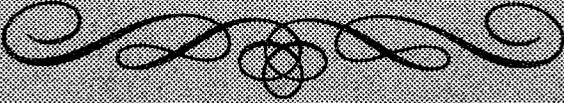


# The Trent Law Journal



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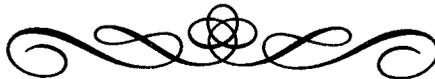
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# **THE QUANGO IN BRITAIN**

**by Philip Holland, M.P.**

The acronym Quango was invented in the United States of America during the late 1960's to describe the growth of corporations set up privately to take advantage of Government contracts and so to act as Government agencies. Thus applied to privately established corporations and foundations, the term signified Quasi Autonomous Non-Governmental Organisations.

In the United Kingdom there have been few developments of this kind, and even the nearest British cousins to the American Quango, like the self financing Horse-race Betting Levy Board, differ in origin and control by being established by legislation or Government decree and influenced directly by the Government Minister who hires and fires and pays the governing members.

Thus in the United Kingdom we have stolen and distorted the American acronym to denote a Quasi Autonomous National Governmental Organisation. In Britain, the Quango is an official body to which a National Government Minister appoints members other than civil servants.

Such official bodies are not new to Britain. Some appeared a hundred years ago to perform functions for which there was no provision in the very limited number of executive departments of Government. With the expansion of Government in the early part of the twentieth century, however, most of them disappeared as their responsibilities were taken over by departments directly under the control of Ministers. Indeed, by the end of the first World War there were few, if any, Quangos still in existence.

It was not an enduring state of grace for Parliamentary democracy. During the 1930's and 1940's there was a moderate but steady growth of official bodies albeit of a largely advisory nature in a technical or professional field. The rate slowed during the 1950's and early 1960's but has since experienced an expansion of disturbing proportions.

Since 1964 many new, larger and more powerful Government agencies have been established beyond the reach of Parliament. Their lack of accountability to anyone other than the departmental Minister who

hires and fires and pays the appointees enhances the power of the executive at the expense of Parliamentary democracy. It contributes to the enlargement of the corporate state, and in the ultimate threatens the survival of democratic institutions developed and defended over the past seven hundred years of British history.

Probably because the process has been evolutionary rather than revolutionary, the country was moving progressively between 1964 and 1979 towards George Orwell's concept of the "Big Brother" state. By 1979 the governed no longer knew who governed them. There had been growing up in recent years an unquestioning acceptance of officialdom.

The establishment of statutory bodies prepared the ground for bodies set up by Ministerial fiat and these, in turn, laid the foundations for obedience to statements from Ministers backed by nothing more legal than a T.U.C. endorsement. The people had become subject to commands, instructions and "advice that must be obeyed" issued by nominated official bodies covering every aspect of life, work and leisure.

Power was passing rapidly from the elected representatives of the people into the hands of unelected, unrepresentative Executive nominees on a whole host of Committees, Councils, Commissions, Boards and Authorities.

Simultaneously and as part of the same process, as Government had been passing into the hands of bureaucrats, so the rule of law had been seriously eroded. Westminster style democracy has always been based on laws made by the legislature being interpreted and enforced by a wholly independent judiciary. That is to say that law interpretation and enforcement has been in the hands of Judges who cannot be dismissed for reaching decisions unpalatable to their political masters.

As a result of the Quango explosion that is no longer the case. By the beginning of 1979 there were seven hundred Boards, Committees, Panels and Tribunals performing judicial functions to which appointments were made, and could be terminated, by Ministers responsible for the enactments they interpreted. These bodies include the Central Arbitration Committee set up by the Secretary of State for Employment to act as a final court of appeal with power to enforce its decisions in relation to parts of the Employment Protection Act. They also include such bodies as the Rent Assessment Panels appointed by the Secretary of State for the Environment. Traffic Commissioners appointed by the Transport Minister, and Immigration Appellate Authorities appointed by the Home Secretary. The Lord Chancellor is responsible in many cases for appointing legal Chairman, but these are normally outnumbered by the Tribunal or panel by lay members appointed by the Minister responsible for the legislation they interpret and enforce.

Yet despite the fundamental change that has been taking place in our society as a result of the proliferation of these bodies, and the vast increase in their powers that has occurred in recent years, a long series of Parliamentary Questions elicited the astonishing information that no one really knew how many there were, how much they were costing the taxpayer or, in some cases, what they were doing. Parliamentary Questions to each Cabinet Minister in the first six months of 1976 produced figures of 18,010 appointments to 785 bodies. In April of that year the "Directory of Paid Public Appointments made by Ministers" listed 295 bodies. In September 1978 the Civil Service Department released a report prepared for it by Mr. Gordon Bowen which listed 250 official bodies excluding judicial and Health Service bodies.

However, in the first three months of 1979, research using a variety of Government, Parliamentary and privately financed sources revealed the names of a total of 3,068 bodies to which Ministers had made 9,644 paid appointments at a cost in fees alone of £7,285,000 and 30,980 technically unpaid appointments at a cost in expenses paid that is apparently not ascertainable.

No control register of official bodies existed and no single Minister knew how many bodies were in existence. Indeed many departmental Ministers were ignorant of precisely how many such bodies had been established by their predecessors.

In other words, by the beginning of 1979, bureaucracy was running wildly out of control. This had been due partly to the great variety of ways in which Quangos are born. The commonest method of all is, of course, through primary legislation. An Act of Parliament establishes the body, prescribes its constitution, its functions, and its relations with the Minister. It also sets out how appointments are to be made.

Primary legislation is the commonest source of nationalised corporations and most national Boards, Commissions and Authorities. There are, however, many more bodies established by means of statutory instruments. Under enabling legislation, Ministers are empowered to set up by regulation a number of bodies required to perform functions prescribed by that legislation.

Examples of this kind of secondary legislation Quango are the development corporations, the marketing boards, the wages councils, the industrial training boards, and a number of regional and area boards concerned with water supply, health and economic planning.

A third source is the Royal Charter or Warrant. This is the main source of Royal Commissions, Research Councils, and other bodies like the Sports Council. At the last count there were twelve Royal Commissions of which seven were on a permanent and five on a temporary basis. The five temporary Royal Commissions have not been included in the Quango total referred to earlier.

Increasingly, however, since the 1950's large numbers of Quangos have been established by Ministerial decree and without any Parliamentary authority. These are in the main consultative or advisory councils, committees or groups appointed by the Minister on his own initiative. Most of the appointed members, though not of course their secretariats, are unsalaried though many can claim fees or expenses, and they all contribute to the growth of Ministerial patronage and an extension of the corporate state. Major bodies established in recent years without any legislative approval included the Metrication Board which began work in 1969, the National Consumer Council in 1975 and the Energy Commission in 1977. The first two of these bodies cost the taxpayer in 1977 more than £2 million. The first and third have now been abolished.

The list of official bodies to which Ministers make appointments directly does not reveal the full extent of bureaucratic expansion. Big Quangos spawn little ones to which the members of the main Quangos appoint their own nominees.

For example, in order to avoid duplication in the work of five Department of Education Research Councils, there now exist an Advisory Board for the Research Councils with three specialised committees, two Inter-Council Committees, an Inter-Council Co-ordinating Committee with four specialised sub-groups and several Joint Council Committees on specific issues.

The Health & Safety Commission has set up ten large advisory committees, and the work of the British Tourist Authority is supplemented by four National Tourist Boards, whose work is in turn supplemented by a host of Regional Tourist Boards. So the credit for an influx of American tourists to see Nottingham Castle could be claimed by the East Midlands Tourist Board, and the British Tourist Authority, although it was probably due to the work of an enterprising travel agent in Wisconsin, U.S.A.

In recent years Ministers have discovered that Quango creation can be used for shedding personal responsibility, rewarding friends, expand-

ing the corporate state, diminishing the authority of Parliament, and enabling them to retain a measure of control over the interpretation and enforcement of the provisions of their own statutes.

In almost every case a Minister can only be questioned in Parliament about the appointments made and the fees and salaries payable. He cannot be questioned about expenses claimed or any of the activities of individual Quangos. It is of particular interest that of the 3,068 main Quangos in existence at the beginning of 1979 less than 700 were in any way accountable to Parliament for their activities or expenditure, and less than 100 of these were required to have their accounts audited by the Comptroller and Auditor General.

On its present scale the vast and complex network of Quangos encourages an abuse of patronage and it was noticeable that after five years of Labour Government all the important Quan-guru appointments were held by dedicated supporters of the Labour Party. The Council of the T.U.C. held 200 appointments between them. Prominent Trade Union leaders held as many as eight or ten appointments each. Some left wing University dons were similarly rewarded. Indeed at one time in 1978 one full time University Professor held no fewer than six Chairmanships and five part time membership of Quangos, whilst many area and regional appointments were held by former Labour Councillors and Party Officials.

Thus, if undetected, a political party can perpetuate its control over large and expanding areas of human activity even though it is defeated at the polls. Of course not all the advocates of Quangocracy have evil intent. Some official bodies have been established to take certain activities "out of politics", whilst others were claimed to be a means of tapping administrative talent that lay outside Whitehall. Some were set up as a result of politicians wanting to spread power and to create more centres of responsibility. It has even been argued that it is necessary to set up such bodies to get away from the restraints and financial control of Parliament in order to achieve desirable ends.

There is, of course, a beguiling logic in proposing with each new Act of Parliament the creation of a body of "ordinary" people to monitor its effect, or even to interpret and enforce its provisions, like the Commission for Racial Equality or the Central Arbitration Committee. Careful scrutiny of a number of these bodies, however, reveals that the "ordinary" people appointed usually have a specialised sectional or minority interest in the body's terms of reference. In some cases they represent no interest but their own.

In many cases lay advisory bodies have been set up ostensibly to advise the Minister on his responsibilities. This is the proper function of the Civil Servants in the Minister's own department, and the extra bodies set up serve little purpose other than to provide "jobs for the boys". This is not intended as a criticism of the few highly technical professional bodies that can provide an expertise not available within a department.

In addition to numerous non-technical advisory bodies, there are others whose sole raison d'être appears to be to produce at public expense half yearly glossy reports for the waste paper basket. There are also planning bodies whose function would be more effectively fulfilled by County Councils or other bodies properly accountable to the electorate.

Some bodies established by Government and subject to the influence of Ministerial patronage serve merely to augment the work of particular industries and to perform functions that could be more effectively performed under the auspices of a profit motivated industry. The Tourist Authority and its attendant host of Tourist Boards come instantly to mind in this context. Others like the Industrial Training Boards that obtain their income from a tax levied on the companies within their individual industries ought, as a tax authority, to be accountable to their tax payers for their expenditure. On these grounds there would seem to be a case for placing the appointment of the 514 members of the 23 Industrial Training Boards under the patronage of the industries concerned rather than the Government.

If this were deemed undesirable then the alternative should surely be to make the appointing Minister answerable in Parliament for the activities of the Boards. It is not so much the role of a Parliamentarian to make the decision as to point the need for a decision to be made.

The main criticisms of the vast consumer protection industry that has grown up in Britain are that too many supposed watchdogs appear to act merely as public relations departments for the nationalised industries; whilst others in the private sector of industry operate against the long term interest of the consumer by distorting the market forces.

The contradictory terms of reference imposed on the Advisory, Conciliation and Arbitration Service, the dual role of the British National Oil Corporation, and the power of the National Enterprise Board to hasten the demise of the private sector of industry without recourse

to Parliament are three examples of Quango power that diminishes the authority of Parliament. Power of another kind, but equally damaging to democracy, is the power to levy taxes vested in non-accountable bodies such as the Regional Water Authorities in England and Wales and the Industrial Training Boards - already referred to in another context.

In order to create this vast Quango empire Local Government, the Civil Service and Parliament have been deprived more and more of the functions they were previously thought to be capable of fulfilling.

In England alone seventeen New Town development corporations, twelve area electricity boards, nine regional water authorities, nine port or harbour authorities, fourteen regional health authorities and ninety area health authorities have all operated on differing boundaries and with differing relationships to local government. The ratepayers' money is being spent within regions with which they have no identity and at a level at which they have no democratic representation. Many of the functions of these bodies would be better left to elected local authorities.

There is a strong case for leaving planning and development functions in the hands of properly elected and properly accountable local authorities. In Scotland water supply is in the hands of local authorities. In the past town and city councils have demonstrated their ability to run their own ports. The larger local Quangos should be subjected to critical scrutiny to see whether they are strictly necessary. The area health authorities were among the first candidates for abolition when the present Secretary of State for Health & Social Security was appointed.

Of the 3,068 official bodies in existence at the beginning of 1979, approximately 1,300 were bodies whose sole function according to official statements or published terms of reference was to advise Ministers. It is quite clear that the functions of many of these could be adequately performed by the Civil Service departments without any increase in manpower. There is thus an obvious case for a large scale massacre of advisory Quangos. Only eleven of the 1,300 such bodies are in any way accountable to Parliament for what they do and spend.

Reference has already been made to such non-Parliamentary bodies as the nine Regional Water Authorities and the thirty two Industrial Training Boards for the United Kingdom & Northern Ireland with the

power to fix and level taxes on large sections of the community. Parliament also suffered a diminution of its power when the office of Postmaster General was abolished, and when the National Enterprise Board was established with the power to extend the public ownership of industry without specific Parliamentary approval.

It is an important principle of democracy that the power to interfere decisively in the lives of the people should be vested in their elected representatives who can from time to time be called to account by those same people.

The past few years in Britain have amply demonstrated that, even in the cradle of democracy, the corporate state can become established gradually, insidiously and almost unnoticed until it is too late.

The only safeguards against it are constant vigilance and an active determination to preserve Parliamentary democracy. Having gone so far as we have in Britain, how do we now draw back from the brink of totalitarianism?

In 1979 the process was begun. New Ministers, before succumbing to the power of personal patronage, and recognising the dangers inherent in the trend, set themselves the task of scrutinising critically all the official bodies to which they appointed members other than Civil Servants. On newly taking office they each set in train an examination of the relevance, composition, terms of reference and accountability to Parliament of each body.

This is the foundation on which we are rebuilding our democratic institutions and strengthening the rule of law.

To set up a super Quango or Royal Commission to consider the whole complex network of bureaucratic bodies and then to make recommendations would frustrate the objective. For prompt and effective primary action each Minister has to take personal responsibility for his own area of influence. Some Quangos are being eliminated whilst others are being restructured to reduce considerably their powers.

Whilst Ministers decide how far they can slim and trim their numbers, all Quangos receiving a substantial proportion of their income from public funds should be made openly and directly accountable to Parliament. There is clearly a major role for Parliament and the reform of the select committee system is playing a modest role in bringing bureaucracy more under control.

There will always have to be some nominated bodies to meet the needs of a modern complex political structure. However, these can be drastically reduced in number by eliminating those that contribute nothing, and those whose function can be adequately fulfilled either by elected bodies or by privately financed associations. For those that survive, the process of nomination must be made much more open. When all members are paid out of the public purse there is a requirement for a measure of Parliamentary control over the nominations. There is also a strong case for limiting the number of appointments that can be held by any single individual. Full time paid appointments should be filled by applicants responding to advertisements stating the nature of the appointment and the qualifications required. Appointments on purely political grounds should no longer be made.

In recent years in Britain, Quangos by their changing nature have become the outriders of the corporate state diminishing democracy and eroding the rule of law.

Quais Autonomous National Gurus have been exploiting a new kind of nominated power extracted, often unseen, from the people's elected representatives. Parliament's belated efforts to regain control in these areas have been to some extent frustrated by a strong vested interest on the part of both those who bestow and those who receive patronage to maintain the status quo.

Since the General Election in May 1979 some four hundred and fifty seven Quangos have been abolished, but fifty five new ones have been created. There remains still much to be done in this field even after two years of government by Ministers apparently prepared to repel the bureaucratic forces threatening to engulf our society. Britain has not been alone in allowing a Quangocracy to threaten her Parliamentary democracy and herald the advent of a corporate state. May she not succumb along with those who have failed to recognise and deal with the danger in time.

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WILLIAM SHAKESPEARE,  
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# LIABILITY IN TORT FOR FIRE

by B. W. Kirk\*

## Liability at Common Law

Writers and judges disagree about the nature of the liability imposed by the common law on a householder for damage caused to his neighbour's property by fire spreading from the householder's premises.

The conclusions fall into two basic categories. Those who think the liability is strict, such as Newark<sup>(1)</sup> and Wigmore,<sup>(2)</sup> and those who think liability was based on a type of presumed negligence, such as Winfield,<sup>(3)</sup> and Banks L J in *Musgrove v Pandelis*.<sup>(4)</sup> Middleton J A in *McAuliffe v Hubbell*<sup>(5)</sup> said the old law simply cast the onus upon the defendant, and that, on satisfying the onus, he escaped from liability. There was always a possible loophole of escape for the defendant who could prove that he had not been negligent.

