe it to English law.

What, I believe, we have not yet received from English law, or from any other source, are clear answers to the questions (a) How exactly is the *ratio decidendi* of a single judgment to be ascertained or described? and (b) How is

the *ratio decidendi* of a case to be ascertained or described where more judgments than one have been delivered, with one or more dissents, and with differing grounds of concurrence by those judges who form the majority? These questions, which have been examined by our Appellate Division,<sup>1</sup> are obviously of vital importance to the operation of the *stare decisis* principle. It is possible that some of our answers may help in the decision of cases in Britain.

Mention of development brings to mind the fact that there are two schools of thought in regard to the growth of the law, the one welcoming and liberal, the other discouraging and conservative. There are of course many gradations. The distinction was to be found in the schools of Roman law and is visible in different countries today, including Britain and South Africa. That the law keeps on growing and must do so if it is to remain healthy has often been stated by our courts. Sir James Rose Innes, the second of the great trio of Chief Justices, the others being Lord de Villiers and Sir William Solomon, who set high our judicial standards after Union, put it clearly in the case of *Blower v. Van Noorden*.<sup>2</sup> In delivering the judgment of the Supreme Court of the Transvaal in that case, he said,

“There come times in the growth of every living system of law when old doctrine and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be

<sup>1</sup> *Levinson v. Pretoria City Council*, 1949 (3) S.A. 305 (A.D.) at pp. 316–317; *Fellner v. Minister of the Interior*, 1954 (4) S.A. 523 (A.D.).

<sup>2</sup> 1909 T.S. 890 at p. 905.

effected by judicial decision, and when they are so important or so radical that they should be left to the legislature. And it seems to me that this is an instance where we shall be fully justified in initiating a change of procedure, which is not in conflict with any fundamental principle of the Roman-Dutch law, and which will assist in keeping that law what we desire to see it, a living and effective instrument for the administration of justice.”

The importance of the principle of growth is emphasised in the passage from the judgment of the Privy Council, delivered by Lord Tomlin, in the case of *Pearl Assurance Company v. Union Government*,<sup>3</sup> which I shall presently quote.

Before I do so, however, I should observe that changes in the rules forming part of a legal system do not necessarily entail the borrowing of ideas from another system. In bringing about the evolution of the law judges commonly use experience, which Mr. Justice Oliver Wendell Holmes said was the life of the law. The experience they use is primarily their own and they reason on the basis of what seems to them to be right and convenient. When they use analogies these will ordinarily be drawn from other branches of their own legal system.

But although the call for growth does not always make borrowing from another system necessary or advisable, it will often be the preferable course to draw suggestions from a wider area than the single system which is the court's own and with which alone it is normally concerned. In *Blower v. Van Noorden*<sup>4</sup> the court departed from the Roman-Dutch law, which made a person who had

<sup>3</sup> 1934 A.D. 560 (P.C.) at p. 563; [1934] A.C. 570 at p. 578.

<sup>4</sup> *Supra*.

contracted, professedly on behalf of another but without authority to do so, personally liable on the contract as if he had contracted as principal. Instead the court applied the more logical and reasonable rule, which had already been reached in England, that the liability was only that on an implied warranty of authority. There would be a practical difference if the supposed principal were insolvent. Though Innes C.J. in the above extract spoke of the step being taken as the initiation of a change of procedure, it was actually, it seems, an alteration of the substantive law, which was accompanied by a corresponding change in the kind of claim open to the plaintiff. The only civil law support for what was clearly a departure from the Roman-Dutch view was a passage in Pothier in which one who had expressly promised that the person, on whose behalf he had without authority contracted, would ratify, was held liable on his promise and not, as principal, on the unratified contract. Since the promise was express and related to ratification, the passage hardly supports the existence of a general principle that there is an implied warranty of authority whenever one without authority professes to act as agent.

I return now to the judgment of Lord Tomlin in the *Pearl Assurance* case, and quote:

“In the first place the questions to be resolved are questions of Roman-Dutch law. That law is a virile, living system of law, ever seeking as every such system must to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society.

“That those principles are capable of such adaptation cannot be doubted, and, while it would be idle to assert that the development of the Roman-Dutch

law in the territories now constituting the Union has not been affected appreciably by the English law, yet in their Lordships' judgment, approach should be made to any question governed by Roman-Dutch law without any fetter imposed by recollections of other systems, and through the principles of Roman-Dutch law alone.

"The fact that the solution of a particular problem reached by Roman-Dutch law bears a similarity to the solution provided by another system does not necessarily indicate any imposition of the rules of one system upon the other, but may be cogent evidence of a resemblance between the relevant basic principles of the two systems."

Lord Tomlin's pronouncement was, in my respectful view, a striking example of judicial tact, carried perhaps a little too far to be entirely convincing. The Privy Council had not, I think, given leave to appeal from South Africa for more than a dozen years, and it seems possible that owing to our history we were thought to be particularly sensitive to the final decision of our cases by what many South Africans regarded as a foreign court. With such considerations in mind, perhaps, Lord Tomlin emphasised the unassailable individuality of the Roman-Dutch law. But he recognised that in South Africa our law's development had, to use his own language, been "affected appreciably by the English law." This could happen, I suppose, either through changes imposed by an outside force, such as the legislature or government of another country, or through voluntary copyings by a South African legislature or borrowings by the South African courts.

Speaking for the Judicial Committee, in a sense an outside force, Lord Tomlin naturally disclaimed imposition. But the borrowing aspect was not mentioned and it must not be overlooked. It requires a different approach—as

if Lord Tomlin had been giving the judgment of our own Appellate Division. A free man, *pace Polonius*, borrows if he wants to and thinks it prudent. If the loan carries no interest and the debt is not repayable there is *prima facie* clear profit to the borrower. A legal system may in proper cases borrow through its courts without shame or loss of dignity, and it may thereby greatly enrich itself. What it has borrowed may increase its strength and efficiency well beyond that of the system from which it borrowed.

Consistency with the inherent basic principles of the system doing the borrowing is no doubt a real merit, to which it is always right to accord respect, but it is one that is more likely to be stressed by those academic lawyers who have a strong sense of the beauty of a harmonious legal system, deeply rooted in the history of the people using it, than by practising lawyers and judges, who may be expected to look rather to the benefits to be derived by litigants and the community if the borrowing takes place, compared with the position if it does not. Looking at the matter from another angle, inbreeding may produce weakness, and sociologically as well as biologically, the hybrid often displays strength far beyond that of the pure breed.

In this connection it is relevant to refer to a passage in the late Professor R. W. Lee's *Introduction to Roman-Dutch Law*,<sup>5</sup> where he says: "There are those who regard Grotius, Van Leeuwen, Voet, and the other Romanists as traitors to the law of their country, which, it is inferred, they enslaved to an alien system." And it is, of course, well known that in Germany there was long-sustained and vigorous opposition to the alleged bastardisation of the law

<sup>5</sup> (1953) p. 5.

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based on local custom through the reception of Roman law. Though it has been pointed out that the absorption of parts of English law into South African law is analogous to the reception of Roman law into Germany and Holland, the similarity does not seem to me to be very close. Apart from other considerations, the need for outside help in the development of Germanic law was much more obvious than the need for such help in South Africa, and the contrast between the primitive Germanic customary law and the polished written law of Rome was much sharper than any similar contrast between Roman-Dutch and English law in modern times. But it remains useful to remind ourselves that the two large-scale borrowings have a substantial measure of similarity and that if the men who created the Roman-Dutch law had refrained on grounds of loyalty to their local law from importing Roman law rules and principles, there would have been no Roman-Dutch law at all nor any South African law as we know it today.

The theoretical justification for all such borrowings is in the first place that every case presented to a court for decision must be decided by it. It cannot refuse to give a decision because there is no applicable law. If there is no direct authority, the law must be ascertained by reasoning from recognised general principles, from analogy and from consideration of what in the court's view, and according to experience, is just, reasonable and convenient. This accords substantially with Chief Justice Cardozo's well-known statement in *The Nature of the Judicial Process*<sup>6</sup> that "logic and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in

<sup>6</sup> (1921) p. 112.

combination shape the progress of the law.” These factors are not confined by national boundaries, and wherever acceptable statements of legal principles or rules, or arguments about the points in issue or similar points are found in foreign judgments or juristic writings they may properly be used to support or modify the judge’s provisional views or to suggest to him new lines of thought. Indeed any court which in the absence of binding precedent has to work by common sense, experience and analogy towards a just, reasonable and convenient conclusion, and which omits to make use of available foreign material, is handicapping itself and prejudicing the litigants before it and the proper development of the law.

It is not only to fill total gaps in our law that resort is had to foreign judgments and legal writings. When there is no authoritative South African precedent on a point to be decided there may be relevant matter in the works of the Roman-Dutch jurists, which we sometimes call “the old books.” If what they say is clear, and all their views concur, the conclusion will ordinarily be applied, unless it is manifestly obsolete or unsuited to the circumstances of today. But sometimes there are no more than general propositions, bald and vague, in the old books, and it is then difficult to be confident that they were meant to cover such a point as the one in issue. Or different writers may express differing views. In such cases a balance will have to be struck between the technically superior authority of the old books, or the more weighty of them, and the considerations of justice, reasonableness and convenience which may support a different view, and which may be backed by foreign cases or legal writings that are clear, convincing and precisely in point. The court has then to decide which

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view it considers ought rightly to be held to represent the South African law.

It is important not to underestimate the value of illustrations, and especially of ones dealing with familiar modern situations, in working out juristic problems. We lawyers are notoriously inclined towards the abstract and it is right that we should make our thinking more concrete by practical illustrations showing how rules work out in similar situations, whether in our own country or elsewhere. Such an approach is not necessarily a superficial attempt to find a ready-made answer to the problem in hand, rendering further thought superfluous. As ordinarily and properly used, such illustrations, with the supporting reasoning found in the relative judgments, serve rather as stimuli to thought than as substitutes for it.

These lectures are being delivered in Cambridge, and speaking of illustrations reminds me of the lectures on criminal law that Professor C. S. Kenny delivered here to many generations of students before the First World War. He used to enliven his remarks by reading out cuttings from newspapers all over the country, briefly reporting cases just decided at assizes or by local magistrates. The case he quoted would either exemplify the point under consideration or provide a ground of distinction. I have no doubt that these extracts contributed substantially to our understanding of the points.

How far a judge should, with counsel's help, explore the authorities, ancient or modern, will depend on the nature of the case and on whether he is sitting at first instance or on appeal. His mind inevitably holds a considerable store of legal knowledge and counsel will have provided more. It is for the judge then to decide whether or to what extent to

augment his store further before deciding the case before him. Certainly it would be unreasonable to expect him always to seek the earliest authorities on every legal problem that may arise in the litigation.

But assuming that, where legal questions of real doubt and difficulty are involved, much effort should be spent, especially by appellate tribunals, to discover the fountain-heads, it is nevertheless not practicable to explore any significant part of the world's law libraries in search of assistance. The lives of judges and lawyers, unduly prolonged though some may think them to be, are yet too short for really exhaustive investigations, even if these would be likely to produce the most satisfactory results.

The decision of cases, even by a final court of appeal, remains largely a practical art. The standard of the reporting of cases, and language considerations, may be crucially important factors in deciding to what overseas authority a South African court resorts, and should resort. It is natural that, in order to fill apparent gaps in our law, or overcome difficulties for the solution of which our own authoritative decisions provide insufficient guidance, such a court should go mainly to the reported cases and juristic writings of those countries which not only follow judicial precedents along our lines but also have a well developed system of reporting and use a language with which the judges and lawyers of our country are well acquainted.

From the beginning of the nineteenth century the English common law and the English language have always been in these respects by far the most serviceable instruments for our purpose. The language has been well understood by our judges and other legal men, and they are accustomed to working with a system of precedents similar to that used

in the countries of the English common law. South African courts have known which decisions in the British Commonwealth and in the United States of America are of the highest authority, from the position of the propounding court in the judicial hierarchy, and from the reputations of the judges who delivered, or were parties to, the judgments. We have not had, and could not well have acquired, a similar grasp of the position in other countries to which we might conceivably have turned.

One country should be specially mentioned in this connection. It is perhaps a reproach to South African lawyers that we have not made a greater use of Scottish cases and textbooks than we have, for Scottish law has a civilian background not very different from our own. Though the technical legal vocabulary of Scotland may sometimes be discouraging, the main cause of our relative neglect of Scottish authorities, is, I believe, their non-availability. We have sets of Scottish reports in our larger law libraries, but there are vastly more sets of English reports in the country, and the same applies to textbooks. We do indeed occasionally quote the institutional writers, and great Scottish judges sitting in the House of Lords have sometimes enlightened us on the principles of their own law. But proportionately there is far more English material available to us than Scottish, and so we tend to use the former much more freely.

The reports, the textbooks and the current legal literature published overseas in English enjoy a far wider reputation in South Africa and are far more readily accessible than the corresponding productions in other languages used abroad. The fact moreover that courts and writers in countries that use general codes are mainly concerned with

the interpretation and application of those codes greatly reduces the usefulness to us of their products. Incidentally if, as one has heard suggested, Britain were to adopt a general code, the usefulness to us of British reports and textbooks would certainly be curtailed. I cannot imagine, however, that this would weigh heavily, or indeed at all, with British codifiers.

As matters have stood hitherto, legal publications in the English language have held a position in South Africa unapproached by those in any other language. This is not a proper ground for criticising the practice of our attorneys, advocates or courts. It is rather a tribute to their common sense and to their due appreciation of the importance, above all other considerations, of using every available legal instrument for reaching the most satisfactory decisions.

Where a South African statute is the foundation of our law on a particular subject, and where, as is not infrequently the case, it has been largely copied from an English Act, the English textbooks and decisions on the subject are obviously of special value in the interpretation of identical or closely similar provisions. No other language has provided us with anything like so many models for our own statutes as has the English language.

In the field of patent law American and Canadian statutes are in some respects more like our law than the English statutes, and in income tax matters Australian law provides a closer parallel. But in both these branches of the law English decisions often exercise a strong persuasive influence. The Reports of Patent Cases and Tax Cases are in general use and cases reported in them are of great assistance to our courts.