The reason for this conflict of opinion lies perhaps in the fact that there seems to be a singular lack of authority on liability for fires prior to the Act of 1707, and those reported cases which have survived, are not as comprehensive or comprehensible as one would wish. There is only one case on fire indexed in the Rolls Series Editions of the Year-Books, and none in the Selden Society Series.

A further difficulty is that of describing the liability imposed in the 14th Century, in 20th Century terminology. Obviously, to describe liability for fire as "strict" is not very meaningful, and the same applies to the word "negligence", as in the Middle Ages, the modern conception of negligence had not emerged.

The principal remedy for fire was trespass on the case for negligently allowing one's fire to escape, in contravention of general custom of the realm, that fires must be kept in safely. In historical origin, it had nothing to do with negligence, as a tort, for negligence did not become a tort until early in the 19th Century. "Negligenter" in connection with the action of trespass on the case for fire, merely signified one mode of committing a tort, not an independent tort.

\*BA (Law) Graduate of Trent Polytechnic.

The standard form of writ used in the early common law contained the words "pour negligent garder son feu"(6) (meaning merely "for failing to keep in his fire"), and that the fire spread and the plaintiff suffered loss by it. The duty imposed on a man to keep his fire safe was one instance of a number of "special duties" imposed by the custom of the realm on persons having a particular status in the eyes of the law. Liability was based on a failure to guard things within the defendant's care or control.

Having established that there was a fire within the defendant's control, the plaintiff must show that it was that fire which escaped and caused damage to his property. There must be an escape of fire to some place outside those premises, as shown by Streatfield J in **Doltis v Braithwaite Limited**(7) and in this way the 'form of liability' is analogous to nuisance and **Rylands v Fletcher**(8) liability.

The earliest recorded case would appear to have been reported in 1369.(9) The plaintiff claimed that his house had been destroyed by a fire emanating from the defendant's premises. He sued the defendant in trespass. The jury found that the fire had started suddenly, and that the defendant had been unaware of its existence. Judgment was given for the defendant on a point of pleading, but the action should have brought in case, not trespass.

In **Beaulieu v Finglam**,(10) the plaintiff grounded his action in case. The fire, it appeared, had been started by a lighted candle. Markham J said that the defendant householder was equally liable if it was started by himself, or by his servants. Thirning CJ in his judgment, expressly recognised the defence of Act of a stranger, so the liability is not absolute in the sense of that imposed by some penal statutes, but it is not clear to what limits the defence of Act of stranger extends. What, for example, would be the position if a stranger had broken into the house and started a conflagration by interfering with a fire already burning there safely?

The following case may throw some light on this problem.(11) A group of Frenchmen, strangers to the defendant, went into his inn and commandeered a room there against his will. The fire in this room started a conflagration which burned the plaintiff's house. The plaintiff sued the defendant in case, but failed as the court decided that the fire was not his. However, it is not clear from the facts whether the fire was lit before or after the intruders entered the room.

If the fire was already burning in the hearth, then it could be argued that from the defendant's point of view it ceased to be his when he lost

control of the room, unless that is, the fire was such that it would have spread irrespective of the intruders taking control. If it ceased to be the defendant's fire, then the defence of Act of a stranger to such an action was the same as to a present day *Rylands v Fletcher* action.

Though the rule was originally laid down to apply to the safe custody of fire ignited by the defendant, it was later applied to purely accidental fires. Thus in an anonymous case<sup>(12)</sup> the defendant standing in his doorway fired his gun at some fowl. The flash ignited his own house and the fire spread to and destroyed his neighbour's premises. The defendant was found liable when sued by his neighbour, the court saying that his mischance, was not by common negligence, but by misadventure; however, in present day terminology the case is one of negligence.

*Turberville v Stamp*<sup>(13)</sup> is a case of double importance, as it provides a clear statement of the law of the day on both liability for fire and vicarious liability in the master and servant relationship. The defendant's servant had kindled a fire on the defendant's heath to burn some weeds, and the fire spread to the plaintiff's heath causing considerable damage. The defendant in his defence tried to draw a distinction between fires kindled in the house, and fires kindled in the fields, and although Turton J accepted this, the rest of the court disagreed. Holt CJ, Rokeby and Eyre JJ said that the fire in the field was as much the defendant's as if it had been lit in his house, by his servant or by himself, although the defence of Act of God if applicable would have been a defence.

The important question to be asked with regard to the defendant seems to be "was the fire his?" and not "Did the fire escape from his land?" Lord Raymond in his report of the case attributes to the majority of the court the words ". . . for the property of the materials makes the property of the fire." However, with this possible exception, nowhere in these early cases is this question phrased in terms of ownership, possession or control of the land.

The available evidence on general liability for the escape of fire prior to the Act of Anne, leads us to the following conclusions. Firstly, the usual action was one on the case, with an allegation of negligence in contravention of a general custom of the realm that a man must keep his fire safe. Experiments seem to have been made with the writ of trespass 'vi et armis' and with action on the case generally, but neither variation seems to have been popular.

Secondly, whatever meaning was attached to negligence in the action alleging the custom, it had not the technical sense which it now bears in the law of torts. Exactly what it did mean, must remain a matter of conjecture, but it excluded liability where the fire spread or occurred by the Act of a stranger, or spread by misadventure; though a man was responsible for the Act of his servant, his wife, his guest, or one entering his house with his leave or knowledge.

However, it is certainly not clear whether at any period in the history of the English common law, a man was absolutely liable for the escape of his fire. To use such phrases as 'a man acts at his peril' or 'liability is absolute in mediaeval law' on analysis tend to turn out as rather inaccurate generalizations.

### **The Intervention of Statute**

By the end of the 17th Century, the forms of liability for the escape of fire, were beginning to look anomalous. Firstly, the frequency of fires in London and the suburbs was calling attention to the law on the subject.(14) The Great Fire of London in 1666 had manifestly established fire as an enormous social evil that had to be contained. Secondly, the form of the action used was case, and it was in connection with actions on the case that the idea that civil liability was based on negligence, was coming to be familiar to lawyers. They and others thought it was anomalous that a man could be made liable in an action on the case, for damage done by a fire which was not occasioned by his negligence.

The 18th Century brought two important developments. The rapid expansion of fire insurance, and a substantial amount of legislation by Parliament, to try to prevent the outbreak of fires.

The civil liability was changed by an Act of 1707,(15) which modified materially the common law rule as to the liability for damage caused by fire originating in houses, as Section 6 of the legislation provided that no action would lie against a person in whose house "any fire shall . . . accidentally begin."

This clause, which was only to last for 3 years, was made perpetual by an act of 1711.(16) Section 6 probably meant that the defendant was not to be liable where the fire which caused damage to the plaintiff's property began in circumstances outside his control. The innovation was to include those cases where the external force ignited not the original flame, but the conflagration, the escape of which caused damage to the plaintiff's property.

The Act of Anne was repealed in 1771,(17) and the Act of 1772 was repealed in 1774.(18) But in 1772 this clause in the Act of Anne was re-enacted,(19) and in the Fires Prevention (Metropolis) Act section 86, the width of the provision was extended to include not only fires originating in buildings but also to fires originating "on estates".(20)

**"shall accidentally begin"**

The major problem with this section, is the meaning to be given to the phrase "shall accidentally begin". Does "accidentally" mean unintentionally, or does it mean by mere accident as opposed to intention or negligence?

Blackstone(21) seemed to be of the opinion that the words of the section dealt with all types of fire, other than an intentionally lit fire, which spread and caused damage. But if this were so, it would virtually abolish civil liability for the escape of fire, and this would hardly seem to accord with the general policy behind the 18th century statutes.

There are few authorities on the meaning to be placed on the words of the section. There is no reported case in which section 86 of the 1774 Act was pleaded until 1842,(22) and by that time, negligence had begun to emerge in its modern sense as the substantive allegation in an action on the case.

In *Filliter v Phippard*(23) it was decided that the Act was no defence if the fire was caused by the negligence of the householder or of one of his servants, or was lit intentionally. The court held that the word "accidentally" was not used in contradistinction to wilful, but to negligent, and meant "a fire produced by mere chance, or incapable of being traced to any cause."

Lord Denman CJ agreeing with Lord Lyndhurst in *Viscount-Canterbury v Attorney-General*(24) thought Blackstone's interpretation of the statute was wrong, and that the reason no reference was made to 6 Anne c31 in *Vaughan v Menlove*(25) was because the parties concerned accepted that the Act had no application to fires produced by negligence.

Of the three cases, the only one of binding authority in its disagreement with Blackstone is *Filliter v Phippard*.(26) The remarks in *Viscount-Canterbury v Attorney-General*(24) are obiter, and *Vaughan v Menlove*(27) dealt with the entirely novel situation of a fire caused by spontaneous combustion, for which the defendant was liable in negligence because he had used his property in such a way as to injure that of others.

A fire which has begun accidentally within the meaning of the Act, may be continued by the negligence of the householder, and so render him liable. In *Musgrove v Pandelis*,<sup>(28)</sup> the servant of the defendant, in attempting to start a motor car caused petrol in the carburettor to catch fire. The fire would have burnt itself out in a short time, but the servant omitted to turn off the tap from the petrol tank, with the result that the fire increased and burnt down the plaintiff's rooms over the garage. It was held that the Act was no defence because, assuming the fire to be accidental in its origin, the negligence of the defendant's servants was responsible for the continuance of the fire and the destruction of the plaintiff's property.

It is clear that the occupier has a duty to abate, and this is confirmed by the decision of the Judicial Committee of the Privy Council in *Goldman v Hargrave*,<sup>(29)</sup> where the Act provided the defendant with no protection, because the damage had been caused by a fire which had negligently been allowed to "revive" and not by the fire which had accidentally begun.

Where a fire is lit in an ordinary domestic fire grate, which later spreads and causes damage, negligence must be proved on the part of the person who causes the fire to be lit. In *Sochaki v Sas*<sup>(30)</sup> a lodger lit a fire in his room, where there was provided no fireguard or fender, and left the room for a few hours, during which time a spark from the fire caused a fire in the room which spread to the adjoining rooms. It was held that his landlady had no remedy in the absence of any evidence that he built up an excessive fire.

The statute affords no protection in the cases of fires caused by a nuisance, as illustrated by *Spicer v Smee*.<sup>(31)</sup> Defective electric wiring negligently installed by a contractor caused a fire which spread and damaged the plaintiff's property. It was held the state of the wiring constituted a nuisance, for which the defendant was liable, and that the Fires Prevention (Metropolis) Act 1774 section 86 did not apply to fires, which were caused by a nuisance.

A fire does not begin accidentally when it is caused or produced by a dangerous thing for which the owner is responsible under the doctrine of *Rylands v Fletcher*,<sup>(32)</sup> as stated by Warrington LJ in *Musgrove v Pandelis*.<sup>(33)</sup> As however it is the fire which is the dangerous thing, and the object of the statute is to give protection against accidental fires, it is difficult to understand why the statute should not protect as much in one case as in the other.

### **Where the Act provides no defence**

The statute was held to be no defence in a case involving contractual liability. In **Shaw v Symmons and Sons**(34) the plaintiff entrusted some books to a bookbinder to be bound and the bookbinder failed to deliver them to the plaintiff within a reasonable time, after the expiration of which the books were destroyed by an accidental fire on the bookbinders premises. The defendant was held liable because "the breach of contract had been committed before the fire occurred."

### **Burden of proof**

The burden of proof rests firmly on the plaintiff, as stated by Tenterden CJ in **Becquet v MacCarthy**(35) and Lush J in **Musgrove v Pandelis**(36) and in invoking the protection of the Act, as MacKenna J said in **Mason v Levy Auto Parts of England Limited**:(37) "there is no burden on the defendants of disproving negligence."

However, this does not apply where there is a bailment. In **Hyman (Sales) Limited v Benedyke and Company Limited**(38) it was held that at common law, the onus of proof lay on the defendants as bailees, to prove the absence of negligence on their part, and that in those circumstances even where they had pleaded the provisions of this Act, it was still for them to prove. It is to be observed that the Act provides expressly another exception, namely, the case of landlord and tenant.

### **The Railway Cases and Rylands v Fletcher**

The re-emergence of strict liability for the escape of fire was the result of a new factual situation - the problem of sparks escaping from a railway locomotive causing fire to spread to neighbouring property. The old form of liability pour negligent farder son fewe had become outmoded but for a time the judges evidently considered that the new doctrine of negligence provided sufficient protection for the landowner in this situation.

In **Piggott v The Eastern Companies Railway Company**(39) the court viewed the spread of fire caused by a railway engine, in terms appropriate only to negligence, and similarly in **Vaughan v The Taff Vale Railway Company**.(40) But in **Jones v Festiniog Railway Company**.(41) Blackburn J distinguished **Vaughan's** case, in finding that the defendants were not protected from liability, by an Act of Parliament, but were left to their liabilities at common law, which he said, involved an application of the general rule as stated in **Rylands v Fletcher** that

they ran the engines at their peril. Surprisingly, no mention was made of the 1774 Act.

Drawing conclusions from these three cases, it seems that if the escape of fire is the result of the pursuance of a dangerous activity then the statute 14 Geo 3 c78 affords no defence. This was stated by Bramwell B in **Vaughan v The Taff Vale Railway Company**. Whether or not the plaintiff succeeds will depend on the question of statutory authorisation.

If the defendant is engaged in an activity, albeit a dangerous one, which is clearly authorised by Act of Parliament then he will only be liable if the plaintiff can establish negligence on his part. If, however, the activity is not expressly authorised, then the plaintiff can succeed without proof of negligence. The duty imposed on the defendant is of the type imposed in **Rylands v Fletcher**.

It has never been certain how far the doctrine of **Rylands v Fletcher** may be applied to cases of fire beyond cases involving railway engines. The clearest extension has been made in Australia, where the environmental conditions make fire an exceptional hazard. However, in England the courts have directed attention not, as in Australia, to the fire itself, and its attendant circumstances, but to the object producing the fire. Thus in **Musgrove v Pandelis**(42) it was held that a motor-car, with petrol in its tank, was "a dangerous thing" within the doctrine of **Rylands v Fletcher**.

This aspect of the decision has been criticized, notably by Romer J in **Collingwood v Home and Colonial Stores**(43) and with significant results, by MacKenna J in **Mason v Levy Auto Parts**.(44) In this case the defendants had a store of machinery in inflammable packings, together with a quantity of petroleum acetylene and paints. They were liable for damage to their neighbours property when fire broke out and escaped.

The learned judge felt himself bound by the decision of the Court of Appeal in **Musgrove v Pandelis**, but refused to accept its reasoning. His argument, based on the remarks of Romer LJ, was that the thing brought onto the land, the car with its petrol, was not the thing which escaped from the land, therefore, the rule in **Rylands v Fletcher** could not have been applied. It must instead have been decided on the wider principle, on which **Rylands v Fletcher** itself was based.

Applied to fire, this principle can be elaborated so that the defendant is liable if, firstly, he brought onto his land things likely to catch

fire and kept them there in such conditions, that if they did ignite, the fire would be likely to spread to the plaintiff's land, secondly, he did so in the course of some non-natural use, and thirdly, the thing ignited and the fire spread. Thus we are now faced with yet another form of liability for the escape of fire.

### **The Scope of Negligence and Nuisance**

Since the decision in *Read v Lyons*(45) the popularity of the *Rylands v Fletcher* doctrine has suffered a marked decline. Most of the modern cases concerned with the escape of fire, have been decided on the basis of negligence or nuisance, which are perhaps more flexible forms of tortious liability, although surprisingly private nuisance was not applied to a case of escape of fire, until 1924, in *Job Edwards v Birmingham Canal Navigations*.(46)

Although distinct, the torts of negligence and nuisance overlap, and in many actions both negligence and nuisance are relied on, when it could make no difference to the result, if either of them were argued alone. In *Midwood and Company Limited v Mayor Alderman and Citizens of Manchester*(47) the defendants were empowered by Order to supply electricity for their district and lay down electrical mains for this purpose. By a clause of that order, they were not to be exonerated for any nuisance caused by them. One of their mains fused, and an explosion occurred, causing a fire in which the plaintiff's goods were damaged. It was held that, quite apart from any question of negligence, the defendants were liable to the plaintiffs for a nuisance, by reason of the provisions of that clause.

### **Conclusion**

The history of liability for the escape of fire has revealed a veritable jungle of legal concepts, so perhaps the foremost consideration is to find a clear rule of law unambiguous and free from existing complexities. Now that negligence and nuisance have developed, it may be that the repeal of section 86 is a useful starting point.

But it would be mistaken to attribute too much importance to labels. A so-called "strict" liability will, in practice, often come close to negligence. Conversely, liability in negligence can be unexpectedly strict, especially where a potential danger exists, and where the doctrine of 'res ipsa loquitur' may be applied.

The problem of choosing a desirable remedy, where damage is caused by the spread of fire from the defendant's land can best be tackled by answering the question, who should bear the risk to the plaintiff's property, in the range of situations, from where the defendant is negligent, to where he is totally blameless. The topic of insurance is crucial to a fair appreciation of the matter, and as the great majority of householders cover themselves against fire damaging their property, a regime of strict liability, putting a heavy burden on the defendant, may be undesirable.

At present, the position is that damage resulting from the unintentional escape of fire may be redressible, by any of the following remedies.

(1) An action of the *Rylands v Fletcher* type. Either the original form, or the modified form in *Mason v Levy Auto Parts*.(48)

(2) The old action of trespass on the case. It may be that the rule in *Rylands v Fletcher* has entirely absorbed the old action of trespass on the case for fire, and the inference is favoured by the fact that the defendant has been held liable for the default of an independent contractor,(49) which may be regarded as the hallmark of the strict liability in *Rylands v Fletcher*. Yet it is doubtful whether the absorption is complete. For instance, inevitable accident is almost certainly a defence to the action upon the case for fire, even apart from the Act of 1774, but it is probably no defence under the rule in *Rylands v Fletcher*.

(3) An action for negligence.

(4) An action for nuisance.

- (1) "The Accidental Fires Act (Northern Ireland) 1944" (1945) 6 NILQ 134-141.
- (2) "Responsibility for Tortious Acts. Its History" 7 Harv LR (1893-4) p 448-9.
- (3) "The Myth of Absolute Liability" (1926) 42 LOR p 46-50.
- (4) (1919) 2 KB 43 p 46-47.
- (5) (1931) 1 DLR 835 at p 389.
- (6) As in **Beaulieu v Finglam YB 2 Hen 4f 18 p16 (1401)**.
- (7) (1957) 1 Lloyds Rep 522.
- (8) (1866) LR 1 Ex 265 (1868) LR 3 HL 330.
- (9) 42 Liber Assis Ed III pl 9.
- (10) (1401) YB 2 Hen 4f 18 p16.
- (11) Fitzherbert, Abridgment, Double Plea 31. Hil 3 Hen VI.
- (12) Anon (1582) Cro Eliz 10.
- (13) 3 Lord Raymond 375. 1 Salkeld 13.
- (14) This is stated in the Preamble to 6 Anne c31 (RC c 58) to be the reason for passing the statute.
- (15) 6 Anne c31 (RC c 58) known as the "Apprehension of Housebreakers Act" which extended only to England.
- (16) 10 Anne c 14 s 1.
- (17) 12 George III c73 s46.
- (18) 14 George III c78 s101.
- (19) 12 George III c73 s37.
- (20) Like the fire which was the cause of action in **Turberville v Stamp 8 Lord Raymond 375, 1 Salkeld 13**.
- (21) Comm i p431.
- (22) **Viscount-Canterbury v Attorney-General (1842) 1 Ch 306 HL**. The discussion of the provision was obiter as the case was decided on the ground that the Crown was not liable in tort.
- (23) (1847) 11 QB 347.

- (24) (1842) 1 Ph 306 HL
- (25) (1837) 3 Bing NC 468.
- (26) (1847) 11 QB 347.
- (27) (1837) 3 Bing NC 468.
- (28) (1919) 2 KB 43.
- (29) (1967) 1 AC 645.
- (30) (1947) 1 AER 344.
- (31) (1946) 1 AER 489 per Atkinson J.
- (32) (1868) LR 3 HL 330.
- (33) (1919) 2 KB 43 at p 49.
- (34) (1917) 1 KB 799.
- (35) 2 B & Ad 951 at p 958.
- (36) 1 KB 314 at p 317.
- (37) (1967) 2 QB 530 at p 539.
- (38) (1957) 2 Lloyds Reports 601.
- (39) (1846) 3 CB 229.
- (40) 3 H & N 743, 5 H & N 679.
- (41) (1868) LR 3 QB 733.
- (42) (1919) 2 KB 43.
- (43) (1936) 2 AER 100 at p 208-9.
- (44) (1967) 2 QB 530.
- (45) (1957) AC 156.
- (46) (1924) 1 KB 341.
- (47) (1905) 2 KB 597.
- (48) (1967) QB 530.
- (49) **Black v Christchurch Finance Company (1894) AC 48.**

# **THE BRITISH NATIONALITY BILL OF 1981**

**by Dr. F. Wooldridge\***

## **Introduction**

The nationality law of the United Kingdom is extremely complex and confusing,(1) and most would agree that its reform has been rendered necessary by changed conditions in the United Kingdom and in the independent members of the Commonwealth. It has often been emphasised that it fails to define a nation, and that this failure has given rise to a number of problems, especially in connection with immigration control. The present nationality laws of the United Kingdom, unlike those of other countries, do not create any special category of "United Kingdom nationals". They instead create a number of different statuses which are not necessarily mutually exclusive and which are usually derived from historical antecedents.

The most important of these categories consists of Citizens of the United Kingdom and Colonies, who are made up of three groups of individuals, and of these the most important are those who derive their citizenship from a close link with the United Kingdom. The second group consists of those whose connection is with an existing dependency, whilst the last group comprises those who derive their citizenship from association with former colonies. The other classes which exist consist of "British Subjects without Citizenship", "British Protected Persons", and "British Subjects and Commonwealth Citizens".(2) The legal criteria employed for determining whether a person qualifies for one of these statuses are extremely complex, and often lead to anomalous situations.

In April 1978, the Labour Government expressed the intention of revising British Nationality Law in a Green Paper entitled "British Nationality Law: Discussion of Possible Changes."(3) The Conservative Government, which was elected to power in 1979, expressed the intention of introducing new legislation on nationality, and it issued a White Paper on the subject in 1980 which was intended to form the basis of legislation after taking into account the views put forward by various individuals and organisations. It was hoped that the proposals

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contained in the White Paper would be discussed by one of the House of Commons Select Committees before the Bill was published, but this anticipated discussion did not take place.

The British Nationality Bill 1981 was introduced in the Commons in January 1981, and received its first reading at the end of that month. The reasons why it was not introduced earlier in the session are apparently, that it was thought necessary to conduct certain preliminary discussions with colonial governments before its introduction, and that when the Home Office came to draft the Bill, certain Cabinet Ministers expressed the view that it might have an unfortunate effect on minority opinion. The Bill was given its second reading at the end of January 1981, and it was then referred to Standing Committee F of the House of Commons although, as Mr Alex Lyon pointed out, the Government was (it is respectfully submitted correctly) advised by the Clerk of the House of Commons that the Bill was a constitutional measure, and ought to have been taken on the Floor of the House.

The debates in Standing Committee F, which were curtailed by a timetable motion, have reinforced a great deal of the criticism to which the Bill has been subjected by the churches, immigrant organisations, the Commission for Racial Equality, the Joint Council for the Welfare of Immigrants, the Legal Affairs Committee of the European Parliament and other bodies. As the result of some of these criticisms, the Government has accepted a number of amendments to the Bill, in particular to clauses 1, 2, 6 and 43 thereof. It put down certain further amendments to the Bill on Report which were accepted by the House.

### **General evaluation**

The Bill has a number of positive features, which include the absence of any restriction on dual nationality, the more liberal approach taken under clause 12 to the resumption of citizenship,(4) the provisions for equality on the transmission of citizenship, and the provision that any discretion vested by or under the Act in the Secretary of State or a Governor or a Lieutenant-Governor shall be exercised without regard to the race, colour or religion of any person who may be affected by its exercise.(5) However, as should be apparent from the discussion which follows below, the Bill has a number of defects. It has been subjected to justified criticism on the ground that it is too complex, and that it creates too many different statuses.

An attempt should have been made to reduce the number of statuses recognised under the Bill, or at least the number of persons who would qualify for the controversial residual status of British Overseas citizenship, as well as the number of British subjects without citizenship and British Protected Persons, by means of appropriate negotiations between the United Kingdom and the other independent members of the Commonwealth followed, if necessary, by appropriate United Kingdom legislation.

There appears to be considerable force in the suggestion that the Bill is based on a racially discriminatory immigration policy. It certainly increases the executive and discretionary powers of the Home Office,(6) and its enactment would create new and unfortunate uncertainties about who was, or was not a British citizen.(7) It is unlikely that many of the objectionable features of the Bill will be removed by amendments in the House of Lords. Owing to the very considerable complexity of the Bill, it has only been possible to summarise and analyse certain of its principal provisions, in the form in which they appear when the Bill left the Commons for the Lords.

#### **The different statuses under the Bill**

If the relevant provisions of the Bill were enacted without amendment, citizenship of the United Kingdom and Colonies would be replaced by three types of citizenship. Persons having close links with the United Kingdom, as defined in the Bill, at or after commencement,(8) would become British citizens whilst persons closely connected with a dependent territory would acquire citizenship of the British Dependent Territories.(9) Those persons who are now citizens of the United Kingdom and Colonies, but who do not at commencement become British citizens, or citizens of the British Dependent Territories would become British Overseas citizens.(10)

British citizens would have the right to enter and leave the United Kingdom,(11) but their citizenship would not be defined in terms of any additional rights and duties. It is envisaged that citizens of the British Dependent Territories would be eligible for a passport describing them as such. The Bill does not define the rights and duties of such citizens: at present they are sometimes not eligible to enter the territory with which they are connected,(12) and there seems to be no guarantee that all dependent territories will amend their immigration ordinances so as to remove this anomaly. Whatever the difficulties involved, it would have been better to have endowed each of the dependent overseas

territories with a separate citizenship whenever appropriate, to which certain defined rights and duties were attached. Serious consideration should have been given to the conferment of British citizenship upon the inhabitants of certain territories, such as Gibraltar, the Falkland Islands and St Helena. It seems paradoxical that people from Gibraltar will be classified as citizens of the British Dependent Territories, although they are included among British nationals for EEC purposes in a definition attached by the British Government to the Treaty of Accession to the EEC.

A British Overseas citizen would be entitled to consular protection overseas but his citizenship would not carry with it the right to abode in a British territory.(13) It has been argued with some justification that BOC's would be virtually stateless. The fact that BOC's will have no right of abode in a British territory, and that citizens of the British Dependent Territories will sometimes be placed in the same position lends support to the view that the Bill is based upon a racially discriminatory immigration policy.(14)

In addition to the above categories of persons, the Bill also provides for the continuance as British subjects of existing British subjects of various descriptions.(15) Clause 29 would be applicable to persons who, immediately before commencement, were British subjects without citizenship by s.13 and s.16 of the British Nationality Act 1948, and to persons who were British subjects by virtue of s.1 of the British Nationality Act 1965. The latter text provides for the acquisition of British subjecthood by alien women who have been married to British subjects without citizenship or to British subjects by virtue of s.2 of the British Nationality Act 1948. The latter category of British subjects consists of persons who were citizens of Eire and British subjects before the 1948 Act came into force who have made a declaration to the Secretary of State after the commencement of that Act claiming to remain a British subject on the ground of any or all the links with the United Kingdom defined in s.2(1)(a)-(c) of the 1948 Act. Such persons would continue to be British subjects as from commencement by virtue of clause 30(2).(16)

The Bill also makes provision for a status called Commonwealth citizenship.(17) If the Bill is enacted in the present form, it will no longer be true to say that all Commonwealth citizens are British subjects under United Kingdom law.

Citizens of the Republic of Ireland will continue to be excluded from the definition of aliens.(18) It will remain possible to make Orders in Council declaring certain classes of individuals to be British protected persons.(19)

It is considered that an attempt should have been made to reduce the number of statuses recognised under the Bill. To that end a Commonwealth conference should have been called before the Bill was drafted to discuss, inter alia, the problems of non patrial citizens of the United Kingdom and Colonies who live in independent Commonwealth countries, but who are not citizens of these countries, and who often have only limited rights of residence and work there, and no such rights elsewhere. Such a conference might also usefully have discussed the similar problems of British subjects without citizenship residing in independent Commonwealth countries, and of certain British protected persons from former protectorates and protected states who did not acquire local citizenship when these countries became independent.

The conference should have aimed at improving the position of persons within the relevant classes by endeavouring to ensure that they became eligible for the nationality of the territory in which they resided, or had such nationality conferred on them. If it had proved impossible to secure that certain persons in these categories acquired, or were granted the right to acquire the nationality of the countries in which they resided, serious consideration should have been given to the conferment of the right of abode in the United Kingdom on them together with, where necessary, citizenship of the United Kingdom and Colonies.

### **Transitional Provisions**

#### **(1) British citizenship**

On the date the Bill comes into force as an Act, British citizenship would be acquired by persons who immediately before commencement were citizens of the United Kingdom and Colonies having the right of abode under the Immigration Act 1971 as then in force.(20) However, persons who obtained citizenship of the United Kingdom and Colonies by registration under s.1 of the British Nationality (No.2) Act 1964 because they were born stateless (many of the persons in this group are illegitimate children born abroad, whilst others are children of British mothers married to non-British fathers, who are unable to transmit their citizenship to the child because of the law of their country), but who themselves became patrials because the registration took place in

the United Kingdom,(21) or in an independent Commonwealth Country(22) would not become British citizens unless certain further requirements were satisfied.(23) In principle, they would acquire the same status as their mother. This exception affects only a comparatively small number of people, and the need for it is questionable, although it must be said in fairness that it corrects an existing anomaly in the law.

Many would regard it as unfortunate that the Bill does not confer British citizenship upon individuals holding United Kingdom and Colonies passports without the right of abode in any country or dependent territory, or at least upon the United Kingdom passport holders living in or originating from East Africa, who have no other nationality and who benefit from the special voucher scheme. The latter individuals had been given assurances before their territories attained independence that, if they wanted to come to Britain, the United Kingdom had no intention of subjecting them to immigration control. Mr Marshall moved an amendment seeking to attain the former objective: Mr Hattersley moved one seeking to attain the latter, more limited objective. Both these amendments were defeated in Committee:(24) the Government's approach to them was clearly conditioned by the immigration potential to which their acceptance would have given rise.

The defeat of the above amendments appears particularly unfortunate when it is remembered that the Bill makes provision for the conferment of British citizenship upon those individuals who are at present citizens of the United Kingdom and Colonies who had a grand-parent who had this citizenship by birth, adoption, naturalisation or registration in the United Kingdom or in any of the Islands. Many such individuals have little real links with the United Kingdom, and the acceptance of this grand-patrial connection as a criterion for citizenship gives some ground for the view that the categories of persons mentioned in the above paragraph are subjected to racial discrimination under the Bill.

Commonwealth citizens who are patrials under s.2(1)(d) or s.2(2) of the Immigration Act would not become British citizens,(25) but would not lose their right of abode.(26)

Citizens of independent Commonwealth countries who were able to satisfy the Secretary of State they they were settled here before 1st January 1973 and had remained ordinarily resident here, Commonwealth citizens who are patrial under s.2(1)(d) of the Immigration Act 1971 who had satisfied certain requirements as to residence and employment,(27) and the wives of such citizens would be entitled to register as British citizens for five years after commencement.(28) Some would argue that

existing rights to registration should have been preserved indefinitely, Patrial Commonwealth citizens who were not covered by clause 6(1) because they had not resided here for five years before commencement would be covered by clause 6(2), which would enable them to complete the five year period and apply for registration within six years of commencement.

Clause 7(1) provides for the retention of the existing rights of wives to registration by virtue of marriage to citizens of the United Kingdom and Colonies for a period of five years after commencement: registration would be as a British citizen. Under clause 7(2), the Secretary of State would have a discretionary power to register ex-wives who were formerly entitled to registration under clause 6(2) of the British Nationality Act 1948.

The Bill originally contained transitional provisions providing for the registration as British citizens of non patrial citizens of the United Kingdom and Colonies, British subjects by virtue of s.2 of the Act, British subjects without citizenship, British subjects by virtue of s.1 of the British Nationality Act 1965,(29) and British protected persons settled in the United Kingdom at the date of commencement. Clause 4(1) (3) of the Bill now provides that people in these categories who comply with certain conditions would acquire in perpetuity the right to British citizenship: this approach is to be welcomed, and might with advantage have been adopted in clauses 6 and 7.