Privy Council decisions based on South African or Roman-Dutch law were, until the year 1950, binding on our courts. Some of those decisions, like some of the decisions of our own Appellate Division, have occasionally been criticised for not showing so deep a knowledge of the background of our legal system as the critics thought they might have done. But even when they have had no binding quality, some other legal system such as the English common law being involved, the judgments of the Judicial Committee, like those of the House of Lords, have often influenced South African decisions by the cogency of their reasoning and the clarity of their language. Now that it is no longer necessary that the Judicial Committee's advice should be contained in a single judgment its persuasive influence may, other things being equal, be expected to increase.

The decisions of the federal courts of the United States, including the Supreme Court itself, are commonly concerned only with the interpretation and application of the Constitution and federal statutes, and seldom deal with problems akin to those that we have to solve in South Africa, while the decisions of the state courts are as multitudinous as the stars and as inaccessible. Consequently, and apart from historical considerations, American precedents are far less frequently resorted to in South Africa than the decisions of British courts. Some few American cases are well known to us and we are glad to use those which help to fill a total or partial gap in our law, particularly in some new situation that has arisen out of the changed circumstances of modern civilisation. For the most part we find our American illustrations or versions of the English common law in the *American Restatement*, or a set of selected and annotated

reports, in addition, of course, to such universal textbooks as those of Story, Wigmore and Williston.

Before dealing with the contribution of English law to particular branches of our law it is relevant to remind ourselves of the important place that the interpretation of language holds in the decision of legal questions, particularly in the modern world. Statutes, regulations, wills, contracts, conveyances—all have to be understood and given a meaning. When they raise difficulties that do not readily yield to common sense and the normal grasp of the language, it may be necessary to resort to authority of one kind or another. Valuable general rules and hints on interpretation are to be found in some of the old books, but we more commonly use the standard modern textbooks, generally in English, and the cases cited in them. As a rule, we derive great help from the interpretation of English words and phrases by the House of Lords, the Privy Council and the Court of Appeal, but on rare occasions the help may be of doubtful value. This is perhaps illustrated by our Appellate Division's reliance in 1964<sup>7</sup> on the majority judgments in *Liversidge v. Anderson*.<sup>8</sup> The Appellate Division was apparently not referred to the Judicial Committee's cautionary remarks in *Nakkuda Ali v. Jayaratne*.<sup>9</sup> *Salus populi suprema lex* has no doubt a proper role to play as a substantive defence in certain cases, but it is not a rule of interpretation.

Special mention should be made of the valuable notion of the implication of terms or provisions. We have used the English cases in fixing the conditions under which implication is permissible, and in the result we have

<sup>7</sup> *Rossouw v. Sachs*, 1964 (2) S.A. 551 (A.D.) at pp. 562–563.

<sup>8</sup> [1942] A.C. 206.

<sup>9</sup> [1951] A.C. 66.

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developed an efficient instrument for the proper adjustment of the rights of litigants in many kinds of situation. English law has made a considerable contribution to our law in this connection.

## CHAPTER 4

### THE ENGLISH LAW CONTRIBUTION IN DETAIL

I COME now to the contribution of English law to particular branches of South African law.

First let us consider the contribution to constitutional law. From early in the nineteenth century the British possessions in South Africa passed through the usual stages of colonial growth, from control by a Governor, with a nominated council, through representative and responsible government to dominion status and complete independence. At first our constitutional law was simply part of the British Empire system, based on the sovereignty of the British Parliament, but as each colony acquired a measure of self-government, and as this increased, its own Constitution became the foundation for its day-to-day constitutional law. Few constitutional issues were raised in South Africa in the decades before Union, though occasionally Governors and governments came into conflict with each other.

The most important predominantly English contribution to our constitutional law throughout this period was the parliamentary system itself, with its Prime Minister and Cabinet responsible to an elected House of Assembly. We still have it today. The South Africa Act, passed by the British Parliament in 1909, created the Union of South Africa, the position of which was further developed by the Statute of Westminster in 1931. Though we are now a

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republic with a State President instead of a Governor-General, our Constitution is little different from the form enacted in 1909. It is not a federal constitution and our courts have hardly been concerned with the kinds of case that have so often come before the Privy Council from Canada and Australia and before the Supreme Court of the United States, in which they have had to reconcile the competing powers of states or provinces on the one hand and of the central government or legislature on the other. We are a union and our provinces are wholly subordinate to the central authority. International law apart, the same applies at the present time to the government of South West Africa. The Transkei is in a similar position in this respect, though it has more parliamentary trimmings than have the provinces.

Our Constitution is written but it contains practically no restrictions on the sovereign powers of Parliament. The only scope for major constitutional issues has been in connection with two so-called entrenched sections of the Constitution. One of these sections guaranteed equal freedom, rights and privileges to the two official languages. In 1951 the Appellate Division decided that where a provincial ordinance provided that children must be taught through the official language in which they were more proficient, the constitutional guarantee did not give a parent the right to have his child taught at the parents' expense in a private school through the official language of the parents' choice, if the child was more proficient in the other language.<sup>1</sup>

<sup>1</sup> *Swart N.O. and Nicol N.O. v. De Kock and Garner*, 1951 (3) S.A. 589 (A.D.).

The other section provided limited protection for the voting rights of non-whites in the Cape Province. The former remains, though the weakness of the guarantee was shown by the Appellate Division decision<sup>2</sup> which in 1956 recognised the effectiveness of legislation<sup>3</sup> that destroyed the latter. The English common law had little to do with this decision. Many Privy Council cases and some American ones were discussed by the Appellate Division in reaching its conclusion, but, save perhaps on a few general points of interpretation, English law only provided the historical background of the problem.

Our Constitution has no Bill of Rights and the rights expressly protected in many other constitutions must be found for South Africa along the same lines as in Britain. I shall return to this subject in connection with the Rule of Law.

Our law of prerogative, in the sense of the historically residual collection of non-statutory powers reposing in the hands of the executive, remains essentially what it was when the British Crown was the titular head of our state. Although it had a monarchical origin, the prerogative does not now depend on the personal exercise of power by a royal sovereign. Whatever person or group of persons exercises the executive power in our state exercises the prerogative. This was the view taken in 1950<sup>4</sup> and 1954<sup>5</sup> by our Appellate Division when it dealt with the powers of the executive to cancel or regain possession of a passport duly issued by it. After some difference of judicial opinion

<sup>2</sup> *Collins v. Minister of the Interior*, 1957 (1) S.A. 552 (A.D.).

<sup>3</sup> Senate Act, No. 53 of 1955, and South Africa Act Amendment Act, No. 9 of 1956.

<sup>4</sup> *Sachs v. Dönges N.O.*, 1950 (2) S.A. 265 (A.D.).

<sup>5</sup> *Fellner v. Minister of the Interior*, 1954 (4) S.A. 523 (A.D.).

it was held that the issue and revocation of a passport originally rested on the royal prerogative and was part of the prerogative powers of the modern executive government, however that was composed.<sup>6</sup> Though we are now a republic the essential elements of the royal prerogative without doubt remain vested in our executive government unless and until they are modified by legislation.

When we come to the powers of subordinate law-making bodies, like municipalities and other regulating authorities working under a statute, the part played by British, mainly English, decisions in the development of our law has been much more significant than in the relatively narrow field of limitations on parliamentary power. Our courts have decided many cases enunciating the principles on which subordinate legislation may be held to be invalid. Ordinances made by provincial councils stand on a special footing, resting directly on the provisions of the Constitution, but in regard to the various types of subordinate legislation issued by regulating authorities we have made very free use of English decisions which have contributed substantially to the present state of our law. Whether unreasonableness, in the special sense in which it is used in this context, is a distinct ground for invalidating subordinate legislation, or whether it is only an element in deciding whether the enabling provisions authorise the subordinate legislation, has not yet been conclusively settled in South Africa. Perhaps the distinction is more verbal than real.

If we consider next our criminal law, there is no doubt that on the vastly important procedural side it has been largely modelled on the English system. The approach is generally the same; the state, which conducts almost all

<sup>6</sup> Fellner's case (*supra*).

prosecutions, litigates with the accused as if it were the plaintiff in a civil action and he were the defendant, and it seeks, without striving unduly, to prove his guilt beyond reasonable doubt. We do not have a *Habeas Corpus* Act but we use a similar procedure with normally similar results. As will appear later, however, there are some modern statutory barriers to the individual's recourse to the courts for release from detention.

A good many years ago I was struck by a passage in a travel book, called *Borderline Russia*, by H. Foster Anderson,<sup>7</sup> in which the author, who was a timber merchant and not a lawyer, said,<sup>8</sup>

“There are times when I have the impression that our form of democracy is ultimately based on the idea that a man is innocent until he has been proved guilty. I doubt very much whether any one of the English-speaking nations can ever grasp the Continental view that a suspect is guilty until he can prove his innocence. He acts, therefore, on the Continent in a way that to the foreigner is little short of recklessness for, in the innocence of his soul, he fails to realize that to be innocent of any hostile or criminal intent will not save him if his acts appear suspicious. This attitude of the Englishman is falsely interpreted. The foreigner believes that we have a sense of superiority which alone can account for our indifference to what people think. They cannot realize, living under a system where a suspect is guilty until he proves his innocence, that it never enters our heads to be continually on our guard against suspicion.”

I was reminded of this extract when, not long ago, I re-read the terms of the Hamlyn Trust, and I wondered whether the founders of the latter had not perhaps come across the

<sup>7</sup> (1942).

<sup>8</sup> p. 220.

passage in Anderson's book and been influenced by it in framing the Trust. My fancy was doubtless far-fetched, for there is nothing very new in the contrast between Continental criminal procedure, as understood, and sometimes misunderstood, in English-speaking countries, and the procedure used in the latter in the trial of persons suspected of a crime. And not very rare, I imagine, is the Englishman's sense of gratitude that in this respect, at least, he is not as others are.

For present purposes the relevancy of the quotation is that, whatever the validity, if any, of the association between the form of procedure and the placing of the onus in criminal matters, or between the latter and democracy (and South Africa, though it has a Parliament, is not a democracy), our criminal procedure is certainly of the same type, the accusatorial, as that of the Commonwealth and the United States, and is unlike the Continental inquisitional type. Some of our modern statutes, often under racial and ideological influences, have cast the onus for certain purposes on the accused and a very recent statute made it, in certain cases, an onus to prove beyond reasonable doubt—and with eleven years' retrospectivity.<sup>9</sup> But there is no doubt that whatever may be the Continental procedure today, and whatever advantages it may have, with us the state has ordinarily to prove the accused's guilt beyond reasonable doubt. In part this may be due to our having escaped the European codifications, but mainly, I think, it arose out of our adoption of the English systems of procedure and evidence in the nineteenth century. That the burden of proof should rest on him who alleges is old, general and

<sup>9</sup> Ss. 3 and 23 of the General Law Amendment Act, No. 62 of 1966. And see also the Terrorism Act, No. 83 of 1967, s. 2 (2).

obviously sensible. But proof beyond reasonable doubt, though the wording of the requirement is sometimes criticised, is the really valuable British contribution, and it is difficult to exaggerate its importance to our approach to the prosecution of crime, with all that this entails.

The jury system, which, though it had Germanic roots, came to us from England, and included for a generation in the Cape Colony the grand jury, has in recent decades lost popularity with accused persons as well as with the rest of the community. An important factor encouraging this attitude has been the existence among us of racial differences, the complainant often being of a different race from the accused. Since the jurors are now all Europeans, the possibility that the verdict might be affected by racial prejudice in such cases could not be ruled out. In practice this was more likely to happen where the accused was a European and the complainant or the deceased was a non-European, than in the reversed situation. There are other types of case in which a trial by jury has been thought to be unsatisfactory, either because it would be too complicated for an ordinary jury to follow (and we have no special juries) or because it is the sort of case, like illicit dealings in unwrought gold or rough and uncut diamonds, in which jurors in some localities might entertain an undue fellow-feeling towards the accused. In all such cases the Minister of Justice may, and generally does, direct that the trial shall be before a judge without a jury, notwithstanding that the accused wishes to be tried by a jury. Apart from these cases, moreover, in which the choice is taken out of his hands, the accused will be tried without a jury unless he specially demands one. Ours is a nine-man jury, a seven to two majority sufficing for a verdict. I understand that

England too is abandoning the requirement of unanimity. We have provision also for special courts of two or three judges to try, without the accused's consent, and without a jury, cases of treason, sedition or public violence, and certain cases under the Suppression of Communism Act. Minor cases are, of course, tried by magistrates without a jury, and in recent years courts of regional magistrates—men of substantial seniority—have been given jurisdiction to try—also without a jury—all cases except those involving the most serious crimes. In the result trial by jury is now rarely used in South Africa. I gather that there is a movement away from it in Britain too.

In regard to our substantive criminal law, it is more difficult to assess the influence of English law. All the important common law crimes existed in Roman-Dutch law, which is still, broadly speaking, the basis of our substantive criminal law. But our modern law has become much more precise than the law of crimes that is found in the old books. The importance of the exact definition of the crime charged is now fully established and there is no doubt that English law has contributed largely to this valuable approach.

The definition of the crime of theft, for instance, with respect more particularly to the intention of the accused to deprive the complainant permanently of the use of the thing taken, was only settled by the Appellate Division in 1955,<sup>10</sup> following earlier cases in other South African courts, which had been powerfully influenced by the English law. The majority of the Appellate Division held that, even if the old law of the Netherlands was different, which it apparently was, it was the law as established by the nineteenth-century

<sup>10</sup> *R. v. Sibiya*, 1955 (4) S.A. 247 (A.D.).

South African cases that should be given effect. But our law of theft has not otherwise been closely linked to the English law of larceny, and we prefer it so.

Though the term embezzlement is sometimes loosely used by us, we do not distinguish from other thefts appropriation by a clerk or servant of things received by him for his employer or master. We consider rather whether the accused took for himself what really belonged to another than whether he interfered with that other's possession.