The facilities for transmitting citizenship by consular registration where it gives the right of abode here would be preserved for a transitional period of five years after commencement where the very complex conditions of clause 8 were not met.

## **(2) Citizenship of the British Territories**

The Bill provides for the acquisition of citizenship of the British Dependent Territories(30) at commencement by a citizen of the United Kingdom and Colonies:-

- (a) who was born in what is still a dependency or associated state when the legislation comes into force, or who obtained his citizenship by naturalisation or registration in such a place;
- (b) who has or had a parent or grandparent who was born, naturalised or registered in such a dependency or Associated State;
- (c) who has been married to a man who becomes, or would but for his death have become, a citizen of the British Dependent Territories.(31)

This citizenship would also be acquired by certain less significant categories of persons at commencement.(32) The transitional provisions governing the acquisition of citizenship of the British Dependent Territories by special classes of persons contained in clauses 17 and 18 are very similar to those of clauses 6(1) and 7, which have been fully considered above.

Certain citizens of the British Dependent Territories would also acquire British Citizenship: one may cite the example of a person born in Gibraltar to a father who was born in the United Kingdom.

### **(3) British Overseas Citizenship**

Clause 25 of the Bill provides that any person who was a citizen of the United Kingdom and Colonies immediately before commencement, and who does not at commencement become either a British citizen or a citizen of the British Dependent territories shall at commencement become a British Overseas citizen. The people who would become BOC's under the bill are mainly CUKC's who derive their present citizenship from a link with a former colony, dependency or protectorate. The Bill also contains transitional provisions governing the registration of wives and ex-wives of BOC's as BOC's.(33)

It seems clear that BOC's remain United Kingdom nationals under public international law, and that if such citizens who had no other citizenship were expelled from a country in which they were resident, the United Kingdom would be obliged to take them.(34) Refusal of entry to such persons would also constitute a violation of the European Convention on Human Rights.(35)

#### **Permanent arrangements**

Owing to limitations of space, and to the fact that the permanent arrangements governing the acquisition, renunciation, resumption and deprivation of citizenship of the British Dependent Territories are generally very similar to those governing the acquisition, renunciation, resumption and deprivation of British citizenship, it is considered necessary to cover the permanent arrangements governing British citizenship in detail below,(36) but the somewhat fragmentary provisions governing British Overseas citizenship do not appear to merit further consideration. It is intended that this citizenship should not be transmissible in the ordinary course of events, but the Bill contains special rules designed to reduce the incidence of statelessness. There are no provisions for naturalisation on a British Overseas citizen, or for the resumption of British Overseas citizenship.

## **(1) British Citizenship by Birth and Adoption**

A person born in the United Kingdom after commencement would be a British citizen if, at the time of his birth, his father or mother were a British citizen or were settled in the United Kingdom.(37) A person would be treated as settled in the United Kingdom or in a dependent territory if he were ordinarily resident in the United Kingdom without being subject under the immigration laws (which would appear to include Community Law) to any restriction on the period of time for which he might remain.(38) Illegitimate children would only be able to claim citizenship through their mother.(39)

It has frequently been contended that there were no good grounds for departing from the *jus soli* principle, and that clause 1(1) would be capable of operating unjustly, in particular in a situation in which the Home Office decided that a child's parent was an illegal entrant because he had obtained his entry clearance by fraud, deception, or failure to disclose a material fact.(40) This clause will also give rise to other serious difficulties for the children of immigrants.

It is clear from a statement made by Mr Raison, the Minister of State, in the House of Commons on the Second Reading of the Bill that no checks would be made on a child's citizenship status at the time of birth, but that they might take place subsequently when the child required a passport. The fear has been expressed that there might be room for racist attitudes in deciding whom to investigate. It would often be very difficult for a child to show that one of his parents was settled in the United Kingdom at the time of his birth: this would be specially hard where the relevant parent had died, or had left the United Kingdom, or had kept no appropriate records. These difficulties would be exacerbated by the fact that settlement requires "ordinary residence", which is a somewhat imprecise concept which has different meanings for the purpose of immigration, tax,(41) exchange control and divorce law, and for the purpose of the Local Education Authority Awards Regulations 1979.(42)

The drafters of clause 1(1)(b) do not appear to have taken proper account of the consequences of the United Kingdom's membership of the European Community; Community nationals have the right to enter the United Kingdom in order to take up employment, and to pursue certain activities as self employed persons, and to remain here for these purposes. The stay of a Community national cannot be restricted through the grant of a limited leave to remain. Most Community nationals

living in the United Kingdom will qualify as being ordinarily resident here, provided that they comply with the requirements governing registration with the police and are thus not in breach of the immigration laws; and it seems that such nationals will also be settled here within the terms of clause 1(1)(b). The Children of such nationals will automatically acquire British citizenship through birth.(42A)

Clause 1(1)(b) has been justifiably criticised on the ground that it would sometimes lead to a child being born stateless. Thus, for example, a child born to an Asian couple, during a visit to the United Kingdom, neither of whom was a British citizen and whose normal residence was Tanzania, the father having resided in Tanganyika both before and at the time when that territory attained independence on December 9th 1961, might not acquire either Tanzanian citizenship or British citizenship at birth. The child would not acquire Tanzanian citizenship if his father did not qualify for Tanganyikan citizenship on December 9th 1961, because, although the father was born in Tanganyika, neither of his parents was born there; unless his father acquired such citizenship or Tanzanian citizenship subsequently by registration or naturalisation. The child would only acquire British citizenship if one of his parents was settled in the United Kingdom when he was born. If such a child were born stateless, he would be entitled to registration as a British citizen if he subsequently complied with the complex and restrictive requirements of para. 3 of Schedule 2 to the Bill, which include a substantial period of residence in the United Kingdom.

A new born infant found abandoned in the United Kingdom after commencement would be deemed for the purposes of subsection (1), until the contrary was proved, to have been born in the United Kingdom after commencement to a parent who, at the time of such birth was a British citizen or resident in the United Kingdom.(43)

A child born in the United Kingdom after commencement who was not a British citizen by virtue of subsection (1) and (2) would be entitled on an application made for his registration as a British citizen to be registered as a British citizen if, while his was a minor, his father or mother became a British citizen or became settled in the United Kingdom, and an application was made for his registration as a British citizen.(44) Such a person would also be entitled on an application for his registration as a British citizen made at any time after he had attained the age of ten years to be registered as such a citizen if, as regards each of the first ten years of that person's life, the Secretary of State was satisfied that the number of days on which he was absent from the

United Kingdom in that year did not exceed 90.(45)

Clause 1(4) is designed to assist children who in later years might find difficulty in producing evidence of their parent's status, and it goes some way to meet certain of the criticisms of the Bill. However, considerable difficulties might be experienced in producing the evidence required under clause 1(4). Persons falling outside the categories provided for in sub-clauses (1)-(4) might be registered as British citizens on application being made to the Secretary of State when they were minor children.(46) In addition a person born in the United Kingdom after commencement who was not a British Citizen by virtue of clauses 1(1) and 1(2) would be entitled to registration as a British citizen, if on application for such registration, the Secretary of State was satisfied that he was and always had been stateless; that he had attained the age of ten but was under the age of twenty-two; and that he had complied with certain residence requirements.(47) Although this rule would conform with art. 1(5) of the United Nations Convention on the Reduction of Statelessness, it is thought that the upper age limit is too low and the lower age limit is too high, and that these age limits should be fixed differently, or even be removed altogether.

A child adopted in the United Kingdom, one of whose parents was a British citizen, would acquire United Kingdom citizenship through adoption.(48) Foreign adoption orders would not have this effect, but the Secretary of State would continue to have a discretion to register any minor child, including one adopted by British citizens outside the United Kingdom.

## **(2) Transmission of Citizenship by Descent**

British citizens by birth, registration or naturalisation would be able to transmit their citizenship to the first generation born abroad,(49) and normally speaking to that generation only.(50) However, an exception would be made for children born abroad one of whose parents was in Crown service under the United Kingdom Government, or in designated service.(51)

Much of clause 3 deals with the situation where a child is born overseas to a parent who is a British citizen by descent who retains certain special links, especially through employment, with the United Kingdom. After criticisms had been made of the original provisions of clause 3 governing links through employment by a number of bodies(52) Government amendments to this clause were tabled and accepted on report,

which made a number of improvements to it; the most significant consequences of these amendments is that British citizens by descent in a much wider ranges of employment would be able to secure British citizenship for their children. The risk that such children might be born stateless in a country such as Belgium, France, Japan or the Soviet Union, which applies the *jus sanguinis* principle is thus diminished.(53)

The provisions of clause 3 governing links through employment are very complex, and still appear to have some defects. A person born outside the United Kingdom would be entitled on an application for his registration as a British citizen made within the period of twelve months from the date of the birth,(54) to be registered as such a citizen if the Secretary of State were satisfied that the following requirements were or had been fulfilled in the case of either his father or mother ("the parent in question"), namely:

- (a) that the parent in question was a British citizen the time of the birth; and
- (b) that the parent in question was employed in relevant employment (but not necessarily the same relevant employment) throughout the period of two years ending with the date of birth and was on that date employed in overseas employment;(55) and
- (c) that the nature or terms and conditions of that employment involved a close connection with the United Kingdom; and
- (d) that the parent in question intended to maintain a close connection with the United Kingdom or, if the parent in question had died since the birth that he or she had that intention at the time of the birth.(56)

Intervals between posts in relevant employment whose duration did not exceed ninety days would not disqualify. Furthermore, a women would be deemed to be in relevant employment when her child was born if she had been so employed within six months of the birth; the six months period preceding the birth of the child would then count towards the qualifying period.(56A)

It is not clear what criteria the Home Office staff would use for the purpose of determining whether a person fulfilled the criteria contained in clause 3(2)(c) and (d). It remains to be seen how the Queen's Bench Divisional Court would interpret these somewhat obscure texts if an application for review was made to it by a British citizen by descent claiming that a child born abroad to him which had been refused registration because he had allegedly failed to comply with either or both these texts was nevertheless entitled to registration. The use of the formula "if the Minister is satisfied" would restrict the powers of review of the Divisional Court.

The most significant categories of relevant employment in clause 3(3) are full time employment with any company or association established in the United Kingdom; with any company or association established outside the United Kingdom where the employee's employment with that company or association was arranged by a company or association established in the United Kingdom; and with any company or association established outside the United Kingdom which is associated with a company or association established in the United Kingdom. Partners in a firm established in the United Kingdom would be treated as being in employment with the firm for the purposes of sub clause (3).(56B)

The relevant employments for the purpose of clause 3(3) do not include employment with a foreign university or technical institution. Self-employed persons are not covered by this text, and missionaries will not always fall within it. Amendments should be made to include these categories of persons under certain conditions.

Clause 16 contains provisions governing links through employment, which are applicable to children born outside the dependent territories to citizens of the British Dependent Territories by descent, and which are very similar to those of clause 3.

The Secretary of State would have a discretion to register a child as a British citizen where the above mentioned requirements could not be fully met, provided that application was made for registration during the child's minority.(56C) Furthermore, where these requirements could not be met, the child might benefit from clause 3(b), which provides that any minor child born outside the United Kingdom one of whose parents is a citizen by descent and who comes to the United Kingdom is entitled to registration after three years' residence here, provided that both parents have resided here for the same period of time, and have consented to the registration.(56D)

### (3) Acquisition of Citizenship by Naturalisation

The grant of citizenship to an adult following a period of residence in the United Kingdom or Crown service would be by means of naturalisation except where special rules existed providing for the registration of such an adult as for example under Schedule 2 and clause 4. The applicant for naturalisation would be required to fulfill the following conditions:

- to be of full age and capacity at the time of his application;
  - to have been resident in the United Kingdom for five years immediately prior to the application or to be serving outside the United Kingdom in Crown service under the government of the United Kingdom at the date of application;
  - unless he was so serving, not to have been in breach of the immigration laws of the United Kingdom at any time in the five years immediately prior to the application;
  - to be of good character;
  - to have sufficient knowledge of the English or Welsh language;
- to have the intention of residing in the United Kingdom, or being in Crown service or other specified forms of service.(57)

The Secretary of State would be empowered to waive the language requirement if he considered that because of the applicant's age or physical condition, it would be unreasonable to expect him to fulfill it.(58) The Bill (which differs e.g., from the Swedish Citizenship Act of 1954 in this respect) does not make provision for any appeal against refusal of naturalisation. The discretion of the Secretary of State to grant or refuse naturalisation would remain absolute.(59) Persons who acquired British citizenship by naturalisation would be permitted to retain their former nationality.

It might have been better if the Secretary of State had been granted a wider discretion to dispense with the language requirement such that he could, for example, exempt a distinguished refugee from compliance with it. The controversial absence of provision for a right of appeal against refusal of naturalisation is based on the belief that it is not possible to find an adequate substitute for the good character test, and that it would not be appropriate to have an appeals system if good

character is to be assessed subjectively on the basis of reports. Although it is true to say that many states such as Australia, New Zealand, India, Italy, Greece, the United States, and Nigeria fail to define the good character requirement which they impose for naturalisation, the position is different in some other States, such as Canada, Denmark and Austria.(60) It is thought that the United Kingdom good character test should be replaced by a more objective one. A person should be entitled to naturalisation unless he fulfills certain criteria of bad character such as the commission of certain crimes, and even if he does, it is thought that the Secretary of State should be entitled to confer British citizenship on him if he thinks fit. The writer has already made some tentative suggestions as to possible criteria.(61) It is hoped that amendments will be moved in the House of Lords designed to make provision for criteria of bad character.

It is thought that a decision to refuse naturalisation should be accompanied by a full statement of the reasons for the decision, except where compelling reasons of public security or matters relating to the preservation of order and security militate against such course of action. In that case, the tribunal to which it is suggested an appeal should lie should be empowered to require the disclosure of full reasons and relevant documents.

It is also thought, as has been proposed by the National Council for Civil Liberties, that an appeal against refusal of naturalisation as a British citizen or as a citizen of the British Dependent Territories or as a British Overseas citizen should be to a tribunal called a Citizenship Appeals Tribunal, having an equivalent status to the High Court, and from thence to the Court of Appeal. The appeal should be on the ground that the Secretary of State has made an error of law or fact, or that any discretion vested in him has not been exercised in a reasonable way. It is thought an appeal should also lie on similar grounds to the same tribunal against a decision to refuse any other type of application under the Act, irrespective of whether the grant or refusal of the application is at the discretion of the Secretary of State. It is hoped that the House of Lords will endeavour to secure the amendment of the Bill to achieve at least some of these objectives.

The present automatic entitlement of wives and former wives of citizens of the United Kingdom and Colonies to obtain citizenship by registration under s.6 of the British Nationality Act 1948 would be ended. Citizenship by virtue of marriage would be acquired instead by naturalisation. The Bill provides that spouses of both sexes shall qualify for natura-

lisation under the same conditions.(62) The non British spouse would be required to fulfil the following conditions:

- to be married to a British citizen at the time of application for citizenship;
- to have been resident in the United Kingdom for three years immediately prior to the application;
- to be free from immigration conditions at the date of the application;
- not to have been in breach of the immigration laws at anytime in the three years immediately prior to the application;
- to be of good character;
- to have sufficient knowledge of the English or Welsh language.

The provisions governing the acquisition of British citizenship by marriage achieve formal equality, but it appears that in practice they would discriminate against certain British women on the grounds of race, and against their foreign husbands on the ground of race and sex. Under paragraphs 50, 52, 116 and 117 of the Immigration Rules of 1980, the non patrial husband or fiance of a women who is a citizen of the United Kingdom and Colonies not born in the United Kingdom, and whose parents are not born in the United Kingdom, is not allowed to enter and settle in this country. These provisions have their most significant impact upon women originating from the Indian sub-continent and their husbands and finances, and the European Commission on Human Rights may very well adopt the view that the discrimination which they and their husbands and fiances suffer is racially motivated. The sex based differences of treatment between men and women require little elucidation.(63) It appears that the residence requirement could only be operated fairly if the Immigration Rules were amended as, it is submitted, they should be.

It may also be the case that some non-British women will, because of their comparative social seclusion, find the language requirement harder to comply with than non-British men. It is difficult to see the need for the requirement in the present context.

#### **(4) Resumption, Renunciation and Deprivation of Citizenship**

A person who had ceased to be a British citizen as a result of a declaration of renunciation would be entitled, on application for his registration as a British citizen to be registered as such a citizen if he were of full capacity and he satisfied the Secretary of State that his renunciation of British citizenship was necessary for him to retain or acquire some other citizenship or nationality.(64) A person would not be entitled to resume his citizenship on more than one occasion,(65) but the Secretary of State would have a discretion to admit a person to British citizenship who had renounced this citizenship on more than one occasion.(66)

The provisions of the Bill governing the renunciation of British citizenship(67) are very similar to those of the British Nationality Act 1948, as amended, and do not appear to give rise to any special problems. Those governing the deprivation of British citizenship obtained by naturalisation or registration do not involve any major changes in the law.(68) It is suggested however that they require amendment in certain respects. The Bill continues to use the phrase "false representation" in clause 39(1), and it might be advantageous to replace this wording by "wilful misrepresentation", which appears in 8 U.S.C. Sect. 1451(a); section 1451 states the grounds on which a naturalized United States citizen may be deprived of his nationality.

Clause 39(7), like s.20(7) of the British Nationality Act 1948, makes provision for an inquiry procedure when it is proposed to deprive a British citizen of his citizenship. The report of the committee of inquiry is not binding on the Secretary of State. It is thought that this procedure should be replaced by an appeal to the proposed Citizenship Appeals Tribunal, which might be made either after the Secretary of State has made a decision to deprive a person of his citizenship and has notified him thereof, or after he has informed a person that he intends to deprive him of his citizenship. The Secretary of State ought to be required to bear the burden of proof, and to prove his case beyond reasonable doubt.(69) Cases in which it was alleged that a person acquired his citizenship by fraud or deceit, and that such acquisition is null and void, should also be within the jurisdiction of the Citizenship Appeals Tribunal.

#### **The Preservation of Certain Existing Rights**

Clause 49(1) provides that in any enactment or instrument whatever passed or made before commencement, "British subject" and "Common-

wealth citizen'' shall have the same meaning. It appears that this text would preserve the voting and other civic rights and privileges enjoyed by British subjects under pre-commencement legislation. There is no guarantee however that the rights of such persons will not be altered to their detriment in the future. Since citizens of the Republic of Ireland continue to be excluded from the definition of aliens, they will remain eligible for the public service. They will also continue to have the right to vote granted them by s.1 of the Representation of the People Act 1949.

### Conclusion

The Opposition moved certain amendments to the Bill on report, and one might expect a considerable number of amendments to be moved in the House of Lords, particularly in view of the weight of informed criticism of the Bill. Certain of these amendments may seek to retain the *jus soli* principle, to provide for a system of appeals in registration and naturalization cases, to provide for the creation of separate citizenships for the dependent territories to confer British citizenship upon at least some categories of BOC's and perhaps to make provision for the transmission of citizenship by registration of a birth at a consulate. However, it seems likely that few significant amendments of the Bill will be adopted in the Upper House; considerable pressure may be exercised of behalf of the inhabitants of Gibraltar.

The Labour Party has promised to repeal the Nationality Act when returned to office, and to replace it by new legislation. Such legislation should aim at greater simplicity, the reduction of the number of the existing statuses and it is suggested, certain of the other reforms mentioned in the paper.

- (1) The principal Act is the British Nationality Act 1948, which has been amended and supplemented by the British Protectorates, Protected States and Protected Persons Order 1949 (this has been supplanted by the Order of 1978, S.I. 1978, No. 1026), the British Nationality Acts 1958, 1964 (No.2) and 1965, the Commonwealth Immigrants Act 1962, the British Nationality Regulations 9169, the Immigration Act 1971, and by more than forty statutes concerned with the grant of independence to former dependencies.
- (2) See De Smith, Constitutional and Administrative Law, 3rd ed. pub. Penguin Books 1977, pp. 406-8 and Cmnd 7987 (1980) p. 32. Citizens of the United Kingdom and Colonies and of the Independent Commonwealth countries all hold the additional status of British Subject/Commonwealth Citizen. British Subjects without Citizenship are persons born before 1st January 1949 who were British Subjects by reason of their connection with former British India, but who did not become citizens of India and Pakistan when these countries introduced their own citizenships, usually because they were not living in one of them at the time. British Subjects without citizenship do not transmit their nationality to their children: see British Nationality Act 1948, s.13 and Third Schedule para 1(a). British protected persons are neither British subjects nor aliens. Many of those remaining are nationals of Brunei, but others enjoy their status as the result of a connection with a former protectorate or trust territory, and are generally unable to transmit their status to their wives or children: see British Nationality Act 1948, ss. 3(3) and 32(1), and British Protectorates, Protected States and Protected Persons Order 1978, S.I. 1978, no. 1026.
- (3) Cmnd. 6795.
- (4) Under this clause, persons who have to renounce British citizenship in future for the purpose of obtaining or keeping the citizenship of a foreign country will be able to resume British citizenship by application: at present, the only individuals who are entitled to resume their United Kingdom and Colonies citizenship are persons who have ceased to be citizens of the United Kingdom and Colonies as the result of a declaration of renunciation made as a condition of acquiring or retaining the citizenship of a Commonwealth country: see s.1 of the British Nationality Act 1948.
- (5) See clause 43(1), the value of which has been doubted because of the exclusion of the jurisdiction of the courts under clause 43(2). However, it is possible that clause 43(1) gives the Commission for Racial Equality the right to conduct an investigation by a Minister in relation to the grant of citizenship. In addition, discrimination on grounds of race, colour or religion, would be maladministration, which could be investigated by the Parliamentary Commissioner for Administration under s.12(3) of the Parliamentary Commissioner Act 1967.
- (6) Note for example clauses 1(1), 2(3), 6(2), 7, 27(2) and 40 and parts of Schedules 1 and 2, and see Second Reading Briefing, published Action Group on Immigration and Nationality, Jan 22nd 1981.

- (7) Note in particular clause 1(1)(b).
- (8) See clauses 1-3 and 10.
- (9) See clauses 14, 15 and 22.
- (10) See clause 25, which has been subjected to considerable criticism.
- (11) See clause 38, which amends s.2 of the Immigration Act 1971, which is also amended by Schedule 4 of the Bill.
- (12) See *British Nationality: A Report of Justice*, pub. 1980, pp. 34-5 for the position in Gibraltar and Bermuda.
- (13) This status would be acquired mainly by people of Indian and Chinese descent living in East Africa, or who had gone from East Africa to India in 1968, or who were living in Malaysia and Singapore. It would also be acquired by other classes of persons, for example certain Tamils living in Sri Lanka, and certain individuals living in Malawi and Zambia. (see House of Commons, Second Report from the Home Affairs Committee, HC 158, Session 1980-81, Numbers and Legal Status of Future British Overseas Citizens without other citizenship, p.ix and pp. 1-9, 27, 31-2, and 41-2). The Home Affairs Committee has accepted the Foreign and Commonwealth Office estimate that the number of future BOC's without any other citizenship is about 210,000 as broadly correct (p. ix *ibid.*). Special difficulties arise in connection with the legal status of future BOC's and their descendants in Malawi and Singapore (pp. 31 and 33-5, *ibid.*). A person born in Malawi after 5th July 1966 only acquires local citizenship if one of his parents is a citizen of Malawi "of African race". A person born in Singapore after 17th March 1967 to parents neither of whom is a Singapore citizen does not acquire Singapore nationality by birth, but the Singapore Government has a discretion to confer such nationality on him.
- (14) Mr Whitelaw is reported to have said in a letter to Cardinal Hume that the Bill perpetuates arrangements under the Commonwealth Immigrants Act 1968. The Commission found these arrangements to be racially discriminatory in the East African Asians Cases: see Minutes of Evidence of the Parliamentary Select Committee on Home Affairs, Sub-Committee on Race Relations, Session 1979-80, H.C. 434, p. 36., and the *British Nationality Bill and the European Commission of Human Rights*, pub. Catholic Commission for Racial Justice, Briefing Paper, April 1981.
- (15) See clauses 29 and 30(2).
- (16) Citizens of the Republic of Ireland who, immediately before January 1st 1949 (the date of entry into force of the British Nationality Act 1948), were both citizens of Ireland and British subjects would continue to be entitled to remain British subjects on making a declaration claiming to do so at any time after commencement if they fulfilled the conditions laid down in clause 30(2)(a) and (b). Such a declaration might be made at any time before the death of the person entitled to make it. The prolongation of this entitlement in this way has given rise to some controversy.

- (17) Clause 36(1) provides that British citizens, citizens of the British Dependent Territories British Overseas citizens, British subjects and citizens of the independent Commonwealth countries shall have the status of Commonwealth citizens. Clause 36(4) provides that, after commencement, no one shall have the status of a Commonwealth citizen otherwise than under this Act. Note however clause 50(1), which is discussed below.
- (18) Clause 50(4).
- (19) Clause 37. British protected persons, like British subjects without citizenship, are at present entitled to United Kingdom and Colonies passports.
- (20) Clause 10(1).
- (21) Immigration Act 1971, s.2(1)(a). The Bill provides that the term "patrials" will be replaced by the term "British citizens" after commencement: see Schedule 4, para. 2.
- (22) Ibid., s.2(1)(a) and (4).
- (23) Clause 10(2). The additional requirements are that the mother of such a person must become a British citizen under clause 10(1), or would have become one under this clause but for her death; or that the person has the right of abode in the United Kingdom by virtue of s.2(1)(c) of the Immigration Act 1971, which requires ordinary residence here for at least three years.
- (24) See Parliamentary Debates, House of Commons, Official Report, Standing Committee F, British Nationality Bill, Twenty-Sixth Sitting, Tuesday 7th April 1981, column 981, and Official Report, Standing Committee F, British Nationality Bill, Twenty-Ninth Sitting, Thursday 9th April 1981, Afternoon, Part 1, column 1113.
- (25) 2(1)(d) confers the right of abode on a Commonwealth citizen born to or legally adopted by a parent who at the time of the birth or adoption had citizenship of the United Kingdom and Colonies by his birth in the United Kingdom or in any of the Islands. S.2(2) confers the right of abode on the wives and former wives of such Commonwealth citizens.
- (26) Clause 38(2), s.2 of the Immigration Act 1971 would be amended by the Bill so as to call patrial Commonwealth citizens British citizens throughout the Act.
- (27) See Appendix A to Schedule 1 of the Immigration Act 1971, provisions to have effect as section 5A of the British Nationality Act 1948.
- (28) Clause 6(1). The Bill originally made provision for a period of two years, but Mr Raison accepted an amendment extending the period to five years on behalf of the Government.

- (29) These are women who have been registered as British subjects because they have been married to British subjects of various descriptions.
- (30) The British Dependent Territories are listed in Schedule 6, and include 15 colonies and 2 Associated States: the circumstances of these territories differ widely from each other.
- (31) Clause 22(1)(a)-(c).
- (32) Clause 22(2) - 22(4).
- (33) Clause 27.
- (34) See however the different opinion somewhat tentatively expressed by Professor Clive Parry in his evidence given before the Sub-Committee on Race Relations and Immigration (House of Commons, Second Report from Home Affairs Committee, Session 1980-81, HC 158, Numbers and Legal Status of Future British Overseas Citizens without other Citizenships, p. 27). Professor Clive Parry cites the decision of the International Court of Justice in the *Nottebohm Case*, I.C.J. Reports (1955) p. 4 as authority for his proposition. However, in that case, the main question was whether Liechtenstein was entitled to protect a citizen who had acquired his citizenship after a brief residence in Liechtenstein, and who had no other citizenship, against Guatemala, with which he more substantial links. The International Court found that Liechtenstein was not so entitled. Although the decision contains some wide dicta, the *Nottebohm case* has nothing to do with the protection of nationals in the event of an expulsion, nor did the Court define what is meant by a genuine link either in the context of persons residing in territories belonging to a colonial empire, or otherwise.
- (35) This appears to follow from the *East African Asians Case* (1971) 1LM 44, in which the European Commission of Human Rights found that certain of the provisions of the Commonwealth Immigrants Act 1968 constituted violations of Articles 3 and 8 of the European Convention on Human Rights as well as of Article 8 coupled with Article 14. The opinion of the European Commission has been published in the *European Human Rights Reports* for January 1981. As the Home Secretary has himself recognised, the concept of British Overseas Citizenship perpetuates the arrangements contained in the 1968 Act: see "The Nationality Bill and the European Commission of Human Rights", pub Catholic Commission for Racial Justice, Briefing Paper, April 1981.
- (36) Note, however, the discretion which would be granted to the Secretary of State under clause 4(4) and (5) to register applicants for British citizenship who had at anytime served in Crown service under the government of a dependent territory, or in paid or unpaid service not falling within the latter description as a member of any body established by law in a dependent territory members of which are appointed by or on behalf of the Crown. It is not clear how this discretion would be exercised. It is understood that the relevant sub-clauses appear in the Bill largely because of representations made by the Governor of Hong Kong.

- (37) Clause 1(1): see clause 14(1) for the similar problem in the dependent territories. It should be emphasised that citizens of the British Dependent Territories will not necessarily acquire the right of abode in a dependent territory. Whether they do so or not depends on the terms of the relevant immigration ordinance, which may be framed restrictively as in Gibraltar and Bermuda.
- (38) Clause 42(2) note also clause 49(3)-(5). The later sub clause provides that a person is not to be treated as ordinarily resident in the United Kingdom or in a dependent territory when he is in the United Kingdom or, as the case may be, in that territory in breach of the immigration laws.
- (39) Clause 49(9).
- (40) See *Zamir v. Secretary of State for the Home Department* (1980) 2 All E.R. 768. The question whether fraud or deception has been practiced is entirely one for the Home Office.
- (41) Note for example *Levinev. IRC* (1928) AC 217; *IRC v. Lysaght* (1928) AC 234; *Stransky v. Stransky* (1954) 2 All E.R. 536 and *Miesgaes v. IRC* (1957) IC 493.
- (42) See *R. v. London Borough of Barnet, ex p Shah* (1980) 3 All E.R. 679 and *Cicutti v. Suffolk CC* (1980) 3 All E.R. 689.
- (42A) The Commission has submitted a draft directive to the Council of Ministers aimed at granting all financially self-supporting Community nationals the right of entry and permanent residence in a state other than their own. The adoption of this draft would probably considerably enlarge the category of persons whose children would automatically acquire British citizenship through birth in the United Kingdom.
- (43) Clause 1(2). Compare clause 14(2), which applies the same rule to children found abandoned in a dependent territory. The term "new born infant" is undefined. In Austria a corresponding rule is applied to children found abandoned who appears to be less than six months old. Citizenship Act 1965, art. 8(ii).
- (44) Clause 1(3): compare clause 14(3) for the position in a dependent territory, which would be similar.
- (45) Clause 1(4), which was inserted as the result of a Government amendment proposed by Mr Raison. The criteria contained in clause 1(4) appear somewhat rigid, the period of ten years seems to be too long.
- (46) Clause 3(1).
- (47) See clause 35, and Schedule 2, para 3(1), which relates to persons born in the United Kingdom or in a dependent territory after commencement.
- (48) See clause 1(5): clause 14(5) contains a similar provision applicable to the British Dependent Territories.

- (49) Thus women would be able to transmit their nationality on the same terms as men, as in France, Germany and in many other countries. Unfortunately, an amendment providing that a child born outside the United Kingdom before commencement would be entitled on application to registration as a British citizen if he satisfied the Secretary of State that he would have become a British citizen at commencement if, in s.5(1) of the British Nationality Act 1948, "father" had been followed by "mother" was defeated.
- (50) Clause 2(1). See clause 15(1) for the position in the British Dependent Territories. Such citizens would be citizens by descent: clause 15(1)(a). The further transmission of citizenship by registration of birth at a consulate which is now permitted under paragraph (b) of the proviso to s.5(1) of the British Nationality Act would only be permitted for a transitional period of five years after commencement, provided that the requirements of clause 8 were fulfilled.
- (51) Clause 2(1)(b) and 2(2). See also clause 15(1)(b) and 15(2), which contain a similar provision applicable to the British Dependent Territories. Clause 2(3) provides that the Secretary of State may, by statutory instrument, designate any description of service which he considers to be closely associated with the activities outside the United Kingdom of Her Majesty's Government in the United Kingdom. The Secretary of State would be granted a similar power in connection with the activities outside the dependent territories of the government of any dependent territory.
- (52) These include the Law Society, the Confederation of British Industries, the London Chamber of Commerce and Industry, and the Council of British Chambers of Commerce in Continental Europe. The absurd anomalies to which the enactment of these provisions might lead was pointed out by several members of Standing Committee F.
- (53) In some countries, including it seems, most of the other EEC countries, a stateless child cannot acquire local nationality until he reaches the age of 18 or 21.
- (54) The Secretary of State would be permitted to treat the reference to a period of twelve months as if it were a reference to six years when he thought fit: clause 3(5).
- (55) The Secretary of State could treat the reference to a period of two years as though it were a reference to a shorter period where he thought fit.
- (56) See clause 3(2)(a)-(d).
- (56A) Clause 3(4).
- (56B) Clause 3(9).
- (56C) Clause 3(1): compare British Nationality Act 1948, s.7.