The mental elements in murder and culpable homicide—the English manslaughter—have been frequently discussed in recent years in our courts and in the deeply lamented Federal Supreme Court of Rhodesia and Nyasaland, and English decisions have figured in the discussions; but it cannot be said that the English law influence has been pronounced in this part of the law. This is not due to any well-established principles of Roman-Dutch law, making borrowing from the English law unnecessary. On the contrary the Roman-Dutch law was unhelpful, for it did not even distinguish between murder and culpable homicide. All killings were the same offence but the punishment varied with the circumstances, which in our modern practice might involve the presence or absence of an intent to kill or might provide a statutory element of extenuation, avoiding the necessity of a death sentence for murder. We have not as a rule attempted to define by statute the mental element necessary for murder and have thus avoided some of the difficulties of harmonising objective and subjective factors. A good illustration of such difficulties is to be found in a definition of malice aforethought contained in the 1964 Bechuanaland Protectorate Penal Code, mentioned earlier.

One of the ways provided in the Code for establishing malice aforethought is by proving that the death was caused in the commission of a crime punishable under the code by imprisonment for three years or more. A number of crimes so punishable are, like forgery and receiving stolen property knowing it to have been stolen, unrelated to possible personal injury to anyone. This creates a highly artificial element in the definition of the most serious of crimes and provides an illustration of the need for caution in codifying the criminal law. This illustration and a later one were cited in a recent decision of the Court of Appeal for Botswana.<sup>11</sup>

Again, we do not make the mental element in murder depend at all on an intention to commit grievous bodily harm. However much it may be insisted upon that the latter expression is used in its ordinary sense, its importation into the definition of murder seems to be artificial and unfortunate. For bodily harm like inflicting a small bite on a person's finger, may be grievous without being in any degree dangerous, as that word is ordinarily understood, even though in the particular case in question death unexpectedly resulted. With us the position has become fairly simple to state, though the application is often difficult. Murder is unlawful killing with intent to kill. The intent includes, but is not limited to, cases where death is desired. It exists whenever the accused realises that his act is dangerous, *i.e.*, may, as a possibility, though perhaps only as a remote one, cause death, and is reckless whether it does or not. The realisation may be proved by inference from what a reasonable man would have realised, but the ultimate test is subjective, not objective. The recklessness may be inferred

<sup>11</sup> *Smetsh Gomee v. The State* (10.3.67).

from all the circumstances, including anything the accused said at the time. Before they can convict, the triers of fact must find that the accused must have realised, and therefore did realise, that there was a risk to life involved in his act, and must have acted, and therefore did act, without caring whether death followed or not. It is respectfully suggested that the English law, in its understandable striving after an objective approach, may not, at the moment, be in as satisfactory a position as is ours.

In the matter of provocation, too, there appears to be a difference. English law apparently uses rules of law to govern the operation of provocation, while we prefer to treat it as no more than an element in deciding whether the requisite element of intent has been established by the prosecution.

In these inquiries English law has provided valuable illustrations and materials for comparison but in the result the paths of the two systems, while not widely diverging, have not coincided.<sup>12</sup>

Much the same may be said about the problems connected with the various forms of participation in crime. So, in discussing the position of a *socius criminis* where the offence is statutory, the Privy Council, in a recent appeal from the Federal Supreme Court in a case from Southern Rhodesia (Rhodesia), applied nothing but Roman-Dutch law.<sup>13</sup>

Insanity as a defence continues to raise problems. We add to the original defences recognised in the *M'Naughten* rules the excuse of irresistible impulse, induced by mental

<sup>12</sup> *R. v. Krull*, 1959 (3) S.A. 392 (A.D.).

<sup>13</sup> *R. v. Mapolisa*, 1965 (3) S.A. 578.

disease. Modern psychological advances and theories are sometimes difficult to reconcile with the old approach. Presumably this is met to some extent by the concept of diminished responsibility, but we have not so far taken it over either by statute or by judicial borrowing. The subject is presently being investigated by a judicial commission.

We do not distinguish between felonies and misdemeanours and do not feel in any way handicapped on that account. I understand that you have just rid yourselves of the differentiation.<sup>13a</sup>

Our law of attempt, especially of attempt to achieve the impossible, owes a good deal to modern juristic discussions in South Africa and in overseas countries, including the United Kingdom, but there is no predominance of the English law in the conclusions reached.<sup>14</sup>

On the whole it seems to be clear that on the substantive side the contribution of English law to our criminal law, though by no means insignificant, has been very much less than it has on the procedural side.

Turning now to civil as opposed to criminal law, not much need be added on the procedural side to what has already been said. During the nineteenth century we took over much of the English procedural system, though in the Supreme Court, but not in the magistrate's court, we retain an old Roman-Dutch procedure called provisional sentence, side by side with the modern summary judgment system, which our legislature copied from Britain. Interrogatories are not used in our Supreme Court but are available in the magistrate's court. Our system of discovery was also

<sup>13a</sup> Criminal Law Act 1967 (c. 58).

<sup>14</sup> *R. v. Davies*, 1956 (3) S.A. 52 (A.D.).

taken from Britain. Generally our rules of court do not go into the great detail to be found in the English books of practice. For a time we adopted the English system of civil juries, which were used in some parts of South Africa until the year 1927, when they were abolished for the Cape Province and Natal,<sup>15</sup> where alone they were still in use.

I shall now mention one after another, but, I hope, at no great length, the more important branches of our substantive private law and refer to some of the English law contributions thereto.

Our law of succession has hardly been touched by English law, except for our statutory adoption of the English form of wills in place of the more elaborate, and for that reason less convenient, Roman-Dutch forms. The contents of South African wills are governed by our own types of disposition, many of which have come to us from Roman law, but we often gain assistance by referring to English cases and textbooks, chiefly on problems of interpretation. Intestate succession in South Africa is governed by rules in which English law has played no part.

Our matrimonial law, based, on its material side, on community of property, with the right in the parties to exclude this by antenuptial contract, owes approximately nothing to the English law. Our divorce law, too, has always been decidedly different from English law. Today modern statutes tend to govern the position, both in Britain and in South Africa, with the British law moving, I believe, in some respects, towards ours. If in this branch of the law we have been among the leaders we are glad to have been able to pass something back to the source from

<sup>15</sup> Administration of Justice (Further Amendment) Act, No. 11 of 1927, s. 3.

which we have received so much. The position of children in relation to their parents and other persons is also in South Africa largely governed by satisfactory modern statutes, similar no doubt to those in many other countries. Adoption is also statutory today. But the rights and obligations of minors in respect of contract, delict, property and succession are based on Roman-Dutch principles with little modern accretion, English or other.

Our law of property owes little to English law. We do not have the distinction between real and personal property and see no reason to regret its absence. We follow the classification of kinds of property that the Romans used. We have a satisfactory system of registering transfers of the ownership of immovable property and of real rights, less than ownership, in such property. Our system was no doubt considered among others when the modern English real property statutes were enacted.

It has been remarked that, unlike English lawyers, civilians—and that includes us—do not think of immovable property in terms of estates but in terms of the bundle of rights that make up ownership.<sup>16</sup> This may differentiate the day-dreams of conveyancers under the two systems, but I doubt whether it materially distinguishes the legal thinking of other lawyers.

Our mortgage and pledge are substantially the Roman *fiducia* and *pignus*. They operate satisfactorily in the modern law.

Possession is a source of judicial headaches in South Africa as elsewhere. It probably plays a larger part with

<sup>16</sup> F.H. Lawson, *A Common Lawyer Looks at the Civil Law*, p. 108 *et seq.*

us than in the lands of the English common law because under our law a change of possession, though not invariably entailing a physical handing over, is required in order to produce a voluntary change of ownership. English cases on possession have often provided us with valuable illustrations in discussing the ownership problems arising out of insolvency.

Whether our general law of contract owes much or little to English law is a matter of assessment and description. There has certainly been an appreciable contribution, which some would call considerable and others insignificant, while intermediate adjectives would to many seem more appropriate. Though South African companies and notaries may use seals we do not have the basic distinction between contracts under seal and simple contracts. In a few cases writing is required by modern statutes but otherwise our contracts are merely agreements. Broadly speaking, if they are lawful they are enforceable. There is no trace of the old Roman distinction between contracts and nude pacts. I shall mention consideration later.

Today we usually discuss the formation of contracts on the lines of offer and acceptance, an approach that owes much to the English common law. Where, however, the parties have negotiated by post, telephone, telegraph or some other form of distant communication, the questions whether, when and where a contract has been concluded may sometimes be decided differently in South Africa from the way they would have been decided in the United Kingdom. As is well known, there has been a great deal of juristic discussion of the more subjective and the more objective approaches to the problem of *consensus*. Mercantile convenience tends to be decisive where there is

no obvious balance of justice on one side or the other and English law has helped us materially to reach the best conclusion. Particularly in this connection it is of prime importance that the law should be clear and certain. If it is, this will enable the expectations of the parties to be met, with a consequent concurrence of justice and convenience. In South Africa, as no doubt elsewhere too, the law has not fully reached this goal, but we are working towards it.

As regards the subject of illegality, neither English law nor South African law allows an illegal or immoral contract to be enforced. But when such a contract has been entered into, and has been executed in whole or in part, difficult problems arise about what relief, if any, either of the parties is to be granted. Roman law, in its developed form, used one or other of its *condictiones* but the question always remained in what circumstances, if at all, either party should receive restitution. English law apparently used the same Roman maxims as its starting point as we did and encountered the same difficulties that we have met. Illegal contracts must be discouraged but considerations of fairness are not to be ignored. Public policy requires that both aspects should be taken into account and that there should be sufficient flexibility in the law to enable the courts to get as near as possible to achieving justice between the parties. It is not possible in this lecture to enter into details on this subject. Our law appears from *Jajbhay v. Cassim*.<sup>17</sup> The English law is discussed in an article in 71 L.Q.R. 254.<sup>18</sup> Though we have freely referred to English decisions it seems

<sup>17</sup> 1939 A.D. 537.

<sup>18</sup> J. K. Grodecki, "In Pari Delicto Potior est Conditio Possidentis" (1955) 71 L.Q.R. 254.

that there are substantial differences in the approaches in the two countries. We do not today favour the procedural test that seems to have become established in Britain and our law is apparently more flexible, giving the courts more latitude to do what seems to be fair and reasonable in the circumstances. There is in our law a doctrine of unjust enrichment which, even though the Appellate Division has stated<sup>19</sup> that it does not create a legal obligation independently of one of the recognised enrichment actions, nevertheless sometimes enables us, I think, to reach a better result than can be achieved by the English courts, though not perhaps than that reached in Scotland.

The trouble about the subject of mistake is that it has either to be dealt with at great length, so as to meet the many problems of doubt and difficulty, or else be merely touched on. The latter is the only practicable course to follow in the present series of lectures. Our Roman and Roman-Dutch sources on the subject cover only a small fraction of the ground. There are the well-known categories of error, each with its own special difficulties. In working them out our courts have often made mention of English decisions, many of which, in their turn, have made use of civilians like Voet and Pothier. It is eminently a field in which the courts are accustomed to seek help wherever it is to be found, and English law is one of the sources to which we have often looked, and not always, though certainly sometimes, in vain. Rectification of written contracts is one aspect of the broad subject of mistake in which English decisions have frequently been used. This is natural, since it is bound up with the parol evidence rule which, with so

<sup>19</sup> *Nortje v. Pool N.O.*, 1966 (3) S.A. 96 (A.D.).

much else in the law of evidence, we have taken over from English law.

Misrepresentation, fraudulent and innocent, has let in English law decisions fairly freely to help in working out the generalisations that were all that the Roman-Dutch law revealed. Only as late as 1955<sup>20</sup> was it established that our law embraces a doctrine that is indistinguishable from the English undue influence—we use the same expression. Different forms of duress stand on much the same footing. English law has helped considerably in the development of this part of our law, but there is a useful substratum of Roman and Roman-Dutch texts on which to build.

Until the year 1919 there was a long drawn-out controversy in our courts as to whether our law required consideration in the English law sense to make an agreement a contract and therefore enforceable. As indicated above, sealing would not make a difference. The first Chief Justice of South Africa, Lord de Villiers, favoured the view that consideration was necessary, but after his death the contrary was established in the case of *Conradie v. Rossouw*.<sup>21</sup> Since that decision it has never been open to question that in our law, subject to certain exceptions, “an agreement between two or more persons entered into seriously and deliberately is enforceable by action.” The controversy about consideration was largely built up on the requirement, referred to in many old authorities, that to be enforceable an agreement must have a *justa causa*. It was asserted, and denied, that *justa causa* meant the same thing as the English law consideration. A great deal has been written on the subject, both before and after 1919, and no

<sup>20</sup> *Preller v. Jordaan*, 1956 (1) S.A. 483 (A.D.).

<sup>21</sup> 1919 A.D. 279.

doubt more will be written in the future. Two of the main views as to the meaning of the requirement of *justa causa* are explained and discussed in *Conradie v. Rossouw*, but today the inquiry seems to be rather arid. Whatever the true historical meaning of *justa causa* may have been, if it ever had one established meaning, all that matters in practice is to know, as every South African lawyer knows, that with us consideration is not required in order to make a serious and lawful agreement enforceable.

The fact that our law does not require consideration, and, in particular, consideration moving from the promisee, in order that an agreement should be enforceable, removes what in English law is or has been, for change is in the air, a major difficulty in the way of enforcing an agreement made for the benefit of a third person, in the sense that it is intended that the third person should be able to accede to the agreement and become a party to it. In South African law such an agreement is fully enforceable by and against the third person, once he has accepted its terms and agreed to become a party to it. Such a *stipulatio alteri*, as it is commonly called, was used, before a statutory change made it unnecessary,<sup>22</sup> to enable a contract to be made to bind in the future a contemplated but as yet unregistered company, and thus to escape from the impossibility, under the law of agency, of binding a non-existent principal or enabling it, when it comes into existence, to ratify or adopt a contract already made professedly on its behalf.

The *stipulatio alteri* has during recent decades also been used to provide a legal foundation for *inter vivos* trusts in

<sup>22</sup> Companies Act, No. 46 of 1926, s. 71.

South Africa.<sup>23</sup> English lawyers have gloried in their invention of the law of trusts and have, perhaps, felt a little superior to their civil law opposite numbers, who have not had the background of English equity to work on, and have been handicapped in this connection by a fairly rigid division between real and personal rights.