- (56D) For the position of minor children born outside the dependent territories, see clause 16(6). Note also clause 3(7), which contains special rules which are perhaps unduly restrictive, applicable to the situation where one of the parents is dead, or the marriage has been terminated on or before the date of application; compare clause 16(7). The latter texts could with advantage be amended in the House of Lords to cover the situation where the parents are separated but not divorced.
- (57) See clause 5(1) and Schedule 1, and compare clause 17(1), which contain similar provisions governing naturalisation as a citizen of the British Dependent Territories.
- (58) Schedule 1, paras 2(e) and 6(e).
- (59) See clause 43(2) which corresponds to s.26 of the British Nationality Act 1948.
- (60) Thus for example, Article 10(1) Nos. 2-8 of the Austrian Citizenship Law enumerates a number of apparently objective criteria of bad character, but many of these criteria seem capable of subjective interpretation.
- (61) New Community 1980, p. 67.
- (62) Clause 5(2) and Schedule 1, paras 3 and 4. Note the similar requirements of clause 17(2) and Schedule 1, paras 7 and 8 which would be applicable to the naturalisation of spouses of citizens of the British Dependent Territories.
- (63) See Minutes of Evidence of the Parliamentary Select Committee on Home Affairs, Sub-Committee on Race Relations, Session 1979-80, HC434, p. 34 et seq. (memorandum submitted by Mr Anthony Lester, Q.C.). The report of the Legal Affairs Committee of the European Parliament, published in December 1980(1-573/80), concluded that the rules governing the right of foreign husbands to enter and settle in the United Kingdom may violate the European Convention on Human Rights and the principle of non discrimination enshrined in Community Law.
- (64) Clause 1(1): see also clauses 21(1) and 23, which govern the resumption of citizenship of the British Dependent Territories.
- (65) Clause 12(2), 21(2) and 23.
- (66) Clause 12(3): clause 23 has a similar effect.
- (67) See clause 11, and note also clause 23, which governs the renunciation of citizenship of the British Dependent Territories.
- (68) Clause 39. They are also applicable to deprivation of citizenship, of the British Dependent Territories: clause 39(10).
- (69) See the case cited in *Corpus Juris Secundum*, pub. West Publishing Co., St Paul Minnesota 1973, Vol. 34, p. 234, note 64.

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# A CONSTITUTIONAL RIGHT TO DIVORCE IN THE U.S.A.

by R. N. Sexton, LLM\*

One of the most interesting developments in the Constitutional Law of the United States in recent decades is the way in which the Supreme Court has discovered "new" rights enshrined in the Constitution, such as the Right to Privacy<sup>(1)</sup> and the Right to Marry.<sup>(2)</sup> These rights are not expressly mentioned in the constitution, they have been inferred by the Supreme Court. They are frequently referred to as being derived from the "Penumbra" of the Constitution, particularly from the vague words of the Due Process clause of the Fifth and Fourteenth Amendments:-

"... nor shall any state deprive any person of life, liberty, or property, without due process of law".

One result of the discovery of these "new" constitutionally protected rights is that the U.S. Constitution now has a surprisingly large impact in the field of Family Law. A crude measure of this impact is the fact that the 1980 volume of the Harvard Law Review carries an article entitled "The Constitution and the Family" which runs to 238 (sic) pages.<sup>(3)</sup> 48 of those pages (pp. 1248-96) are concerned with the now (well-established) Right to Marry. Another five pages (pp. 1308-13) deal with an alleged constitutionally protected Right to Divorce.

The "Right to Marry" was first recognised by the Supreme Court in *Loving v Virginia*.<sup>(4)</sup> In that case the Supreme Court had to rule on constitutionality of "Ante-Miscegnation" statutes, i.e. laws banning marriages between blacks and whites. The Supreme Court unanimously struck down these laws. Two alternative reasons were given for the decision - (a) that such laws constituted a denial of Equal Protection contrary to the Fourteenth Amendment and (b) that they were an unconstitutional infringement of the Right to Marry.

Since *Loving v Virginia* the "Right to Marry" has become firmly established in the U.S. Constitutional Law. It would now appear that any law that substantially interferes with a person's freedom to marry will be invalid unless there is some compelling state interest justifying the law. (E.g. the need to protect people under 16).

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Applying this reasoning in *Zablocki v Redhail*(5) (1978), the Supreme Court ruled unconstitutional a Wisconsin Law which prohibited the issue of a marriage licence to any person who was in arrears with child support (maintenance) payable under a Court order. Similarly, in *Salisbury v Lust*(6) (1960) the U.S. District Court for Nevada ruled unconstitutional a state law prohibiting prisoners from marrying.

Decisions such as *Zablocki v Redhail*(7) do not go far enough however, in the view of some American commentators, including the authors of the Harvard Law Review article. They argue that the "Right to Marry" should not be seen in isolation, but should be viewed as part of a wider constitutional right, a right to enter into whatever personal relationships one chooses. Not discouraged by the fact that the Supreme Court has not yet recognised the existence of this wider right, the authors proceed to analyse the content of the right.(7a)

Some of their suggestions as to the content of this right are controversial. For example, they argue that not only should homosexuals be free from the harassment of the criminal law but they should actually be able to enter into legally recognized marriages.(8)

Relatively less controversial is the argument that the new constitutional right would compel state Courts and legislatures to grant enhanced status to cohabiting couples. All states would have to recognise the validity of contracts between cohabiting couples designed to regulate their cohabitation, whereas at the moment this is far from being so.(9) The article even suggests that this new freedom in one's personal life should entail that on the breakup of a cohabitation the state makes available to ex-cohabitees provisions for alimony (maintenance) and distribution of property currently confined to parties who have contracted a lawful marriage.(10)

The authors of the Harvard Law Review article also advocate a constitutionally protected right to divorce. They see this right as a further aspect of freedom of choice in personal relationships.

"Since the right to marry is ultimately grounded largely in respect for freedom of choice in intimate personal relationships, full effectuation of that policy requires access to divorce as well, for liberty to associate must imply a liberty to choose not to continue to associate".(11)

Even if there is no constitutionally recognised "freedom of choice in intimate personal relationships" a right to divorce can be viewed as a

logical corollary of a right to marry. This is accepted by the authors of the Harvard Law Review article:

“While there appears to be no basis in Anglo-American tradition for a similar fundamental right to divorce as such, it should be envisioned as a necessary complement to the right to marry. A liberal right to divorce may be a pre-requisite to full exercise of the right to marry; to the extent that divorce is unavailable, the right to remarry is burdened.”(12)

It is the purpose of this article to present arguments against this alleged constitutional Right to Divorce. Before doing so, it is necessary to consider the potential practical impact of such a Right to Divorce.

In the U.S.A., divorce law varies from state to state. Originally all states, in so far as they allowed divorce at all, allowed it only on proof of traditional ‘fault’ grounds such as Adultery, Cruelty and Desertion. The position has now radically changed. Almost all states now have a no-fault ground for divorce, though there are variations.(13)

In some states the ground is “Irretrievable Breakdown”; others use “Irreconcilable Differences” or “Incompatibility”. In yet others, divorce can be granted after a relatively short period of living apart.

There are however, a minority of states where divorce law remains relatively conservative. In two states, Illinois(14) (principal City Chicago) and South Dakota,(15) the grounds remain exclusively fault based. In two other states, New York(16) and Mississippi,(17) there is a “no-fault” ground, but it can only be invoked by agreement between the spouses. Thus in these four states, a party who has not committed a matrimonial wrong can block the dissolution of the marriage indefinitely.

This situation is unacceptable to the proponents of a constitutional Right to Divorce. In their view, the constitution requires all states to provide a no-fault ground of divorce, available to all spouses irrespective of “guilt” and “innocence” and irrespective of the wishes of their fellow spouses. Thus a constitutional Right to Divorce would compel the conservative minority of states to follow the views of liberal majority.(18)

What arguments can the conservative minority bring in defence of their position?

**1. Sosna v Iowa(19)**

Not only are there no decisions of the U.S. Supreme Court which directly support a right to divorce, but there is one quite recent (1975) decision which seems implicitly to reject such a right. In *Sosna v Iowa*, Mrs. Sosna challenged the validity of an Iowa Law which required her to reside in the state for one year before invoking that state's divorce law. (Most other states have a much shorter minimum residence requirement, usually between 90 days and six months).(19a)

The Mrs. Sosna's challenge to the Iowa Law was on two alternative grounds. (a) The minimum residence requirement deprived her of due process of law because it unreasonably debarred her from access to the Courts. (b) The residence requirement was an unreasonable burden on her constitutionally protected "right to travel" (The "right to travel" is another right which has been discovered in the "penumbras" of the constitution).

The Supreme Court rejected Mrs. Sosna's challenge. As the writers of the Harvard Law Review article are forced to concede, if there were a "Right to Divorce" protected by the constitution, then limiting it by one year residency requirement would surely be impermissible(20) *Sosna v Iowa* is thus authority against a Right to Divorce. Even the dissenting judgment of Marshall, J., (joined by Brennan J) lends no support to a "right to divorce". Rather it speaks of a right to seek a divorce.(21)

**2. Protecting the Rights of a Spouse who wishes to maintain a marriage.**

Proponents of a right to divorce concentrate on the rights of a spouse who wishes to be rid of a union which he/she finds no longer satisfactory. They seem blind to the fact that the other spouse may have rights too, in particular the right to insist that the obligations of the marriage contract are adhered to.

Even leaving aside religious and ethical objections, a spouse may have very good financial reasons for opposing divorce. In most of the states of the U.S.A., there are provisions (similar to our MCA 1973 SS 23-25) which give Courts wide powers to order the payment of maintenance, and to redistribute marital assets between spouses.(22) Divorce can thus be a financial disaster for a wealthy spouse. If a spouse substantially is innocent of

blame for the marriage breakup, why should such a disaster be imposed upon him by constitutional mandate?

Moreover, the alleged "right to divorce" stands in strange contrast to the protection which the U.S. Constitution gives to Commercial Contracts. Commercial Contractual ties are protected by Article 1 Section 10 which

provides (inter alia) that

"No state shall ... pass any ... law impairing the obligation of contracts".(23)

Proponents of a constitutional Right to Divorce are reading into the Constitution a provision which might best be phrased as "No state shall pass any law impairing the right to repudiate the obligations of marriage contracts".

### **3. The true meaning of a "Right to Marry"**

The "Right to Divorce" is seen as a logical corollary to the "Right to Marry" by the authors of the Harvard Law Review article. Whether this view is correct depends, it is submitted, on how the concept "Right to Marry" is interpreted.

Is the right to marry proclaimed by the Supreme Court a right which can only be exercised once (like the right of testation) in which case the writers are clearly wrong, or is it a right which can be exercised more than once if special circumstances exist, or is it a right which can be exercised any number of times?

Put another way, is a "right to marry" a right to enter into a union which will be permanent and enduring, or is it a right to be legally attached to the particular individual (of the opposite sex) for whom one currently has the closest affection, subject to the proviso that the legal relationship only lasts as long as that individual shows reciprocal affection?

The Supreme Court cases on "right to marry" do not clearly define the concept. The questions just asked are not expressly answered. Yet we are able to examine the various phrases which the Supreme Court has used to describe (rather than define)

marriage. In **Loving v Virginia** the Court (per Warren, C.J.) declared in the final paragraph of its (unanimous) judgment,

“Marriage is one of the basic civil rights of man, fundamental to our very existence and survival”.(24)

This is repeated in **Zablocki v Redhail**.(25)

In **Boddie v Connecticut**(26) Harlan, J., giving the opinion of the Court, described marriage as “a fundamental human relationship” He also spoke of “the basic position of the marriage relationship in this society’s hierarchy of values”.

It is submitted that these descriptions are consistent only with a view of marriage as something which is (at least prima facie) permanent and enduring. The authors of the Harvard Law Review article clearly see easily dissoluble marriage as a necessary part of the ideal American society of the future. They are entitled to their opinion. But when Warren, C.J., spoke of marriage as “fundamental to our very existence and survival” and Harlan, J., spoke of “the basic position of the marriage relationship in this society’s hierarchy of values”, they were surely thinking of American Society as they knew it, a society which viewed marriage as in principle a permanent status.

#### **4. Freedom of Choice and the Right to a Divorce**

As already noted the authors of the Harvard Law Review article see the right to divorce as one aspect of wider freedom to enter into whatever forms of personal relationships one chooses without any interference from the state. It is submitted that consideration of this “freedom of choice in personal relationships” may well lead to the conclusion that divorce laws should be **strict**, not liberal.

The Harvard Law Review article urges (in effect) that Courts should be required to recognise cohabitation as a status akin to marriage. Cohabitation contracts should be enforced, and on the breakup of a cohabitation, the Courts should have the powers to redistribute property, award maintenance etc. which we are currently confined to formal divorces of legally married couples.(27)

At the same time the article argues that marriages should be freely determinable at the will of either party. There thus ceases to be

any real difference between marriage and cohabitation. Where then is the freedom of choice? The writers of the Harvard Law Review article (who clearly see themselves as expressing a "liberal" viewpoint) appear to be saying to couples contemplating marriage etc. "You have freedom of choice in your personal relationships - provided you choose our version".

### **CONCLUSION - Application to England and Wales**

The discussion in this article is not, of course, irrelevant to English law. Present English divorce law (fairly conservative by U.S. standards) is under increasing attack from many different stand-points. Holders of liberal views (views akin to those appearing in the Harvard Law Review article) complain at "the guide line" system which ensures that a spouse who cannot prove "fault" and cannot get the consent of the other spouse has to wait for 5 years to obtain "freedom".

At the opposite extreme there is the viewpoint that our present law is grossly unjust on an innocent spouse who is divorced against his will, particularly where he then has to give up his home and a substantial slice of his income to meet orders under sections 23-25 of the M.C.A. 1973.(28)

It is submitted that the answer to present controversies in England is not a further tinkering with the grounds for divorce. Rather, what is required is a radical rethink of the whole of the law of personal relationships. Currently, two persons contemplating entering into a close personal relationship have a straight choice between (a) marriage and (b) cohabitation.

It is submitted that a reformed English Law should offer at least the following choices:

- (1) Cohabitation without contract.
- (2) Cohabitation with contract.
- (3) Marriage dissoluble if the spouses have lived apart for a short period.
- (4) Marriage dissoluble on fault grounds alone.
- (5) Indissoluble marriage.

Such a law would secure the "freedom of choice in personal relationships" advocated by the Harvard Law Review authors (whereas their own suggestions do not). England, normally behind the U.S.A. in social and legal trends, might actually provide a lead for the U.S.A. to follow.

- (1) Derived from *Griswold v Connecticut* (1965), 381 U.S. 479; 85 S.Ct 1678. 14 Law Ed. 2d. 510, much expanded by subsequent cases.
- (2) Derived from *Loving v Virginia* (see below).
- (3) 93 Harvard L. R. 1156-1383. The "article" is classified by the editors of the Harvard Law Review as a "Note" in the series of "Notes" on "Developments in the law". The authorship is not given.
- (4) (1967) 388U.S. 1; 87 S.Ct. 1817; 18 Law Ed 2d 1010.
- (5) (1978) 434U.S. 374; 98 S.Ct. 673; 54 Law Ed 2d 618.
- (6) (1980) Vol. 7. Family Law Reporter 2082.
- (7) (1978) 434U.S. 374; 98 S.Ct. 673; 54 Law Ed 2d 618.
- (7a) See also an article entitled "The Freedom of Intimate Association" 89 Yale L.J. 624 (1980) by Professor Kenneth Karst.
- (8) pp 1283-9.
- (9) pp 1289-95.
- (10) pp 1295-6.
- (11) p. 1311 Karst in his article also sees a right to divorce as an element of "The Freedom of Intimate Association" 89 Yale L.J. 671.
- (12) p. 1311 (immediately preceding the passage at Note 11).
- (13) See Foster and Freed "Divorce in the Fifty States: An Overview as of 1978". 13 Fam. L.Q. 105. Since publication of that article Pennsylvania has passed a no-fault divorce law. (Pennsylvania Divorce Code, particularly Sect. 201).
- (14) Illinois Statutes (Sect. 40-401).
- (15) South Dakota Statutes (Sect. 25 - 4 - 2).
- (16) New York Statutes Sect. 10 - 170.
- (17) Mississippi Statutes Sect. 93 - 5 - 1.
- (18) See also article by Berg, 16 Journal of Family Law 265.
- (19) (1975) 419 U.S. 393; 95 S.Ct. 553; 42L Ed. 2d. 532.
- (19a) See Foster and Freed, Table VI p. 120.
- (20) pp. 1309 - 10.