If the English lawyers, led by magnificent Maitland, have been pleased to claim as their own achievement the law of trusts, with all its wonderful possibilities, we in South Africa—I cannot speak for other civil law countries—have perhaps yielded too extended a respect to English rights of invention. It would be ungenerous in any civilian lawyer, above all one quite unequipped to support the view that the English law of trusts absorbed a good deal of the Roman law of *fideicommissa*, to question the claim that trusts were a true native growth of England, only using Roman law occasionally to supply a convenient word or phrase. I do not suggest that we should challenge the validity of the patent. I feel, however, that we have been over-sensitive about claiming, or taking, a compulsory licence to use what ought to be an international tool, whatever its origin. Indeed the South African man in the street or on the veld has come to use the trust pretty freely. But it has been when the lawyers have sought to rationalise this user that difficulties have arisen. Although, as already indicated, we have often been successful borrowers, we have refused to take over any appreciable part of the English law of trusts, partly, no doubt, for fear that it would be indigestible and would create internal troubles, partly, I believe, because of all the subtle equity rules that we think we should have to

<sup>23</sup> *Crookes N.O. v. Watson*, 1956 (1) S.A. 277 (A.D.).

master and apply, and partly, perhaps, out of a feeling of independence, exaggerated to counter-balance the inventors' air of superiority. However that may be, we have generally declined to admit openly that since a proper law of trusts is necessary for modern civilised life, and since we have not got one, all such, but only such, copyings and borrowings should be effected as are required to produce a satisfactory system. Instead we have claimed that we already have a sufficient law of trusts based on the *stipulatio alteri* for trusts *inter vivos*, and on the *fideicommissum* for testamentary trusts. I do not think that the result so far is satisfactory. The requirement of acceptance by the beneficiary for whose benefit the trust *inter vivos* is created, if the trust is to be binding, can lead to failures of purpose and countenance breaches of faith, while the *fideicommissum* is limited in its possibilities by the principle that it only creates rights *in personam*.

These defects could no doubt find improvement through judicial or legislative action, but it seems to be a pity that up to the present we have been so hesitant about taking into our law enough of the English law of trusts to satisfy the needs of modern South Africa. One can borrow too much, but one can also borrow too little.

Another example, I think, of an unfortunate reluctance to borrow is provided by the refusal of our courts to assume an equitable jurisdiction to relieve against the forfeiture of leases for breach of their conditions, where the landlord is expressly given the right to cancel for breach. In some respects our common law is more favourable to the tenant than is the English law, and we too have our Rents Act dating, in its original form, from the First World War, but on the question of relief against forfeiture we have

taken the stern line that the provisions of the contract must be given effect, however harshly they may operate against the lessee.

A similar severity appeared till recently in our law of sale, where the *lex commissoria* was given full effect on the authority of a passage in Voet's *Commentaries on the Pandects*. This *lex* is not a law but a term in a contract of sale whereby, on failure of the purchaser to carry out his obligations under the contract, the seller may cancel, and, if it was so provided in the contract, retain instalments of the purchase price already paid. Our common law allows no room for relief in the purchaser's favour even though in any particular case the *lex* operates, and was intended by the parties to operate, in a highly penal manner. For Voet spoke otherwise. The South African law on the subject was, however, changed in 1962 by the same Act as altered the law of penalties and liquidated damages, to be mentioned presently.

During the last few decades our legislature has followed the overseas, including English, practice of passing hire-purchase statutes to protect the instalment purchaser against the harshness of the common law. The field of hire-purchase is today an enormously wide one throughout the Western world, with extensive social and economic implications, and its law has become correspondingly involved. It is not possible in these lectures to do more than refer to it and say that, as far at least as South Africa is concerned, the statutory protection to the usually weaker contracting party is far from complete. Improvements may perhaps best be achieved by copying what has been found good in other countries.

In 1934 the Privy Council decided the already mentioned case of *Pearl Assurance Co. Ltd. v. Union Government* on the subject of penalties and liquidated damages. Although our law has been changed by a 1962 statute<sup>24</sup> the case remains an important landmark in our legal history. Where a contract provided that in the event of a breach the defaulting party should pay a fixed or ascertainable sum to the other, Roman-Dutch law entitled the latter on breach to recover the stipulated or ascertained sum in full, provided that where this sum appeared to the court to be grossly excessive it might order the payment of a smaller amount instead. In South Africa in the middle of the nineteenth century this approach encountered the English law rule, which looked at the intention of the parties at the time of contracting. If they were really trying to assess the probable loss that would be suffered by the innocent party through a breach, the fixed or ascertainable sum was deemed to be "liquidated damages" and was recoverable in full, regardless of the amount of the loss actually suffered. If on the other hand there was no genuine pre-estimate of damages, but, as would then normally be the case, only the provision of a formidable sum designed to frighten the party affected into observing the contract's terms, this was called a penalty and could not be recovered. In such cases the actual loss had to be proved as if no sum had been fixed in the contract.

In South Africa our courts moved away from the old Roman-Dutch approach and copied the English law distinction, looking at the intention of the parties when they contracted. But in the *Pearl Assurance* case<sup>25</sup> the majority of our Appellate Division held that, though our

<sup>24</sup> Conventional Penalties Act, No. 15 of 1962.

<sup>25</sup> *Pearl Assurance Company v. Union Government*, 1933 A.D. 277.

law had adopted the English law distinction, the fixing of a penal sum was not with us, as in England, wholly ineffective. It altered the onus by requiring the party in breach, on being sued for the penal sum, to allege and prove that the loss suffered had not been as great as that sum, which should accordingly be reduced. But the Judicial Committee held that, once the distinction between liquidated damages and penalty was accepted, it followed that a stipulated penalty, not being recoverable, could not reasonably alter the onus.<sup>26</sup> As was pointed out in the minority judgment in the Appellate Division, considerations of convenience accord with the view that, if the penalty is not recoverable as it stands, the plaintiff should have to prove his loss as if no penalty had been fixed, instead of the defendant's having to prove the plaintiff's loss and that it was less than the penal sum.

The result has sometimes been criticised on the ground that an English law approach was introduced into our law which already had an adequate line of its own. That would have been a supportable argument in the middle of the nineteenth century, when the change of direction was initiated, and it may have been a factor contributing to the restoration of the old law by our Parliament in 1962. But testing the position in 1933 and 1934, once the move in the direction of the English law had been made, it is difficult to criticise the view that, although sometimes it may be proper to borrow only a part of the relevant rules of another system, in this case the English law had to be taken over *in toto*, if at all. The half-way position approved by the majority of the Appellate Division would not have saved the historical harmony of our law, nor would it have

<sup>26</sup> *Pearl Assurance Company v. Union Government*, 1934 A.D. 560 (P.C.); [1934] A.C. 570.

provided us with a just, reasonable and convenient set of rules.

I have dealt with this case at some length because the introduction of the penalty-liquidated damages distinction was a striking example of the English law contribution to South African law. It remains as striking as ever despite the subsequent statutory change. The law laid down in 1934 was not imposed on us—and therein I respectfully agree with Lord Tomlin—but it was unquestionably borrowed by us in the nineteenth century, and this, I venture to suggest, might have been more openly stated in 1934.

Before I leave the subject of contract, mention must be made of the law of agency, which is such a universally important part of contract-making in modern times. Though Roman law had its gratuitous contract of mandate and its hiring of services, which might include the service of making a contract for the hirer, it did not develop the notion of representation without the agent's incurring liability. The Roman-Dutch jurists made considerable progress towards the modern idea of a contractual agent as a mere link between his principal and the other contracting party, but they had not elaborated the details to any great extent before the end of the eighteenth century. Then in the nineteenth century, South African lawyers came into contact with the English law, which was not materially different in principle but had been worked out more fully. English cases and textbooks provided the clearest and most convenient guidance that was available and their free use led to the present position in which, with a few exceptions, which are rather theoretically possible than established, the two systems of law are on this subject indistinguishable. Though it is possible to describe this result as a mere example of

parallel development, in a matter where sound reasoning should reach the same conclusions, the fact is that we did get a great deal of help from English law in developing our law of agency up to its present level.

I turn now to that great branch of the common law that is called in South Africa the law of delict and in England the law of torts. The difference between the singular and the plural corresponds roughly to a difference in historical backgrounds, though it is sometimes treated as of more importance than it deserves. In English law the prevailing picture is one of individual wrongs which the courts at various stages in the law's long history came to recognise as requiring an action for damages at the suit of the injured party. The English law of torts is thus a compendious description of the rules that apply respectively to the separate civil wrongs that have come to be treated as such over the centuries. In South Africa, on the other hand, we are accustomed to say that, with trifling exceptions, our law of delict rests on two ancient Roman remedies—(a) the *actio injuriarum*, to compensate for and penalise attacks on the person, which originated in the XII Tables and was developed by praetorian edicts; and (b) the *actio legis Aquiliae*, the action to recover compensation, including originally a penal element, for harm done to another's property; in the later law harm to the other's body was included, and all forms of harm had to have been caused intentionally or negligently. There being thus, substantially, only two major bases for our law of delict, we are inclined to claim that this law is broader and more capable of being reduced to a few principles than is the English law, with its multiform distinct torts.

For these reasons it has been said that the English law is rich in detail but poor in principle, while the South African law is poor in detail but rich in principle. I find it difficult to estimate the correctness of this superficially attractive aphorism. In the nineteenth century when our South African textbooks and volumes of reported cases were few and covered but a small part of the law, a lawyer writing an opinion or a judge composing a judgment had perforce, where legal problems were involved, to rely largely on the general principles that were part of his mental equipment or were to be found in the old books. But as more of our cases came to be properly reported, and were established as the major source of our common law, and as more and better textbooks giving the effect of the decisions came to be written, it was inevitable that the principles, though always there in the background, should be less in evidence, and the detail, in the form of *rationes decidendi* and even *obiter dicta*, should bulk more largely. In deciding cases, courts increasingly required more directly useful guidance than could ordinarily be found in the Roman texts or even in the old books of the seventeenth and eighteenth centuries.

When it is a question of moving the law forward—when it is not merely a matter of reaching the right decision by applying deductively a well established general rule to the facts—the more useful process is the largely inductive one of working selectively from case to case, inferring from the earlier, the special rule appropriate to the later. *Ex hypothesi* in such cases there is an element of growth to be considered and this is not produced by purely deductive reasoning. It will rarely be an earth-shaking advance that has to be made. Though occasionally gaps may have to be filled, more commonly there will be no more than an

explanation or clarification of what has already been laid down. But whether the step be big or small, it involves development, aimed at an improvement. To achieve this it can rarely be of much assistance to study closely the remote origins of the law. The examination of modern decisions in any other country where the courts have dealt with similar problems to the one in issue is far more likely to be helpful.

A good illustration of this situation is to be found in a problem on which the courts of some countries have been working for several decades, namely, whether, and if so subject to what conditions, a person injured by another's negligent, but not fraudulent or defamatory, statement should be entitled to recover damages from that other. The earlier law of negligence is in the nature of things concerned with physical damage to person or property by direct or indirect contact. Now we come upon a somewhat different problem. It seems to be pre-eminently a field in which it would be best to study other systems of law, under which the subject has come before the courts, and to borrow from them and work into our own law apparently suitable ideas. In South Africa we have moved tentatively along these lines but there is much more to be done before our law on the subject is clear and satisfactory. It is possible that our debt to British and American legal thought may grow in the process, or, of course, that we, in turn, may be able to make a useful contribution to the law of other countries, including the United Kingdom.

Any modern system of law must provide remedies for much the same kinds of wrongs, and much the same defences to those remedies. All systems must in one form or another, and with such limitations as may seem reasonable, give

effect to the notion that he who traduces another or intentionally or negligently injures his person or his property without lawful excuse should, in general, make good the damage, so far as money can do it. Harm caused in these ways will naturally be compensated on fairly similar lines in every civilised country. It is, at any rate, difficult to see why the adjustment of the rights of the parties should vary according as the origin of the remedies, or the defences, if discoverable, is found in an ancient statute, a recorded custom, an old judgment or a piece of juristic reasoning. These origins provide the history of the law but are unlikely to help us to fix the scope of its operation today.

There is no doubt that during the past century and a half we have used English law decisions fairly freely in deciding our delict cases. We have certainly not swallowed the English law without discrimination. It has occasionally become obvious to the English courts themselves that a line of their cases has come to a dead end and has been forced by precedent into an unsatisfactory situation. In such cases we, coming later and gaining by the experience of the English courts, have sometimes been able to avoid the impasse. Examples of our refusal to follow English rules are fairly common. For instance the English common law doctrine of conversion, whereby a person who innocently keeps another out of the possession of his property is liable for its full value, is not part of our law. We do not distinguish between the legal positions of invitees and licensees (a distinction which I understand was only abolished in England when the Occupiers' Liability Act 1957<sup>27</sup> came into force on January 1, 1958), nor do we limit a trespasser's right to compensation to the extremely restricted circum-

<sup>27</sup> 5 & 6 Eliz. 2, c. 31.

stances in which English law gives him a remedy. In all cases we recognise a duty on the part of the occupier of premises towards all persons whose presence thereon might reasonably be foreseen. In particular circumstances this would include trespassers. Again, we limit the award of nominal damages to cases where action was brought in order to establish the existence of a disputed right. Otherwise, in cases involving no element of insult, the plaintiff, if he is to win his case, must prove some damage, even though it be small.

A more important difference between the two systems is that we have an old but decidedly alive remedy for the unlawful killing of one who was legally obliged to support others. This "dependants' action" has the peculiarity that it gives a right of action to the dependants, to whom no duty was owed, for breach of a duty of care owed by the defendant to the deceased. In consequence problems of interest and importance arise in regard to contributory negligence, the principle embodied in the maxim *volenti non fit injuria* and the operation of statutory damage apportionment. Although in providing compensation for the death of a breadwinner we were ahead of the United Kingdom, the latter has closed the gap by means of statutory relief. The results in the two systems are now similar, though not identical.

These are only a few of the examples that could readily be multiplied to show the differences, generally minor, between English and South African law in the sphere of delict or torts. Nevertheless it would be a serious mistake to underestimate the importance of the English law contribution in this branch of the law. We have gained a great deal by using English law to fill gaps, provide examples and

support reasoning by analogy. Generally this has been done with discretion and the results have been satisfactory. We have developed a good body of law, South African law, for the compensation of persons injured by the harmful behaviour of others.

Our law of negligence, however much we may like to refer to the *lex Aquilia*, generally follows lines that are closely similar to those in use in the lands of the English common law and no doubt also in other civilised communities. The wide and important area of inquiry into the liability of employers, principals and masters for the delicts committed by independent persons whom they have engaged to do something for them, or by agents, or by servants, bristles with difficulties in the exposition of the bases of distinction and in the application of the law to the facts. Much of our modern law on the subject is represented in what was said by Voet, Pothier and other civilians of the Roman-Dutch period, but the law has continued to grow in the course of deciding cases right up to the present day. Illustrations throwing light on situations requiring their own special treatment have continually been found in the English law countries and have been used to make our law clearer and to contribute to its growth.

But here too our law has sometimes diverged pronouncedly from the English law. Thus our treatment of cases where the servant has caused damage after he has temporarily abandoned his master's work has in some respects been differently stated,<sup>28</sup> and the exception of common employment to the general rule of the liability of the master for the acts of his servant in the course of his

<sup>28</sup> *Feldman (Pty.) Ltd. v. Mall*, 1945 A.D. 733.

employment has not been adopted by us. So the High Court of the nineteenth-century South African Republic emphatically rejected the exception while recognising that the general rule of liability had been taken from English law. In his judgment Kotzé C.J. said, "This exception is foreign to our jurisprudence, and rests upon untenable grounds."<sup>29</sup> In 1948 the British Parliament excised the unattractive growth after a relatively short and unpopular life.<sup>30</sup>

Contributory negligence in accident cases is a universal problem and in different countries the same sort of revulsion has been observable from the general proposition that the plaintiff loses his case if he was in any degree relevantly negligent. Our courts and the courts of the English common law area wrestled, with only partial success, to reach a good solution, and our legislatures have had to come to the rescue. Apportionment of Damages Acts have been passed on the lines of the old Admiralty rule and the codified apportionment rules already adopted in some civil law countries before our modern statutes were introduced. The words used in the latter have not been identical and interpretation has revealed divergences. Throughout this part of the law, which has become so important owing to the vastly increased volume and speed of all kinds of modern transport, there has been some exchange of ideas among legislatures and courts, but it would be difficult to point to significant contributions of English law to South African law.

In this connection some reference should be made to the phrase *res ipsa loquitur*, which, as Lord Shaw so wisely said, would never have been called a principle if it had not been

<sup>29</sup> *Lewis v. Salisbury Gold Mining Company* (1894) 1 Off.Rep. 1 at p. 21.

<sup>30</sup> Law Reform (Personal Injuries) Act 1948.

in Latin. We received it from Britain and have used it in a good many, perhaps in too many, cases. Although there have been, and may still be, judicial differences of opinion on the operation of the maxim, the basic principle is well settled, and it is now beyond dispute in South Africa that when the circumstances proved by the plaintiff call for an answer from the defendant, in other words when *res ipsa loquitur*, this does not shift the onus to the shoulders of the defendant, for the onus, in its only proper sense, is fixed on the different issues in the case by the pleadings and never shifts. The only effect is that if the defendant calls no evidence or evidence of little acceptability or weight he may, but will not necessarily, lose his case. It is perhaps not so clear that the position is exactly the same in the United Kingdom.

Another sub-department of the law of negligence in which our courts have leaned heavily on English decisions has recently had its foundation removed by statute in Britain, while with us the earlier law still stands. The law, as it is in South Africa and was in Britain, limits the liability of a local authority where harm has been caused by an unevenness in a road surface which the authority was only authorised but not obliged to maintain. This limitation, established by what are often called in South Africa "the municipality cases," rests ultimately on the principle that mere omissions do not ordinarily create liability for resulting harm. Our courts, while recognising the weighty reasons for giving municipalities this protection, have sometimes suggested that the hardship to the injured party might call for legislative action. Perhaps when we have watched the operation of the English 1961 Act<sup>31</sup> for a sufficient period

<sup>31</sup> Highways (Miscellaneous Provisions) Act 1961, s. 1.

we too may impose an obligation on local authorities to repair all roads under their jurisdiction up to the reasonable limits of their resources, when the immunity would presumably disappear.

The English law contributions to the South African law of defamation and of nuisance will appear from the following section.

## CHAPTER 5

### HOW THE CONTRIBUTION STANDS TODAY

THE fact that our law has in various ways come to be composed of elements drawn from different sources, some modern and many related to English law, has not in the past seemed to most South African lawyers to constitute a defect or disadvantage. In the last few years, however, certain decisions of our highest court have indicated a disposition to get rid of certain of these elements, especially though not exclusively, in the law of delict. In consequence quite a juristic war has come into existence among South African writers on legal topics. Two of the principal areas of controversy have been defamation and nuisance, and it will be convenient to deal with the contributions of English law to these parts of our law by referring to what may prove to be the end stage of those contributions.

In some respects our law of defamation differs substantially from the English law. For instance, we do not distinguish between oral and written defamation. Sir Alan Herbert's well-known problem about the defamatory gramophone record raises no difficulties for us. Like each of the noble lords who sat on the appeal we would indeed call it a clear case, for though we occasionally use the terms "libel" and "slander" the law for both is the same. The plaintiff never has to prove special damage. Our recognition of absolute privilege is far more limited than that of the English law, being confined to the statutory protection of statements made in Parliament or in a provincial council

and of authorised reports of parliamentary proceedings. Advocates, attorneys, witnesses—even judges—must be content with qualified privilege for what they say in court. Our defence of justification requires proof not only that the words complained of were true but also that their publication was in the public interest.

Two principal issues emerge from the recent Appellate Division decisions on defamation<sup>1</sup> to which I have referred. The first issue relates to the requirement of *animus injuriandi* and to the question whether the defendant can meet the plaintiff's claim, not only by establishing privilege or one of the other "set or stereotyped" defences, as they have perhaps unfortunately been called, but also by showing generally that in publishing the words complained of he had no intention to injure the plaintiff. The second issue is a linguistic one, as to the meanings to be given in our law of defamation to the expressions *animus injuriandi* and malice. The Afrikaans word for the latter when used to signify spite or ill-will is "kwaadwilligheid." I mention this because it happens that the principal judgments that have raised the controversial issues have been composed in Afrikaans, one of our two official languages. Whether "kwaadwilligheid" would, like malice, carry the technical sense of entertaining an indirect or wrong motive, if used in relation to the rebuttal of qualified privilege, does not clearly appear from the judgments in question. Presumably it would, unless the law has been even more radically changed than seems to be probable.

<sup>1</sup> *Jordaan v. Van Biljon*, 1962 (1) S.A. 286 (A.D.); *Craig v. Voortrekkerpers, Bpk.*, 1963 (1) S.A. 149 (A.D.); *Nydoe v. Vengtas*, 1965 (1) S.A. 1 (A.D.).

The first issue appears to have been settled in favour of the view that, although proof of publication of defamatory matter concerning the plaintiff places the onus on the defendant of negativing *animus injuriandi*, the latter can defend himself by any kind of evidence that shows his non-injurious state of mind and not only by proving one of the "set or stereotyped" defences. The view that has thus come to prevail makes liability for proved defamation in most cases a subjective issue, depending on whether the defendant actually entertained *animus injuriandi*, and not, as the other view would have it, that what must be principally looked at is the harm to the plaintiff, the defences being restricted to certain kinds of situation, to be established objectively, and the defendant's state of mind only becoming relevant at the stage when the plaintiff seeks to rebut a rebuttable defence.

The second issue may in the long run turn out to be the more important, for it is obviously essential that key expressions like *animus injuriandi* and malice or "kwaad-willigheid" should be used unequivocally in the same sense in setting out the law. The Latin expression, in particular, would be none the worse for being translated, and kept translated, lest it degenerate into an imprecise symbol, reminding one of the old lady's use of the blessed word "Mesopotamia" to which she had recourse whenever she needed comfort.

The relevancy of the defamation problems to the contribution of English law seems to lie principally in the fact that we took over the defences of privilege and fair comment from the English law, though no doubt cases falling under either would prima facie support a general defence on Roman-Dutch lines that the defendant was not actuated by *animus*

*injuriandi*. This process of making specific categories (in this case of defence) out of a wide generalisation apparently seemed to the Appellate Division to be a harmful importation. Another objection to the treatment of defamation cases that had hitherto obtained was found in the use of the word "malice," which seems to have been regarded as a confusing alternative to *animus injuriandi* introduced unnecessarily from English law.

It would be interesting to explore fully these important matters, on which it seems likely that much more remains to be said. In particular it will be interesting to see whether the publishers and editors of newspapers containing defamatory matter will in future be significantly relieved of liability where they can show that they had no intention to injure the plaintiff. But for present purposes it is sufficient to say that the English law contribution to the law of defamation has been substantial, but that its retention has, at least, been placed in some doubt. There is apparently a good deal still to be done in working out this branch of the law before clarity and certainty are attained.

In regard to nuisance a recent Appellate Division decision,<sup>2</sup> in its majority judgments, deprecated the great reliance on English decisions that had become established in our courts on this subject. The Eastern Districts Court of the Cape Colony had in 1882 come to the conclusion that "the English law upon the subject of nuisance seems to be in every respect similar to that of the Roman and Roman-Dutch law."<sup>3</sup> Reference was also made in the 1882 case to the fact that English cases on nuisance had cited Roman law maxims to the effect that one must not do on one's

<sup>2</sup> *Regal v. African Superslate (Pty.) Ltd.*, 1963 (1) S.A. 102 (A.D.).

<sup>3</sup> *Holland v. Scott* (1882) 2 E.D.C. 307 at p. 312.

property what might harm the property of another, and that one must use one's property so as not to harm that of others. English cases dealing with the same type of nuisance as was involved in the Eastern Districts case were freely used by the 1882 court in reaching its conclusion. In many later cases in South Africa it was accepted that our law of nuisance is the same as the English law. It has, however, frequently been stated in our courts that the English case of *Rylands v. Fletcher*,<sup>4</sup> which is commonly treated in England as part of the law of nuisance, would not be followed by us. In the case of an isolated act causing damage to land or buildings, negligence at least would have to be proved.

In the recent Appellate Division case it was suggested that the 1882 judges had acted like legislators by substituting English law for existing South African law. If this is the right interpretation of the 1882 judgments it was, no doubt, a grievous fault. Future investigations may, however, lead to the conclusion that the only fault to be imputed to the 1882 judges is the relatively venial one that, while they referred to some of the old books, they did not do enough exploration and accordingly too readily resorted to the convenient and apposite English cases. The actual decision, it should be noted, was not overruled in the Appellate Division case.

It was also suggested in the latter that the 1882 court had reasoned that, because the above-mentioned Roman law maxims had been quoted in English judgments on nuisance, it followed that English law could safely be treated as identical with our own. Such reasoning would, of course, have been fallacious, since, starting from the Roman law maxims, the English law might have diverged and followed

<sup>4</sup> (1868) L.R. 3 H.L. 330.

lines that would make it different from, and unsuitable for incorporation in, our law. Whether the reasoning in the Eastern Districts court did follow this fallacious rule of thumb may, however, still be open to further consideration. Mere mention of the Roman law maxims would not have established such faulty reasoning, since use of the maxims by English courts would properly suggest that what might be taken from the English law would probably fit harmoniously into ours. The latter reasoning would suffice to justify the common practice of our courts, when making use of English decisions, to refer to the fact, if it is a fact, that those decisions have been based on Roman law texts or on the commentaries of Roman-Dutch or other civilian jurists. Where, as in the case of the conflict of laws, a branch of the English law has been largely built up on the views of Roman-Dutch and other civilian jurists, it is natural for our courts to use the relevant English decisions with greater confidence that the South African law so established will be in harmony with our basic principles than if the English decisions had no historical association with Roman-Dutch law.

Even, however, if the 1882 judges did reason fallaciously and thought that our law was automatically to be treated as the same as the English law because the latter was based on Roman law maxims, it would not necessarily follow that the long-accepted view of what the South African law was should be overridden. It would be right, before reaching a conclusion, to have regard *inter alia* to the intrinsic merits of the parts of the English law that had been introduced. The distinction between nuisances causing physical damage and those causing no more than discomfort might seem to be valuable, and so might some of the language of English judges in describing the test for actionable discomfort. In

fact the English law used by the trial judge in the case that went to the Appellate Division was not criticised on its merits by the latter.

In the result it seems doubtful whether a delict of nuisance, or in Afrikaans "hinder," still exists in South African law, though, if it does not, protection against such interferences as have hitherto been so described will presumably be afforded by working out afresh what is referred to in the Appellate Division judgments as the law of neighbours (Afrikaans—"burereg"). Whether cases will be decided differently in consequence of any such change of approach remains to be seen.

In introducing the subject of the recent tendency to remove some of the English law elements from our law, I mentioned that the tendency was especially but not exclusively observable in relation to the law of delict. Another example of the working of the tendency is presented by the recent treatment of the law of estoppel by conduct or representation. The Appellate Division had many years before accepted the view, previously adopted in colonial or provincial courts, that though we had taken the word "estoppel" from English law it was analogous to the Roman law *exceptio doli mali*. The Roman law maxim *nemo contra suum factum venire debet* would, moreover, it was said, create the same legal consequences as estoppel, the rule embodied in the maxim being practically the same as the estoppel by conduct of the English law. The Appellate Division had also in the earlier cases remarked on the fact that the subject had been much more fully developed by English decisions and that in practice we usually looked to the latter for guidance rather than to what were called "our

own authorities.” In a recent case,<sup>5</sup> however, in the Appellate Division the majority of the court found fault with the somewhat similar language used by the trial judge, and emphasised that a court is obliged to apply its own law and cannot treat another legal system as having taken the place of its own. The majority judgment does not seem to have recognised as permissible the process of borrowing, or incorporating in one system of law what appears to be useful in another and suitable for adoption, though it recognised the value of consulting another legal system in order to reach clarification so as best to apply, adapt or extend the principles of one’s own system.