- (21) See particularly Part 1 of the dissent 419 U.S. at pp. 420-1; 42 Law Ed. 2d at 552-3.
- (22) See Foster and Freed Table IV pp. 116-8.
- (23) The decisions in Allied Structural Steel Co. v Spanmaus (1978) 438 U.S. 234; 98 S.Ct 2716; 57 Law Ed. 2d 727 and U.S. Trust Company of New York v New Jersey (1977) 431 U.S. 1; 52 Law Ed. 2d 92; 975 S.Ct. 1505, demonstrate that this "Contracts Clause" is not a dead letter.
- (24) 388 U.S. at p. 11; 18 Law Ed. 2d. at 1018.
- (25) 434 U.S. at p. 383; 54 Law Ed. 2d. at 629.
- (26) (1971) 401 U.S. 371; 91 S.Ct. 780; 28 Law Ed. 2d. 113.
- (27) See pp. 1289 - 96.
- (28) This is the viewpoint of "Campaign for Justice in Divorce".

# STATE INTERVENTION AND SOCIAL JUSTICE

by Paul Spicker, MA MSc(Econ)\*

As an individual, and professionally as a lecturer training students for work in the social services, I believe passionately in the importance and value of state intervention in the life of the individual citizen. I accept the intellectual coherence of the objections which have been made to this proposition - for some time, I subscribed to those objections myself - and I believe that there is a burden on me to justify my position. This article is a preliminary attempt to do so.

## THE STATE AND THE LIBERTY OF THE INDIVIDUAL

The libertarian argument against the state has been presented in various forms in recent years. A fundamental challenge to the legitimacy of state intervention has been made by Robert Nozick, in *Anarchy, State and Utopia*.(1) Nozick believes that the freedom of the individual is of paramount importance; the individual has the property of his self, to do with as he pleases. Ryan represents this, I think correctly, as dependent on a concept of natural rights(2); Nozick assumes that the individual's control over himself is prima facie legitimate. The state, the argument runs, is necessary to protect the freedom of the individual from the depredations of others. It has, therefore, basic functions of maintaining order, providing defence, and perhaps to some degree acting as an arbiter in disputes between individuals. This is the limit to which the state may act: if it extends its influence further, the freedom of the individual is infringed. There is no justification, consequently, for greater intervention than the actions of a 'nightwatchman' state:

"The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights."(3)

This argument is internally consistent, and it cannot be falsified directly. My disagreement with it is based both in personal values, and in a different conception of the issues and principles involved. Freedom is not to be thought of only in negative terms. There is nothing improper about the use of a negative concept of freedom, but its value is diluted if it has no positive aspects. A person is not really 'free' if he has no power to act; it is futile to talk of the freedom of a homeless man to

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live in a luxury hotel if he does not have the means to do so. 'Freedom' is a meaningful concept only if people are free to **choose**, and freedom of choice is not the same thing as an absence of restriction of choice. I was raised in a fairly sheltered middle-class environment. When I first came into contact with poor people, I was horrified to discover that they were not 'free' as I understood the word. Their choices were restricted, because they had fewer resources: they were driven to deal with immediate concerns - to find any housing they could afford, to feed their children without being able to defend their long-term interests; and the constant pressure of short-term hardship denied them the opportunities or time, which until then I had taken for granted, to reflect on their condition or to make considered decisions. Choice, in a society which operates by an economic market, depends on a man's ability to pay. A person who is more able than another to pay has more choice, and is therefore more free. There is nothing in the nature of freedom which guarantees an equality of its distribution.

We commonly accept that it is proper to limit the freedom of some people when it infringes the freedom of others: liberty is not equivalent to licence. The liberty of one person is purchased at the expense of the freedom of others. I believe, consistently with this, that it is also proper to restrict the choice of some people in order to increase the freedom of others who have less. This is not to say that Nozick's argument is untenable, but the restrictive conclusions he draws depend crucially on his initial assumptions. Because he begins with a limited concept of freedom, and attaches such importance to that concept, he is forced to accept the distribution of resources which results from this concept -

From each as they choose, to each as they are chosen(4)

- as legitimate in itself. There is, in his view of society, no reason why this distribution should be changed, because he has admitted no other criterion by which its legitimacy is to be judged. However, if a positive concept of freedom is accepted, it becomes clear that this is not adequate to guarantee individual freedom: on the contrary, it establishes a distribution that is necessarily unequal, and which leads in consequence to an inequality of freedom. If we do not, at this stage, distinguish between men's claims to freedom - and Nozick does not - this inequality is justifiable only if its effect is to increase the choice of the poorest members of society. This leads us to Rawls' celebrated 'difference principle': that inequalities are acceptable only if they create advantages for all.(5) (This principle should be qualified by the reservation, made by Tawney,(6) that economic inequality may act in itself to limit individual liberty.)

## THE MORAL BASIS OF STATE INTERVENTION

In *A Theory of Justice*, Rawls attempts to establish the foundations of a legitimate society.(7) He does this by means of social contract theory. This approach tends to cause confusion among people who are unfamiliar with the technique, but it is not in itself a complicated idea. We cannot, by logical deduction, arrive at a view of how society ought to be from looking at the way it is. The object of Rawls' social contract is to provide a moral prescription for society, a method by which the distribution of resources can be judged. The metaphor of the contract implies that something which is desired or desirable is also likely to be accepted as morally good or legitimate. The proposition, when stated in this form, is evidently questionable, but to some extent it reflects the true basis of many social norms. Edmund Burke argued that morality was founded in a process of 'prescription': over the course of time, practices which are thought to be desirable become enshrined as moral principles.(8) If we are not to assume what is 'right', as Nozick does, we are driven to justify social structures in terms either of expediency (as the Utilitarians did) or of their desirability. I prefer, in order to emphasise the extent to which my own values must intrude on the discussion, to consider the desirability of state intervention as a justification for it.

The concept of intervention implies, not only that the state acts directly to affect the lives of its citizens, but also that, because the state has few resources of its own, it is prepared to redistribute resources between people. Any justification of intervention requires a justification of redistribution; I have attempted to consider them together. Intervention, taken beyond the functions of individual protection described by Nozick, is desirable on three main grounds. The first is that it may increase the sum of welfare of the citizens, by minimising their hardships(9) and increasing their freedom. Social welfare may be increased by economic management to improve the resources of a whole nation. Certain social services (like universal education, or the health service) assist and to some extent service the economic system. Titmuss argued that redistribution can stimulate both demand and production, leading to increased, stable growth; and that it can be used for an investment in human capital that works to the benefit of a whole society.(10) These arguments are disputed by a number of writers (notably Milton Friedman(11)) who believe that economic affairs are better left to the 'free market'. The substance of this belief is that the free market allows individuals both to be responsible for their own actions and to exercise choice in economic matters, and that it responds to individual desires in a way that a planned economy cannot. This is

a powerful argument: the main reservations I must make to it are, firstly, that it permits a wide degree of inequality of choice which implies severe limitations on freedom, and secondly that certain public goods (like parks, roads or sewers) are difficult to provide for and unlikely to emerge within the context of a private competitive market.(12)

Secondly, there are moral imperatives, both humanitarian and religious, which lead the state not only to protect individuals from others (for example, to protect a child from parents who neglect or abuse it) but also to take positive action to avoid or at least mitigate the consequences of want, idleness, ignorance, squalor and disease - the 'five giants' of the Beveridge scheme.(12a) I appreciate that there is some circularity in this proposition: I believe that these measures are desirable because I believe they are morally right. They are also widely accepted, however, and few people now would be prepared to defend starvation or misery (as Herbert Spencer once did(13)). Opposition to state intervention comes rather from those who believe that these problems can be solved more effectively without the intervention of the state but, even if their analysis is accepted, it seems clear that some measures will be required to mitigate the effects of ill-fortune or the failure of the market to provide for essential needs.

I think these points are sufficient to justify a degree of intervention and to that extent I feel I have met the objectives which initially I set myself. There is, however, a further justification of intervention - the pursuit of social justice - which goes beyond a limited defence. The idea of social justice implies that state intervention is accepted as an institutional norm rather than an external adjustment to the workings of society. Some libertarians have taken great exception to this idea. They argue that, because certain inequalities are inherent, the question of whether they are just or unjust simply does not arise. The comparison has been made (notoriously by L. P. Hartley, in *Facial Justice*(14)) of the redistribution of resources with the application of cosmetic surgery to beautiful people to make them uglier; one, the parallel suggests, is no more legitimate than the other. Nozick follows this line when he asks Rawls:

"Why should knowledge of natural endowments be excluded from the original position?"(15)

The reasons are quite simple. Firstly, natural endowments have nothing to do with legitimacy; we cannot argue from facts to values, and Rawls is concerned only with the foundations of a moral society. Secondly, the justification for redistribution rests in the belief that it will increase

the freedom and welfare of the poorest members of society; it is difficult to see how it would benefit those who are naturally least well endowed to curb the talents of those who are best endowed; whereas it requires little explanation to justify the redistribution of income and wealth in these terms. Thirdly, the production of resources, and their distribution, are for the most part determined by the structure of the society in which we live. There is nothing 'natural' about an ability to create wealth by producing cars, and it is nonsensical to compare it with the individual's physical features. If society defines an initial distribution of resources, it is open to that society, through its representatives, to redefine it. Tawney argued that there was no reason why we should assume that the distribution of resources is legitimate, or (more important) accept it as it stands.(16) However, Tawney's arguments for redistribution are based in his rejection of inequality rather than a justification of egalitarian principles. In order to establish a case for greater equality as a desirable end in itself, it is necessary to define the basis of 'social justice'.

## SOCIAL JUSTICE

The definitive descriptions of 'justice' is Aristotle's(17): Aristotle distinguishes two forms of justice: 'corrective', or justice in relation to punishment, and 'distributive'. These principles have in common the idea of proportion:

"The just is the proportionate"(18).

The guiding principle of corrective justice is that the punishment should be proportionate to the crime. The principle of distributive justice demands equity - distribution that is proportionate to defined criteria. Justice is not, by this definition, a substantive rule governing distribution or correction, but a principle by which they can be judged.

David Miller, in his book on Social Justice - in my opinion the best analysis of the subject to appear in recent years - isolates three criteria by which justice may be determined: rights, desert, and need.(19) (By 'rights', Miller means primarily the formal legal rights which establish a person's status; he distinguishes them clearly from moral rights, which are nothing more than moral claims.) He uses the thought of certain writers to give distinctive examples of each criterion of justice. The work of David Hume illustrates the idea of justice based in status: justice implies a set of rights arrived at by a long establishment of their practice. Herbert Spencer is used to show a concept of justice based in desert. Spencer believed that perfect competition in a

market economy would recompense merit in a manner proportionate to the good that was done, and was therefore socially just. Thirdly, Kropotkin argues that justice should be based entirely on need, and draws on examples of primitive societies as evidence that social organisation on this basis is possible. Miller then proceeds to define 'justice' on these criteria. An 'hierarchical' (or feudal) society founds its concept of justice in established status; a 'market' society, in desert; and a 'primitive' society (rather than a communist one) in need. In our present society, which Miller calls 'organised capitalism', a blend of opinions is to be found. Rights, even though unequal, are still protected. Deserts are still considered worthy of reward (although Miller points to the emergence of the idea of desert as a collective concept, so that deserving groups are as likely to claim justice as deserving individuals). Needs have been recognised, to a large extent, in the idea that a state has a duty to serve its citizens.

Miller concludes that ideas of justice have varied according to the historical circumstances of the people who have written about them. The ideas have an ideological function, because they serve to make certain practices of a society acceptable to its members. But there is not one clear idea of what justice is: the concept has, as he says, a 'contested character'. Although I agree with these observations, I think it would be wrong to conclude that the concept of 'justice' is different at different times. Justice, like morality, is influenced by social norms, but it is consistent with Miller's arguments to regard status, deserts or needs as criteria which are relevant to a principle of distributive justice rather than discrete forms of justice in themselves.

It is clear, from Miller's analysis, that the idea of 'justice' is bound up with morality; but the terms are not synonymous. It is possible to identify circumstances in which the ideas are used distinctly: for example, we may accept the justice of punishing an attempt less than we would punish a completed offence, but there is no moral distinction between the two; because moral judgments rest on intention rather than performance. J. S. Mill wrote of justice as an aspect of morality, and claimed that justice was qualified by 'expediency' (by which he meant a consideration of a consequences of a decision).<sup>(20)</sup> This opinion is clearly wrong: expediency may set the bounds of morality (as Mill believes it does), and morality may qualify justice, by establishing the criteria on which it is to be decided, but we should not suppose that the principle of justice is therefore to be determined by the desirability of its consequences. Rawls makes a similar error when he seeks to establish a concept of justice by creating the conditions under which a

society can be accepted as legitimate. Legitimacy is not equivalent to justice; Rawls defines a society which is liberal and acceptable to many people, but which draws on considerations beyond a principle of justice. There is, nevertheless, at the root of Rawls' work an underlying assumption of proportionate distribution. Nozick takes Rawls to task for his assumption that justice implies equality.(21) This objection is understandable: **A Theory of Justice** does not deal with the point. The answer to Nozick's question is that **a principle of proportionate distribution implies equal treatment in those cases where the people who are dealt with cannot otherwise be distinguished by relevant criteria.** This principle is fundamental to the argument for equality, because it requires inequalities to be justifiable. At the same time, the principle is not necessarily 'egalitarian'; a concept of social justice based in need may imply substantial equality, but one based in desert could be expected to lead to an unequal distribution.

Even if it were possible to agree on a basis criterion of social justice, there would not be a consensus on the merits of redistribution. Many people doubt its desirability, because of what they see as its consequences for social organisation. This does not make redistribution less 'just', but illustrates that other factors besides justice are believed to be relevant. It has been objected, for example by Hayek(22), that the basic mechanism of redistribution -the operations of the state -act in themselves to limit the freedom of the individual, and consequently undermine the values which those who believe in state intervention claim to hold.(23) It would be foolish not to recognise the dangers inherent in the construction of a corporate state, but the answer to these dangers lies in democratic accountability and a guarantee of individual and collective rights. It would be equally unwise to overlook the threat to individual liberty posed by an irresponsible society.

I should like to thank Richard Marquiss for his comments on a draft of this paper.

- (1) R. Nozick, **Anarchy, State and Utopia**, Basil Blackwell, 1974.
- (2) A. Ryan, 'The new libertarians: a challenge to left and right', **New Society**, 11.6.81, 56(969), 427-430.
- (3) Nozick, op.cit., p.149.
- (4) Ibid, p.160.
- (5) J. Rawls, **A Theory of Justice**, Oxford University Press, 1972, esp.ch.2.

- (6) R.H. Tawney, *Equality*, Allen and Unwin, 1964 (4th edition).
- (7) Rawls, *op.cit.*
- (8) See G.H. Sabine, T.L. Thorson, *A history of political theory*, Dryden Press, 1973 (4th edition), pp. 557-568.
- (9) In the terms of economists, the marginal utility of increased income to a poor man is generally greater than the loss felt by a rich one: the sum of welfare is thereby increased.
- (10) See D. Reisman, *Richard Titmuss: Welfare and Society*, Heinemann Educational Books, 1977.
- (11) M. Friedman, *Capitalism and Freedom*, Chicago University Press, 1962.
- (12) Interested readers are referred to J. LeGrand, R. Robinson, *The Economics of Social Problems*, Macmillan 1976, which reviews the arguments on both sides and can be read without prior economic knowledge.
- (12a) Cmd. 6404 Social Insurance and Allied Services (1942) H.M.S.O. Para 8.
- (13) 'The poverty of the incapable, the distresses that came upon the imprudent, the starvation of the idle, and those shouldering aside of the weak by the strong, which leaves so many 'in shallows and in miseries', are the decrees of a large, far-seeing benevolence.' H. Spencer, p.145 of M.B. Clinard (ed.), *Sociology of Deviant Behaviour*, Holt, Rinehart and Winston, 1968 (3rd edition).
- (14) L.P. Hartley, *Facial Justice*, Hamish Hamilton, 1960.
- (15) Nozick, *op.cit.*, p.226.
- (16) Tawney, *op.cit.*
- (17) J.K. Thomson (trans. and ed.), *The Ethics of Aristotle*, Penguin, 1953.
- (18) *Ibid*, p.147.
- (19) D. Miller, *Social Justice*, Oxford University Press, 1976.
- (20) J.S. Mill, *Utilitarianism*, (ed. M. Warnock), Collins/Fontana, 1962, ch.5.
- (21) Nozick, *op.cit.*, p.223.
- (22) F. Hayek, *The Road to Serfdom*, Routledge and Kegan Paul, 1944.
- (23) The extent to which a fear of the corporate state permeates political argument is indicated by Philip Holland's article, elsewhere in this issue.