No doubt in the course of time the issues raised by this judgment and the distinction which its language suggests will become clearer. Perhaps it may turn out to be largely a matter of degree as to how far a court should go in taking help from another legal system. Obviously it should not copy slavishly, without sufficient reason, and it should be careful in choosing its language to avoid support for the suggestion that it has not merely engaged in developing our law by useful adaptation or extension (employing, if thought fit, foreign materials) but has substituted the law of another country for the well-established law of our own. A number of factors would enter into the question whether or not a particular borrowing would be justified and desirable, but once an authoritative decision to borrow is reached it should be respected as much as any other decision of the tribunal in question.

Before I leave the subject of the contribution of English law to South African law, mention should be made of two

<sup>5</sup> *Trust Bank van Afrika, Bpk. v. Eksteen*, 1964 (3) S.A. 402 (A.D. at pp. 410–411.

related matters that have been discussed in connection with the recent cases that I have referred to. The first is the question whether the tendency to eliminate English law elements may reasonably be connected with the name of our common law—whether it ought to be called Roman-Dutch law or South African law. I do not think that the connection can properly be made. Our law has in truth come from several sources, including borrowings from English law. And this fact, as already indicated, no doubt contributed substantially to the use of the term “South African law” instead of “Roman-Dutch law.” But whether particular borrowings were rightly made and whether, if not, they should even today be excised from our law cannot reasonably depend on whether we ordinarily call our law Roman-Dutch or South African law. To attach weight to the usage would be to rely on a mere verbalism. Whether to eliminate or not must depend on more solid considerations.

The other, related, matter is the suggestion that, because we have embodied much English law in our system, English law has ceased to be foreign law. Being a tributary of our legal stream, so the suggestion runs, it is as much a part of our law as Roman and Roman-Dutch law, and consequently fresh borrowings from it stand on a different footing from borrowings from other modern legal systems. I have difficulty in accepting this suggestion. In so far as we have already duly absorbed English law elements they are indeed part of our law, but they were foreign law until they were incorporated. In the same way, unincorporated English law remains foreign law today, just as the modern law of Holland, if not incorporated in South African law, is foreign to us. Modern Dutch commentators on the Roman-Dutch law stand on their own merits as experts on

that law but derive no added persuasive authority from the fact that Holland was a main source of the Roman-Dutch and therefore of the South African law. So the English law of today derives no added persuasive authority from the fact that a great deal of English law has been absorbed into our law. The absorbed part is ours, the rest is foreign. And English textbook writers also stand on their own merits as experts in English law, including those parts of it that our law has absorbed, but they have no added authority by reason of the fact that we have absorbed much English law.

PART II

THE RULE OF LAW



## CHAPTER 6

### THE MEANING OF THE RULE OF LAW

I AM afraid that I cannot escape the task of trying to fix the meaning of the Rule of Law, not, I am glad to say, for general use but in order to show how the expression will be used in this lecture in applying it to South Africa.

The expression “the Rule of Law” has already been used in a fair variety of senses and no doubt others will in the course of time be thought out in an effort to increase precision, and also, perhaps, to move opinion in some desired direction. But for present purposes it is only necessary to select a reasonably well-established meaning which seems to be appropriate to the inquiry in hand.

One meaning of the Rule of Law mentioned by constitutional lawyers is the existence in a country of public order, a condition where the law is generally obeyed and the courts function effectively. This meaning is clearly not important for present purposes. Anarchy in time of peace is a rare and temporary phenomenon and is certainly not present in South Africa today.

We must then consider the meaning of the Rule of Law when applied to countries where public order exists. There the expression relates primarily to the control by the law, *i.e.*, the rules or precepts recognised by the courts, over the actions of the executive and the legislature in their dealings with the individual. If one goes back far enough one presumably finds all the powers—to make the law, to expound the law and to execute the law—concentrated in the hands of a monarch. But the notion of the supremacy

of the law requires some sort of separation of powers between the executive, the legislature and the judiciary. It presupposes an understanding that the law is what the courts say it is, including their rule that what the legislature prescribes is law. When that stage is reached it has become possible to say that the executive must observe the law, which was a principle advanced, if not generally accepted, as early as the days of Plato and Aristotle. There are traces of another early notion that even legislation is invalid if it conflicts with the common law laid down by the courts. The same sort of superiority was sometimes claimed for natural law. But these notions did not persist and before the era of modern written constitutions, when a kind of super-law was introduced, which might limit the powers of the legislature itself, the issue lay between the law, including statute-law, on the one hand and the executive on the other. The latter was generally represented in Europe until two or three centuries ago by a monarch with indefinite and extensive, nearly absolute, powers. The supremacy of the law over the executive was established in Holland in the sixteenth century and in England by the end of the eighteenth century. Other countries, often after violent revolutions, set up constitutions in the course of the eighteenth and nineteenth centuries, thus establishing the law's general supremacy, at least over the executive.

It was Dicey's analysis in *The Law of the Constitution*, first published in 1885, that gave prominence to the expression "the Rule of Law." Substantial equivalents are used, such as "Government under Law," "Government by law and not by men," "Justice under Law," "Constitutionalism" and, in a special sense, "Legality." All involve

the idea that rules for future conduct, and not the uncontrolled decisions of men in power, should be supreme. Dicey's treatment of the problems involved has been frequently, and in some respects, I believe, convincingly, criticised by constitutional lawyers in different countries, but it remains not only the most important landmark in the history of the subject but also the basis of most of the later definitions and discussions. I shall use it as the foundation for my attempt to delimit the scope of the Rule of Law for the purpose of its application to South Africa.

Dicey's main proposition, which he called the first meaning of the Rule of Law, is that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary courts of the land. In this sense," Dicey continued, "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint."

To his main proposition Dicey added two extensions, which he suggested, not, I think, very happily, were other meanings of the Rule of Law. I shall call them the second and third propositions. The second is that "every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." The third proposition is that what Dicey calls the English Constitution may be said to be "pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the

security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.”

Whether the second proposition has any importance for the purpose of this lecture depends, I believe, on whether it covers the feature of present-day South African life that is usually called apartheid. Dicey developed his second proposition by contrasting the position in England, where he said there was legal equality or the universal subjection of all classes to one law administered by the ordinary courts, with the position in many Continental countries where persons employed by the state were protected from the jurisdiction of the ordinary tribunals and subject in certain respects only to official law administered by official bodies. It is clear that Dicey did not have anything like South African apartheid in mind, but he did think that equal treatment by the law was an element in the Rule of Law. He thought of inequality through privilege, but the idea might be held to cover, perhaps *a fortiori*, inequality through unfavourable discrimination. I shall return to this subject later.

Since I am not in any way an expert in these matters it is, perhaps, not surprising that I cannot understand Dicey’s third proposition. A written constitution like that of the United States, with its impressive Bill of Rights, seems to provide for the protection of the individual through the supremacy of the law, including the super-law of the Constitution itself, quite as fully and effectively as an unwritten constitution resting solely on judicial decisions. I cannot see why the fact that a constitution is of the latter type makes it any more entitled than a written constitution to be regarded as based on the Rule of Law. Indeed, an operative Bill of Rights seems to be the Rule of Law at its

highest. There does not seem to be any need to deal further with the third proposition.

Dicey's main proposition has been subjected to very close analysis by experts in constitutional law throughout the world. I certainly do not intend to try to throw new light on a subject that has been so thoroughly investigated by such men. But there are four points on which I should touch before I approach the South African situation. The first is whether the Rule of Law is only an ideal or whether it is actually realisable. The second is the Rule of Law in relation to differing judicial systems. The third is the reconciliation with the general acceptance of state planning, of Dicey's contrast between countries that observe the Rule of Law and countries where there is "the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint." The fourth is the treatment by the International Commission of Jurists of the Rule of Law as a dynamic concept.

The answer to the question raised in the first point seems to depend on what one understands by the contrast between the ideal and the realised or realisable. The one thing to keep clear is that the Rule of Law is not a rule at all but a statement of principle that the law rules or ought to rule. To the extent that the law fails to rule, the expression may only embody an ideal, but there is no doubt that in the countries of the West the Rule of Law, as defined on the lines of Dicey's main proposition, is not only realisable but is ordinarily realised. Its importance is not destroyed or materially diminished if it is not in fact always realised.

The second point may be shortly disposed of. The question has been raised whether the Rule of Law has a practical meaning for countries other than those inside what

has been called the Anglo-American system. There are no doubt differences of detail between the various legal systems which may involve difficult problems in the present connection. Where there is a written constitution the approach to the validity of legislation, as opposed to that of executive action, is not always exactly the same. The existence of such an institution as the French Council of State may influence the treatment of the subject. But the basic notion that the law, as propounded by the courts, is or should be supreme in the protection of the individual against unregulated state power seems to be of general application in the non-totalitarian world. It goes without saying that the courts should be as independent as possible—it must always be a question of degree, though a very high degree of independence is attainable—but it would not seem to matter greatly whether special courts, free from governmental interference and of high standing, are assigned to deal with cases where the state and its officials are more directly concerned than in other matters. The purpose and effect of creating such special courts must not, of course, be to secure favourable treatment for the state side of the issues, but to enable experts to decide questions that fall outside the ordinary work of courts of law and might, conceivably, be less efficiently and economically dealt with by them.

The third point relates to the inference, drawn from the wording of Dicey's main proposition, that in his view the Rule of Law would be infringed by the practice of assigning wide discretionary powers to administrative officials and boards in the multifarious planning of today. Planning bulks largely in the promotion of public welfare by positive state action, even in countries genuinely devoted to the

principle of free enterprise. There are, of course, people who, though they will concede that state planning may be useful within limits, think that as often as not it impedes material progress and menaces the free life found in western civilisation at its best. State planning levels out and reduces the inequalities thought by these persons to be essential to progress.<sup>1</sup> It is not necessary for the purposes of this lecture to express concurrence with or dissent from this view. The important fact is that all governments today plan extensively in most departments of social life. More and more they undertake new enterprises, generally aimed at the common good, so that today all a country's economic activities are, in common parlance, divided into the public sector and the private sector, with some overlapping. If state plans are to be duly composed and executed it seems to be unavoidable that officials and administrative bodies should be given wide powers by the legislature. The powers of the courts over administrative acts are frequently curtailed, and the tendency has recently been for the legislature to pass the control increasingly to tribunals other than the ordinary courts. Hence the development of administrative law—the rules laid down by or for administrative tribunals.

It may well be that if Dicey had envisaged all the beneficent, or at any rate benevolent, operations of the modern welfare state he would have modified his argument or used more careful language. The unregulated, capricious aspect of arbitrariness might have been emphasised at the expense of the mere extent of discretionary power. Lawyers and laymen alike have come to live fairly comfortably with administrative tribunals and their law. But it does not follow that, because the grant of wide discretionary powers

<sup>1</sup> F. A. Hayek, *The Constitution of Liberty*, *passim*.

is sometimes unobjectionable, the notion of the Rule of Law has lost its virtue. The law may still be supreme in the sense that ordinarily people are or should be punishable only if they contravene general rules of the common law, or general rules made either directly by the legislature itself, or indirectly under delegation. That is the sense in which the Rule of Law covers what Dicey said, and the sense in which it is still most valuable today.

The fourth point requires some setting out of the meanings given to the Rule of Law by the International Commission of Jurists. The views of that body are but little discussed in the commentaries on the Rule of Law that I have consulted. The Commission is a comparatively young body but it is an active one and not without influence among lawyers around the world. It has closely studied the important question of definition and, as I read its resolutions, has modified its view of the scope of the Rule of Law to make it accord with the Commission's expanding ideas of what a modern state ought to do for its citizens.

At Athens in 1955 the Commission declared that

- “ 1. The state is subject to the law.
- 2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.
- 3. Judges should be guided by [the] Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges.
- 4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.”

It will be observed that this declaration assumes that the Rule of Law has an accepted meaning which, however, the declaration does not explain beyond saying that the state is subject to the law. This means presumably that the executive, at least, and the legislature, at any rate if it is restricted by a written constitution, must act within the law. The declaration properly stresses the importance to the effective operation of the Rule of Law of the independence of judges and lawyers and the vital importance of fair trials, but there is nothing in the declaration to suggest that the scope of the concept of the Rule of Law requires extension beyond what Dicey had stated.

In 1959, however, at Delhi the Commission went much further. As the basis for its deliberations it used a Working Paper which characterised the Rule of Law as

“The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men.”

This is plainly not a definition of the Rule of Law. It is a general reference to the forms of machinery considered by lawyers in different parts of the world to be necessary or desirable in operating and supporting the supremacy of the law. It does not extend the definition beyond the protection of the individual against arbitrary state action.

But in the final resolution of the Delhi Congress the Commission, after reaffirming what had been declared at Athens in 1955, went on to declare that it

“ Recognises that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised.”

In subsequent congresses of the Commission what was laid down at Athens and Delhi was reaffirmed and various points were elaborated, but I do not think that any fresh matter modifying the Delhi definition, or description, of the Rule of Law was introduced.

It is obvious that the dynamic concept recognised by the Delhi Congress is very different from Dicey's concept and from what was declared at Athens. What the Commission declared at Delhi was no doubt an excellent statement of conceivably realisable ideals on the lines of the 1948 Universal Declaration of Human Rights, accompanied by some practical advice as to how communities generally could move towards a welfare state, which, while using public resources to the full in order to advance the general good, would, it was hoped, preserve the essentials of individual freedom.

It is difficult to withhold approval from the new approach and the sentiments that inspired it. But, and it is a serious objection, by going far beyond the idea that the law should, to protect the fundamental interests of the individual, control the actions of the executive and even of the legislature, and by trying to cover the whole field of progressive administration and legislation, the Delhi Congress seems to me to have confused the issues. In its eagerness to advance the cause of justice in the widest sense, the Congress built up the Rule of Law into a popular slogan, advertising as it

were a universal remedy, while at the same time it extended the relatively narrow earlier meaning, which with minor variants was generally accepted, so as to embrace the whole area of good government.

Some sort of authority for this course might, I think, be found in the "due process" clauses of the Fifth and Fourteenth Amendments to the American Constitution and their history in the Supreme Court of the United States. As I understand the position, for more than 100 years after the Fifth Amendment, and for a decade or two after the Fourteenth, due process was interpreted in the light of procedure. In deciding whether due process had been observed, the only question was whether the proceedings had all been fair and regular. Then a change was made in order, it seems, to counter social welfare legislation thought to be too advanced. The latter goal largely fell away, but there was no return to the narrower, stricter interpretation of the clauses. There was, if I may respectfully say so, a good deal to be said for the earlier view that the clauses only dealt with procedure, but the cause of justice might well have lost much if that view had been maintained.

In his opening address to the Conference at Harvard in 1955 to celebrate the two hundredth anniversary of Chief Justice John Marshall's birth, Mr. Justice Felix Frankfurter said<sup>2</sup>:

"Once we conceive of 'the rule of law' as embracing the whole range of presuppositions on which government is conducted and not as a technical doctrine of judicial authority, the relevant question is not, has it been achieved, but, is it conscientiously and systematically pursued."

<sup>2</sup> *Government under Law* (the report of the Conference proceedings), p. 28.

This sentence, if I understand it correctly, also seems to lend support to an extended definition of the Rule of Law. Nevertheless, I cannot regard as satisfactory, or indeed as legitimate, the unproclaimed expansion of a definition in order to further a cause, however worthy. Dicey had given world-wide circulation to a valuable concept and had called it the Rule of Law. If that concept is not sufficient to achieve the good life, by all means put forward new proposals, but do not, I suggest, use the old name as if it had imperceptibly acquired a wholly new meaning.

In South Africa the actions of the present Government since it assumed office in 1948 have frequently been criticised on the ground that they have infringed the Rule of Law. How far these criticisms have been justified naturally depends in the first place on how the Rule of Law is defined, and, as I have indicated, the Delhi resolution created a measure of confusion. In 1962 the South African Government introduced a system of house-arrest to restrain persons suspected of anti-governmental designs or activities. In its November 1962 issue of *Race Relations News*, the South African Institute of Race Relations, of which I was then the president, published a statement by me. I hope that I may be excused for quoting the following portion of it. I do so because it is a tiny element in the recent history of the Rule of Law in South Africa and because it represents my understanding of the essentials of Dicey's concept. It reads:

“The world is striving to establish the Rule of Law everywhere. It is important to understand what is meant by it.

“It does not mean that laws should not be harsh or unfair. Some harsh and unfair laws infringe the Rule of Law; others, also undesirable, do not.

“The Rule of Law means that law should rule; in

other words, that the life, liberty, property, freedom of speech and movement of the individual should not be endangered or restricted by state action save in accordance with a general precept applicable to all persons in circumstances set out in the law, the applicability of the general precept to a particular person being decided by a court of law.

“A law can itself infringe the Rule of Law. That is because whatever will be enforced by the courts is law in form even though it provides no general precept. So a statute providing that the persons whose names appear in a schedule are to be executed, imprisoned or restricted in their speech or movement or be deprived of their property would be a law in form and would have to be enforced by the courts; but it would not be a general precept providing that anyone who did certain acts would be liable to suffer certain consequences. Such a statute would be effective law but would infringe the Rule of Law.

“Similarly, if a law provided that a Minister of State or an official could by an order direct the execution, imprisonment or restriction of movement of persons selected by him, this law and action under it would infringe the Rule of Law.”

I then referred to states of emergency as excusing departures from the Rule of Law, and concluded that house-arrest constituted an infringement of the Rule.

I have no reason to be proud of this statement. It is dogmatic and shows no appreciation of the existence of different meanings of the expression “the Rule of Law” or of the wealth of learning to be found on the subject in the writings of constitutional lawyers. It does not mention the equality feature advanced in Dicey’s second proposition, and there is no reference to the question of discretionary powers in the era of the welfare state. But it does, I think,

approximate to the generally accepted meaning of the Rule of Law, which is in essence the same as Dicey's main proposition. I shall use it as the basis for the discussion of the Rule of Law in South Africa.

Coming back to November 1962, it was in the same month that the South African Minister of Justice, now our Prime Minister, was interviewed by a government-supporting newspaper and was referred to my statement. He said that there are just as many interpretations of the Rule of Law as there are people, and that the Rule of Law is very easily used as a pretext for attempts to frustrate action against communism. He went on to say that it was Parliament, freely elected by secret ballot, that made the laws to bring about an efficient administration, the maintenance of law and order and the safety of a well-established state.

Especially in the light of the dynamic concept adopted at Delhi, there was some force in the *quot homines tot definitiones* portion of the Minister's remarks, but it would be most unfortunate if variations in definition were to lead to a weakening of confidence in the Rule of Law, which in its generally accepted meaning embodies a most important principle and, when realised, provides a bulwark against all forms of totalitarianism, including the communism that the Minister thought that it might assist. The existence of a sovereign Parliament provides no guarantee against infringements of the Rule of Law, especially when the Government has an overwhelming parliamentary majority, elected by a minority racial group.

## CHAPTER 7

### THE RULE OF LAW IN SOUTH AFRICA

It is now high time to start applying the definition of the Rule of Law to the facts in South Africa. It seems to me that there are two distinct questions to consider, namely, (a) whether the compulsory apartheid policy that now permeates South African life in itself infringes the Rule of Law; and (b) whether the Rule of Law is infringed by specific items of legislation or executive action, such as bail refusals, detentions, bannings and the like.

If it should be established that such infringements of the Rule of Law have occurred or are occurring, the further question, (c), might arise, whether they have been or are excusable on the ground of emergency.

(a) There is no need to spend time on the precise definition of apartheid. It means separation or segregation—the keeping apart of the several races of South Africa. Sometimes the euphemism “separate development” is used instead, but the meaning is the same. Apartheid has a history going back to the earliest days of white settlement in South Africa. It has become more and more important in the life of the country during recent decades as all races have rapidly become more urban and industrialised, and as what used to be a natural and elastic practice for like to seek like has become a compulsory, hard and fast system laid down for all by the majority of the politically dominant white minority. From now on when I speak of apartheid I mean the compulsory kind that is operative today.

The main facts about the extent to which apartheid obtains can be briefly told. There is a wealth of material and my only problem is to decide how much to mention in order to give as true a picture as possible without overloading the canvas. Since the year 1950 we have had a Population Registration Act,<sup>1</sup> under which we are all classified in respect of our races. Apart from the injustices inherent in the use of such a classification to determine individual rights, the uncertainties of definition and the difficulties of application have led to many cruel results, especially in the division of families. Parents may be registered as white and their children, or some of them, as coloured, or vice versa. The various statutory tests—and there are many—often point in opposite directions. There is a right of appeal to the Supreme Court, which has recently allowed some appeals. Before Parliament at present<sup>2</sup> is a Population Registration Amendment Bill which, if it becomes law, will reverse the effect of these decisions and make it much more difficult for persons classified as coloured to obtain a change in their classification.

This classification, however it is brought about, affects us in various vitally important ways. Whether we can vote for or become Members of Parliament or of a provincial or town council depends on how we are classified, and so do the questions where we may own or occupy land or carry on business, whether we have to carry a reference book or pass, whether against our will we can be moved from one part of the country to another, whether we may represent our country in sporting contests, in what schools our children may be taught, whether we may attend an adult night

<sup>1</sup> Act No. 30 of 1950.

<sup>2</sup> March 1967; (now) Act No. 64 of 1967.

school or a residential university, what places of refreshment, entertainment or relaxation we may frequent, where on the sea coast we may bathe or fish, in what vehicles we may travel, on what public benches we may sit, what part we may play in the country's police and military forces, whom we may marry or be intimate with, whether we may be apprenticed to a trade, whether we may be employed on particular kinds of work, whether we may belong to a registered trade union, whether we may lawfully take part in a strike, in what hospitals we may be treated and in what ambulances we may be conveyed to hospital. The list has grown rapidly in recent years and is still growing.

I am only concerned in this part of these lectures to consider whether the apartheid policy infringes the Rule of Law and not whether it is harsh, unfair or otherwise open to criticism. Whatever may be said of the justice or wisdom of the policy, there does not seem to be any essential connection between apartheid as such and Dicey's main proposition. The various elements of the apartheid policy could all, it seems, have been put into operation through general rules enforced by the ordinary courts, and indeed most of them have in fact been so dealt with. Generally the machinery for enforcing apartheid consists of rules for future conduct laid down in statutes and regulations.

But in the course of carrying out the apartheid policy, infringements of Dicey's main proposition are likely to, and do, occur. They usually take the form of legislation authorising executive action that interferes with the freedom of individuals. Restrictive banning orders, to be mentioned again, are probably often issued to persons whose only "offence" is their vigorous opposition to the apartheid

policy, though it is difficult to affirm this positively since reasons for imposing a ban are not given.

Apart, however, from prohibitions and restrictions imposed by law, there are extra-legal governmental practices designed to bring about apartheid in certain fields. An important example is provided by welfare organisations, of which there are more than 2,000 registered under the national Welfare Act 1965.<sup>3</sup> This Act—in its present form, though amendment is always a possibility—nowhere authorises governmental restriction of membership of a welfare organisation to a particular race, or compulsory separation of the races in the carrying out of an organisation's activities. But these ends can be achieved indirectly through the pressure, threatened rather than exercised, of the government's powers under the Act. These powers extend to the possible cancellation of the organisation's registration, on which its ability to raise funds depends. After informal suggestions had been made from time to time by departmental officials, a circular was issued in the middle of 1966,<sup>4</sup> declaring the government's opposition to multiracial organisations and calling for the establishment of separate organisations for each racial group. National councils, executive committees and local committees of existing mixed bodies should, it was stated, consist of whites alone, and only whites should attend annual meetings. Representatives of different groups might attend meetings on request, to effect liaison or furnish advice. In cases of noncompliance with the government's policy, officials would no longer attend the meetings of the organisations in default.

<sup>3</sup> Act No. 79 of 1965.

<sup>4</sup> No. 29 of 1966, summarised in *A Survey of Race Relations in South Africa*, 1966 (published by the S.A. Institute of Race Relations), p. 288.

Such attendance would often be greatly missed. Even when dominated by the apartheid motive, governmental co-operation and help are of vital importance to many welfare organisations in South Africa today, so that the threat was serious. In fairness, it should be added that encouraging social groups to try to help themselves has undoubtedly merit. But the compulsory limitation of welfare activities across the lines of race has nothing to recommend it. The freedom of strong and independent voluntary bodies to conduct their welfare work without subjection to ideological state control is essential to a healthy society. Public-spirited people in South Africa, who are engaged in invaluable voluntary work for persons of all races in need of help, are often driven to conform to a policy that they dislike for fear of what might otherwise befall their organisations and the admirable work that they are doing. This is a highly unsatisfactory state of affairs.

But although apartheid contributes materially, I believe, to the frequency of infringements of Dicey's main proposition through legislative and executive action, the policy, as such and taken as a whole, can, in my view, only infringe the Rule of Law if it involves inequality of such a nature as to make Dicey's second proposition applicable.

That apartheid involves extensive and serious inequality is beyond question. The most obvious and important illustration is the fact that, with one insignificant remnant of a more liberal policy, all political power is vested in the whites.

Another illustration, which strikingly reveals our present-day rejection of the notion, formerly respectable even in America, of equal though separate facilities, is the

Reservation of Separate Amenities Act 1953,<sup>5</sup> under which any person in charge of any public premises or a public vehicle may reserve the whole or any part of the premises or vehicle, or any counter, bench, seat or other amenity or contrivance in or on the premises or vehicle for the exclusive use of persons of a particular race or class. It is an offence for any person of another race or class to enter or use the reserved premises, etc. No reservation is to be invalid merely because no premises, etc., have been similarly reserved for the exclusive use of persons belonging to any other race or class, or because any premises, etc., so reserved for any other race or class are not substantially similar to or of the same character, standard, extent or quality as the premises, etc., alleged to have been unlawfully entered or used. This provision is largely used to the disadvantage of the non-whites. The whole system of apartheid, indeed, assumes that widespread inequality, almost invariably unfavourable to the non-whites, exists and is enforced or countenanced by law. There are no indications that this is intended to be a temporary state of affairs. Mitigation of hardships is rarely allowed to interfere with the principle of apartheid.

The rather pointless point then arises whether Dicey's second proposition covers the type of inequality involved in apartheid. I call the point rather pointless because it could hardly affect the merits or demerits of the apartheid system that it was or was not properly describable as infringing the Rule of Law. The facts are all clear and what is practically important is to judge aright whether they show harshness or unfairness. It involves no belittling of the Rule of Law to say that it is of slight importance whether in the circumstances one concludes that the inequality inherent in

<sup>5</sup> Act No. 49 of 1953.

apartheid as we know it in South Africa calls for the label of an infringement of the Rule of Law, in addition to any other labels that may seem to be appropriate.

Nevertheless, the issue having been raised, I should carry it a little further. As the late Sir Ivor Jennings pointed out in the Second Appendix to *The Law and the Constitution*, Dicey's second proposition was dealing with a narrow point, namely, "that if a public officer commits a tort he will be liable for it in the ordinary civil courts." In Chapter II Professor Jennings expressed the view that the notion of equality in this connection means that

"among equals the laws should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be the same for all citizens of full age and understanding, and without distinction of race, religion, wealth, social status or political influence."

As I understand Dicey's second proposition, having regard to Professor Jennings' comment, the position is that equals are, according to the Rule of Law, entitled to have the law administered equally in all cases. I am not clear what is meant by "equals" in this connection, but at any rate race and class distinctions in the administration of the law must be deemed to infringe the Rule of Law. In respect of relief through the processes of law all must be treated alike.

But apartheid generally operates outside the administration of justice. Although, as mentioned previously, since the early days of colonisation there has been some recognition of the local African law and special courts of Native (now Bantu Affairs) Commissioners have applied that law in

appropriate cases, and although there are many modern statutes which apply rules that are peculiar to the cases of Africans and press hardly on them in relation to their presence in urban areas, and similar matters, there is hardly any discrimination before the law of the kind that would correspond to Dicey's favouritism. Discrimination there is in plenty, but it is in the substantive law, which puts members of one group at a disadvantage as compared with members of another group under the apartheid legislation. The Group Areas Act of 1950,<sup>6</sup> for instance, with its many amendments and consolidations and the proclamations made under it, controls the occupation and ownership of land. It defines "occupation" in language artificial and wide beyond any ordinary usage. It operates very severely against non-whites and hardly at all inconveniences whites. But while the substantive law is obviously open to criticism, there is not, in the main, any difference in the position of the parties affected when they are involved in law-suits or prosecutions.

I have purposely used words of qualification in asserting that before the law all are equal in South Africa. In general that is undoubtedly true, but included in the legislative provisions that discriminate on the ground of race there are some that create special procedural disadvantages that might correspond, on the reverse side, to the favouritism hit by Dicey's second proposition. Provisions for the compulsory and unregulated removal of Africans from one place to another appear in several enactments. Originally they constituted an extension of the normal powers of government by the device of calling the head of state the Supreme Chief

<sup>6</sup> Act No. 41 of 1950, consolidated in Act No. 77 of 1957 and thereafter in Act No. 36 of 1966.

and according him the dictatorial powers in respect of Africans that were rightly or wrongly attributed to chiefs in unsettled times. But today there are no more tribal wars and these powers may be exercised by local authorities as well as by the Government. The powers of the courts to intervene on behalf of the Africans affected are commonly restricted in this legislation, culminating in the Natives (Prohibition of Interdicts) Act 1956,<sup>7</sup> which prohibits the issue of any interdict or other legal process for the stay or suspension of the execution of any order issued under any law requiring an African to vacate or remove from any place or area.

In certain limited respects, then, there is racial discrimination before the law, which may fairly be said to infringe the Rule of Law in the way mentioned in Dicey's second proposition. But this fact, though not unimportant, hardly warrants a general conclusion that apartheid, as such, involves inequality of a kind that brings it within that proposition.

Generally speaking, apartheid lies in the field of substantive law. The apartheid policy represents the basis of a planned state system like that of a welfare state, only one that is guided in its idea of welfare by greatly preponderating consideration for the advantage of the whites. Much of what today invites criticism and even condemnation might, a century or two ago, at a different stage in our history, and at a time when different views of human relations obtained, have seemed even to an impartial onlooker to be fair and reasonable or at least excusable in the circumstances. But such a conclusion could hardly ever—indeed, I believe never—be right in relation to inequality before the law.

<sup>7</sup> Act No. 64 of 1956.

The real case against apartheid at the present day is not that there is inequality in the administration of the law, for in general there is not, but that it is harsh, unfair and increasingly difficult to support in the light of the growing industrial development of our country and in the light of modern views on the treatment of other races. With the minor exceptions, however, that I have mentioned I do not think that apartheid falls within Dicey's second proposition or, consequently, that, as such and taken as a whole, it infringes the Rule of Law.

I turn now to the second question, (b), whether the Rule of Law is infringed by certain items of legislation, most of them recent, and the action taken under them. It will be convenient to approach the subject rather from the angle of the invasions of individual freedom that the law effects or permits, than from the angle of the enumeration of the relative statutes. The attempt will be made to illustrate the position rather than to cover all the ground. This approach is the more natural because the law is constantly being changed, every parliamentary session introducing amendments generally in the direction of advancing apartheid by filling gaps or closing loopholes. In recent decades this year's position has always been different from that of the year before, and more restrictive, and the process shows no sign of coming to an end.<sup>7\*</sup>

At the start of the consideration of provisions restricting liberty there should be a general reference to the laws

<sup>7\*</sup> The product of the 1967 session illustrates interference with individual freedom and the tightening-up of laws having that effect (see, e.g., Suppression of Communism Act Amendment Act, No. 24 of 1967; Training Centres for Coloured Cadets Act, No. 46 of 1967; Border Control Act, No. 61 of 1967; Population Registration Act Amendment Act, No. 64 of 1967; Terrorism Act, No. 83 of 1967).

impeding the freedom of movement of Africans in, into and out of urban areas, and also in rural areas outside the African reserves. There is an elaborate system of influx control in relation to the urban areas and this involves a large number of decisions by officials which vitally affect the African and his family life. The reference book that he must carry is in some ways an assistance and a protection to him, but its main purpose and effect is to facilitate control of his movements, and if he fails to produce it on the demand of the police he commits an offence. Hundreds of thousands of convictions for pass law and similar offences take place every year and ordinarily involve a period of incarceration for persons who are not morally criminals at all. For present purposes, however, the point is that the African is widely restricted in his movements without his having been convicted of any offence. Indians, too, of whom there are more than half a million in the country, have not full freedom of movement. The rest of the population generally comes and goes as it pleases, subject to prohibitions on entry into areas restricted to persons of another race.

Another important sphere of movement restriction, and one not confined to Africans, is that created by the extensive powers of banning possessed by the Minister of Justice under the Suppression of Communism Act 1950<sup>8</sup> and various tightening-up amendments made to it. The Minister may ban organisations and may also ban persons because, possibly years before, they were members of a banned organisation which may then have had a very different character from that which it later acquired. Banning orders vary. They usually last for five years and generally restrict movement

<sup>8</sup> Act No. 44 of 1950.

out of a specified area, which may be large or small, sometimes being limited to the dwelling where the person affected lives. The conditions of such house-arrest orders may allow him to go to work but he may have to report regularly to the police. He is commonly banned from attending any gatherings, even social ones. He may not be allowed to receive visitors except his lawyers, whom he may see if they are not themselves banned or listed on the statutory list of members of a banned organisation.

A person whom a commissioned police officer suspected of being engaged in subversive activities or of having information about them, could in terms of a 1963 Act<sup>9</sup> be arrested and detained until he had, in the view of the Commissioner of Police, answered satisfactorily all questions put to him. The maximum period of detention was 90 days, but on release he could be re-arrested and detained for a further 90 days. No court had power to order his release. These provisions of the 1963 Act were suspended in January 1965, but the Government has power to proclaim their revival.

Also under the 1963 Act it was provided that a person who is imprisoned for various kinds of subversive action may be prohibited by the Minister of Justice from absenting himself from prison for successive periods of up to twelve months each, after serving his term of imprisonment. In other words his period of imprisonment may be extended even to imprisonment for life without further offence or sentence.

In 1965 it was enacted<sup>10</sup> that where an attorney-general (an officer of the Department of Justice whose duties cover

<sup>9</sup> General Law Amendment Act, No. 37 of 1963, s. 17.

<sup>10</sup> Criminal Procedure Amendment Act, No. 96 of 1965, s. 7, inserting s. 215 bis in the Criminal Procedure Act, No. 56 of 1955.

the area of jurisdiction of a provincial or local division of the Supreme Court) is of opinion that there is a danger of the tampering with or intimidation of a person likely to give material evidence in a prosecution for one of a number of listed crimes (including treason, murder, kidnapping, sabotage, arson and robbery or housebreaking where aggravating circumstances are present) or that he may abscond or that it is in his interests or the interests of the administration of justice, the attorney-general may direct the arrest and detention of that person. The detention may be for as long as six months. The courts are expressly debarred from ordering the release of such detainees or from pronouncing on the validity of regulations about the conditions of detention or the reception of visitors.

It was further enacted in 1966<sup>11</sup> that a police officer of at least the rank of lieutenant-colonel may cause the arrest and detention for up to fourteen days of anyone whom he has reason to believe is guilty of sabotage or of favouring terroristic activities. The period of detention may be extended by a judge, but no order of detention is subject to appeal or review by a court nor may a court order the release of a detainee.

Some reference should also be made to the change in the law of bail. This used to be in the discretion of the courts, but now this discretion is subject to new powers vested in attorneys-general, who may order that an accused person under arrest be not released till the conclusion of his trial.<sup>12</sup> Such an order may not be interfered with by the courts.

<sup>11</sup> General Law Amendment Act, No. 62 of 1966, s. 22.

<sup>12</sup> Criminal Procedure Amendment Act, No. 96 of 1965, s. 6, replacing s. 108 bis of the Criminal Procedure Act, No. 56 of 1955.

All these drastic orders are made under the express authority of laws which are in form unexceptionable and the validity of which cannot be challenged on any ordinary legal grounds. Nevertheless they severely interfere with the liberty of the individual without any court having made an order against him in pursuance of a legal rule or precept alleged by the state to have been contravened. The Minister or official acts on information that is not tested in a court of law and may well be wrong.

There is no doubt, in my view, that these statutory provisions and the action under them infringe the Rule of Law. This does not mean that there has been any illegal executive act for which the person affected can obtain the relief that would certainly have been available to him if the Acts had not authorised the interference with his liberty. For, it must be repeated, the Rule of Law is not a legal rule but a statement of principle.

The charge that the Rule of Law has been infringed is a political charge, not a charge that a law has been contravened. And so the answer must necessarily be a political and not a legal one. Actually, however, the South African answer follows in shape the lines of a legal defence to a legal charge. Question (c), which I said might arise and which in fact does arise here, is whether established infringements of the Rule of Law are excusable on the ground of emergency. The South African Government says that they are, since our country is, in effect, in a state of siege or in an unproclaimed emergency or in a state of undeclared martial law. All these conditions mean the same thing—that the safety of the state requires action of the kind taken.

In the statement in November 1962 from which I have already quoted, I said,

"Infringements of the Rule of Law can be excused in cases of emergency, where the safety of the state or the maintenance of peace and good order require immediate action. The temporary nature of the emergency is crucial.

"An order covering a period of years cannot be justified on grounds of emergency. It must be possible within a much shorter period to embody general precepts in a statute and so secure the punishment through the courts of law of persons contravening those precepts."

These propositions, like the others in my statement, were bald and dogmatic and did not set out all the relevant complicating factors, but the underlying idea was, I think, sound. A country cannot lightly accept the position that it is to live for an indefinite period in a state of emergency. Unless the idea of returning to normality is kept freshly before the people, the latter are likely to lose their proper zeal to regain the full supremacy of the law. Their character will deteriorate as their independence of outlook diminishes. An emergency should not be allowed to become permanently embedded in the country's life merely because it is easier to deal with subversive activities by sharp executive action than by following the ordinary processes of law enforcement. If it is possible to define offences that will cover what the Government thinks justifies banning or detention, and then leave it to the courts to apply the definition to the conduct of individuals, this should surely be done. And it is difficult to see why such definition and entrustment to the courts should not now be possible in respect of the matters we have been considering.

The maintenance of law and order is of crucial importance, but almost equally important are the methods of maintenance. *The difficult position of multiracial South*

Africa, while the world-wide tensions between communists and non-communists persist, must always be borne in mind. Racial divisions tend to be linked to ideological ones. South Africa is at present very unpopular in the world. Whether or not this unpopularity is mainly due to the concentration of political power wholly in the hands of a white minority, or to that coupled with the apartheid policy and the serious interference with individual freedom that exists, or to these factors plus envy of the country's wealth, so strongly based on rich mineral resources and a hardworking and capable labour force, I do not know. But whatever the causes, and whatever success we might have if we tried to remove or reduce the effect of those causes, the facts remain that at present my country has few friends and that, especially in the light of our geographical position, it is very vulnerable to guerilla infiltration and other subversive activities. Difficult problems thus raised have to be decided by statesmen. Lawyers who are not active in the world of politics can only observe the facts and emphasise the great importance of completely restoring the Rule of Law as soon as possible before, as individuals, we lose our sensitive appreciation of its extreme importance, and before, as a country, irreparable damage is done to our internal race relations and to our external reputation and safety.

## CHAPTER 8

### CONCLUSION

HAVING come to the end let us go back to the beginning.

I see no reason to change my original view that the task allotted to me contains two distinct subjects—the English law contribution to South African law, and the Rule of Law in South Africa. The view that the subjects are not connected might be tested by asking oneself whether the common law of a country has any bearing on whether that country observes the Rule of Law or not. I do not think that it has. Acceptance of the Rule of Law is in theory universal in the non-totalitarian world; its observance in practice depends not on what the local common law happens to be but on all the factors that influence the current trend of legislation—economic, social and racial conditions and relations with other countries. Take the position in comparable parts of southern Africa. Zambia and Malawi use the English common law; Botswana and Lesotho use South African law. Surely no one could suppose that there would be more loyal adherence to the Rule of Law in the one pair of countries than in the other because of the difference in the common laws.

In this connection the case of Canada might be relevant. Though I have no personal knowledge of the facts I gather that between Quebec, where the common law is codified French law, and the other provinces, where the common law is English common law, there is no difference in the approach to the Rule of Law. I infer this from the absence of any

suggestion of a difference in the address on “Constitutionalism in Canada” given by Chief Justice Kerwin of Canada to the 1955 Harvard Conference.<sup>1</sup>

I am sure that the English law contributions to South African law were in no way responsible for our 90-day and 180-day detentions and the other infringements of the Rule of Law that I have mentioned. Equally, I am sure that those contributions had nothing to do with the fact that, subject to these modern statutory exceptions, our South African adherence to the Rule of Law has been general and steadfast. That adherence is in accordance with the ordinary attitude of the free nations of the modern world.

So I have no doubt that the separate treatment of the two subjects mentioned in the title of these lectures was correct. They are indeed quite distinct subjects.

To the run-of-the-mill folk of the United Kingdom to whom, by direction, I have been speaking, I would say in conclusion—we have two fine common law systems which are all the better for not being completely codified. The arguments for and against codification have provided law examiners with a stock question for generations. We do not need to be able to give an answer that would earn us many marks. I have always thought that the main reason why so many of us lawyers dislike codes is that they are so dull. But a more respectable reason is the risk of interference with the healthy growth of the law. One of our former chief justices, well known as deeply learned in the old books, favoured codification in South Africa because the principles of Roman-Dutch law might thereby be crystallised and protected against the erosion which he thought he could

<sup>1</sup> *Government under Law*, p. 453 *et seq.*

observe, owing particularly to the presence of English law authorities in our midst. It depends on one's point of view. I like the picture of the growing law, developing indefinitely into the future, not losing its roots but ever throwing out fresh branches and deriving its sustenance from any source above or below the ground that can be of use to it. Looking at it that way one can see that your legal system and mine can continue to grow in beauty side by side—if one's interest is in the harmony of the law—or providing ever more appropriate and convenient rules—if one is more concerned with the practical service of the community. I suggest that we can both be proud of our legal systems and of the association that has for more than a century existed between them. Long may that association continue and much may we together contribute to the strengthening of the supremacy of the law inside our respective jurisdictions and, above all, in these dangerous days, between the nations of the world.