# THE EXTENT OF WARDSHIP

by Ms. J. Corrin

Wardship originates in the feudal system of land tenure and the prerogative power of the Crown over children as *parens patriae*. In the seventeenth century the jurisdiction came to be exercised by the Lord Chancellor. It later passed to the Court of Chancery, then to the Chancery Division and eventually, to the Family Division of the High Court. In 1949 wardship procedure became governed by statute. s.9, the Law Reform (Miscellaneous provisions) Act 1949 put an end to the rule "once a ward, always a ward" by empowering the Court to de-ward a child. More importantly, after the passing of the Act it was no longer necessary to settle a sum of money on a child to invoke the Court's inherent jurisdiction and the feudal connections were thereby severed.

One of the most interesting characteristics of wardship is the width of its jurisdiction, which has not been restricted by the 1949 Act. It has often been stated to be unlimited so far as protecting a ward is concerned. For example, in *Re X (A Minor)* Lord Denning M.R. said, "No limit has ever been set to the jurisdiction...The Court has power to protect the ward from any interference with his or her welfare."(1)

This lack of limitations has enabled the jurisdiction to encompass many novel situations which have arisen over the years. For example, in *Iredell v Iredell*(2) where a Roman Catholic priest insisted on seeing a sixteen year old girl, contrary to her father's wishes, in order to instruct her in the Catholic faith, the judge granted an injunction against the priest. The jurisdiction has also been used to authorise blood tests to determine paternity, before this matter was covered by statute.(3)

Another good illustration of the Court extending its jurisdiction to deal with new situations is the case of *Re D (A Minor)*.(4) There D, a girl of eleven, suffered from Sotos Syndrome, which made her clumsy, emotionally unstable, aggressive, and impaired her mental function. Her mother, fearing that D might have a child who was also abnormal, wanted D to be sterilised. The consultant paediatrician caring for

D recommended such an operation, and the consultant gynaecologist agreed to perform it. An educational psychologist concerned with D's welfare made D a ward of court in order to challenge this decision, and the question arose of whether wardship was appropriate. Counsel for the mother argued that it was not, because the case raised a matter of wide public importance, and the matter affected many people. However, Heilbron J. adopted the Official Solicitor's view that wardship was a wide jurisdiction which should be extended to this new situation, because it was "just the type of problem which this court is best suited to determine when exercising its protective functions in regard to minors".(5)

The Court has felt justified in stretching its jurisdiction to cover cases where this has been in the interests of the child, even to the extent of ignoring the normal rules of natural justice. In *Re K (Infants)*,(6) for example it was held that the special nature of the jurisdiction allowed the judge to take into account the contents of a confidential report (in this case by the Official Solicitor) without disclosing its contents to the parties. It was considered that revelation would have been adverse to the child's welfare, and that the normal rules of evidence should not, therefore, be applied.

It has also been held that a solicitor is obliged to reveal a ward's whereabouts or any information relating to this, even though this has been communicated to him in the course of his professional employment, as the claim of privilege does not apply. In *Ramsbotham v Senior*(7) where the mother of the wards concerned had absconded with them, her solicitor was ordered to produce the envelopes of letters which she had sent to him as her solicitor, in order that her residence could be discovered from the postmarks.(8)

Despite this theoretical lack of limits, in practice restrictions do exist. It seems, however, that these restrictions do not apply to the jurisdiction itself, but only its exercise. This argument was aptly expressed by Sir John Pennycuik in *Re X (A Minor)*:

"It may well be, and I have no doubt it is so, that the courts, when exercising the parental power of the crown, have, at any rate in legal theory, an unrestricted jurisdiction to do whatever is considered necessary for the welfare of a ward. It is, however, obvious that far reaching limitations in principle on the exercise of this jurisdiction must exist. The

jurisdiction is habitually exercised within those limitations. It would be quite impossible to protect a ward against everything which might do her harm.”(9)

Wardship cannot be exercised with complete disregard of third party rights. In *Re X* it was sought to make a girl a ward, and prevent publication of certain parts of a book, describing the sexual activities of her father. Roskill L.J. stated that the court had to do a difficult balancing act with the interests of freedom of publication and the interests of the child. In this case he thought the latter was overridden.(10) Similarly in *Re C (An Infant)*(11) an order preventing the the B.B.C. from showing a television programme about a ward was refused, as the demands of the ward’s welfare were not strong enough to override the right of bona fide comment.

It has also been contended that wardship has been cut down by statute. Controversy over this point has led to a vast amount of case law and comment thereon, a full discussion of which is outside the scope of this article. Briefly, in dealing with several statutes the courts have held that they will not normally exercise jurisdiction over minors in relation to duties or discretions vested by parliament in other bodies.(12) This is a self-imposed limitation on the exercise of the jurisdiction only, and the court may still intervene if it considers that there are special circumstances to warrant this.(13)

In one fairly recent case it was stated that there is no jurisdiction to make a bare declaration of paternity in wardship proceedings.(14) At first sight this may appear to impose a limitation, but on further reading it is clear that the lack of jurisdiction only applies to an isolated, or ‘bare’ declaration of paternity. If such a declaration were necessary in order to resolve some other issue jurisdiction would be asserted, if it were in the child’s interest that the matter should be investigated.

It has been suggested by Ann R. Everton that wardship is confined by ‘domestic boundaries’.(15) She states that over the centuries the cases where jurisdiction has been exercised show a distinct pattern with clearly defined boundaries and on each occasion when the court is asked to intervene they are concerned exclusively with people who have an intimate connection with the child and there is no question of an order issuing against anyone not in a personal or family relationship to him. This argument relies on the fact that wardship has allegedly never been exercised outside the ‘domestic’ sphere to support the contention that it does not exist outside those bound-

aries. The mere fact that the courts have never exercised their jurisdiction over a wider area is no reason why they should not do so in a suitable case: "There is never a precedent for anything until it has been done".

Ms. Everton believes her theory to be backed up by the history of wardship as she contends that feudal wardship was concerned with such things as "care, control, custody, maintenance, education, property and marriage".(16) Infact, it is submitted that a feudal lord's first concern would have been the potential monetary value of the wardship, and the jurisdiction could be better described as 'commercial' than 'domestic'.

It appears that wardship is still an extremely wide, if not limitless jurisdiction. Certain restrictions have arisen, but these relate to its exercise, not its existence. A limitless jurisdiction is useful and necessary to deal with the countless variety of circumstances which may effect a child's welfare. Nevertheless, clear guidelines governing its exercise should be developed to prevent the uncertainty which has led to confusion and consequently a vast amount of case law.

- (1) (1975) Fam. 47, at p. 57.
- (2) (1885) 1 T.L.R. 260.
- (3) **Re L (An Infant)** (1968) p. 115, prior to the Family Law Reform Act 1969.
- (4) (1976) Fam. 185.
- (5) *Id.*, at p. 193.
- (6) (1965) A.C. 201.
- (7) (1869) L.R. 8 Eq. 575.
- (8) See also **Heath v Crealock** (1873) L.R. 15 EC. 257.
- (9) *Op. cit.*, at p.61.
- (10) *Ibid.*
- (11) The Times June 17 1969.
- (12) See e.g. **Re M (An Infant)** (1961) Ch. 328; **Re H (A Minor)** (1978) Fam 65.
- (13) *Ibid.*
- (14) **Re J.S. (A Minor)** (1980) 3 W.L.R. p. 984.
- (15) "High Tide in Wardship" 125 N.L.J. 930 at pp. 930-931.
- (16) *Id.*, at p. 931.



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# **MEMORANDUM ON LORD WADE'S BILL OF RIGHTS BILL**

**by M. A. Fazal**

## **Background**

In December 1976 Lord Wade introduced in the House of Lords his Bill of Rights Bill which by clause 1 provided "The Convention for the Protection of Human Rights and Fundamental Freedoms signed by Governments being members of the Council of Europe at Rome on 4 November 1950, together with the five Protocols thereto, shall without any reservation immediately upon the passing of this Act have the force of law, and shall be enforceable by action in the Courts of the United Kingdom". In February 1977 during the second reading of the Bill the House decided to appoint a Select Committee to report on the question whether a Bill of Rights is desirable and if so, what form it should take. The Committee which were appointed in May 1977 reported in May 1978. They decided by a majority that there should be a Bill of Rights. The Committee were unanimously of the opinion that such a Bill should be based on the European Convention of Human Rights but that there should be some changes in the Bill as introduced by Lord Wade (in particular in Clause 3 providing against an implied repeal). Lord Wade's Bill amended largely on the basis of the Select Committee's recommendations completed its passage through the House of Lords in December 1979. The Lord Chancellor stated during the Bill's final passage in the Lords that it was likely to be introduced in the Commons during the Session 1980-81. In fact during 1980-81 session the Bill was passed again by the House of Lords. At the time of writing the Bill is awaiting consideration by the House of Commons.

In November 1977, the Standing Advisory Commission on Human Rights published its Study Report "The Protection of Human Rights by Law in Northern Ireland" which recommended that a legally enforceable Bill of Rights, based upon the European Convention be implemented in the United Kingdom. The Commission also recommended that in the event of devolved legislative and executive functions being returned to the Northern Ireland Government it would be desirable for the enabling legislation to include a clear and enforceable charter of rights for

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Northern Ireland, framed in the light of whatever at the time seem to be the special needs of the people of Northern Ireland. Complementary to the debate within the United Kingdom, is the recommendation by the Commission of the European Communities that the European Communities should accede to the European Convention on Human Rights.

All these warrant a close examination of the important aspects of the Bill now pending before the House of Commons. This is what is attempted in this work.

LORD WADE'S BILL OF RIGHTS BILL  
(AS AMENDED ON REPORT)

"An Act to render the provisions of the European Convention for the Protection of Human Rights enforceable in the courts of the United Kingdom."

"Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:-"

"1. The Convention for the Protection of Human Rights and Fundamental Freedoms signed by Governments being Members of the Council of Europe at Rome on 4th November 1950, together with such Protocols thereto as shall have been ratified by the Government of the United Kingdom shall subject to any reservations thereto by the Government of the United Kingdom immediately upon the passing of this Act have the force of law, and shall be enforceable by action in the Courts of the United Kingdom."

"2. In case of conflict between any laws or enactments prior to the passing of this Act and the provisions of the said Convention and such Protocols as shall have been ratified by the Government of the United Kingdom and subject to any reservations thereto, the said Convention and Protocols shall prevail."

"3. In case of conflict between any enactment subsequent to the passing of this Act and the provisions of the said Convention and Protocols as shall have been ratified by the Government of the United Kingdom and subject to any reservations thereto such enactment passed after the passing of this Act shall be deemed to be subject to the provisions of the said Convention and Protocols and shall be so construed unless such subsequent enactment provides otherwise or does not admit of any construction compatible with the provisions of this Act."

“4. (1) Notwithstanding anything contained in section 1 of this Act and subject to subsections (2) and (3) of this section, in time of war or other public emergency threatening the life of the nation Her Majesty by Order in Council may take measures derogating from the obligations of the Government of the United Kingdom under the said Convention and Protocols (“derogating measures”).”

“(2) No derogation from Articles 2 (except in respect of deaths resulting from lawful acts of war), 3, 4 (paragraph 1) and 7 of the said Convention shall be made under the provisions of this section.”

“(3) No derogating measures shall have any effect on the obligations of the Government of the United Kingdom under international law.”

“(4) For the purposes of this Act, a declaration by Her Majesty by Order in Council that there exists for the purpose of any derogating measures a time of war or other emergency threatening the life of the nation shall be conclusive.”

“5. For the purpose of this Act-

“Convention” means Articles 1 to 18 inclusive and Article 60 of the said Convention;

“Protocols” means Articles 1 to 3 inclusive of the (First) Protocol to the said Convention;

“reservations” means the Reservation made to the (First) Protocol (Article 2) by the United Kingdom under Article 64 of the said Convention.”

“6. (1) This Act may be cited as the Bill of Rights Act 1979.

(2) This Act extends to Northern Ireland.”

Whom will the Bill of Rights protect - citizens, aliens, Commonwealth Citizens, British Subjects without Citizenship, British Protected Persons, Irish citizens? The Bill of Rights Bill does not explicitly provide an answer to this question. In view of experiences with a Bill of Rights in other countries and record of English courts on the matter the issue needs to be spelt out.

## USA

The American Bill of Rights protect aliens within the country as opposed to aliens who have not yet made an official entry into the country. Thus as a general rule all aliens residing in the United

States for a shorter or longer time, so long as they are permitted by the government to remain in the country, are entitled to the safeguards of the constitution.(1) Therefore the due process clause, equal protection clause etc of the American Bill of Rights can be invoked by the aliens residing within the country.(2) While an alien is not entitled to the "privileges and immunities" of a citizen strictly as such under the Fourteenth Amendment yet he is a "person" to whom the States cannot deny "the equal protection of the laws".(3)

Discrimination against an alien may be upheld where there is some compelling public interest, eg subjecting aliens to curfew rules or excluding them from certain areas during war.(4)

The courts have interpreted the words "persons" in the Fifth(5) and Fourteenth(6) Amendment and "people"(7) in other provisions of the Bill of Rights so as to embrace aliens as well as citizens.

### **Canada**

By contrast the protection of the Canadian Bill of Rights is not available to aliens.(8) That is so notwithstanding the language of the Canadian Bill of Rights 1960. Thus s1 declares "it is hereby recognised and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex the following human rights and fundamental freedoms..." Perhaps the words "national origin" instead of "nationality" were not sufficiently effective.(9) However, s2 is categorical in the use of the words "any person" or "a person".

In spite of such wording the Canadian Bill of Rights is of no avail to aliens.(10)

### **India**

Part III of the Indian Constitution contains guarantees of fundamental rights. Article 19 which comprises the main freedoms (freedom of speech and expression, freedom of assembly, freedom of association or union, freedom of movement within the country, freedom to reside or settle in any part of the country, freedom to acquire, hold and dispose of property, freedom to practise any profession or to carry on any occupation, trade or business) is expressly limited to citizens. On the other hand Article 14 which provides for 'the right to equality before the law' or 'the equal protection of laws' uses the words "any person". It is believed that this would have the effect of extending

the protection of Article 14 to aliens while within the territory of India.(11) In fact the Indian Constitution denies specific rights to aliens, eg the right to hold public office and employment (Article 16) the right to vote (art 326), the rights listed in Article 19 including the right to hold land.(12) Consequently the rights of an alien under Article 14 amounts to no more than this, namely, in matters in which aliens are under no constitutional disability the State may not discriminate against a person simply on the grounds that he is an alien.(11)

Therefore, by and large, the protection of the Bill of Rights is not available to aliens in India.(13)

### **European Convention on Human Rights**

Article 1 states "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". J E S Fawcett in his leading work(14) on the subject wrote while explaining the word "everyone" in Article 1

"This marks the great departure taken by the Convention from traditional forms of the international protection of individuals, for it dispenses with nationality as a condition of protection. Each contracting State undertakes to secure the rights and freedoms of Section 1 to everyone within its jurisdiction, whether he or she is an alien, a national of the state or a stateless person and regardless of civil status."

No authority is cited for the proposition. Presumably the ordinary meaning of the words is relied on to support this view. However, in construing a statutory provision in the United Kingdom the ordinary meaning of the words is not necessarily the surest guide as to their probable effect or intention. For instance s1(2) of the Immigration Act 1971 provides that those not having the right of abode but nonetheless settled in the United Kingdom shall be deemed to have "indefinite leave to enter or remain in the United Kingdom". S1(5) reinforces this provision by enacting that the Immigration Rules shall not curtail the existing rights of the Commonwealth Citizens. Yet the Court of Appeal held in *R v Secretary of State ex p Mughal*(15) that s1(2) did not confer on such persons "indefinite leave to enter or remain in the United Kingdom" eg after a short journey abroad.

Indeed the European Court of Human Rights has stated recently "Article 1 is drafted by reference to the provisions contained in Section 1 and

thus comes into application only when taken in conjunction with them; a violation of Article 1 follows automatically from, but adds nothing to a breach of those provisions".(16)

However, in **Caprino v United Kingdom**(17) an application by an Italian national against the United Kingdom was held admissible by the European Commission on Human Rights. This would suggest that the protection of the European Convention would be available to aliens as well as citizens.

However, it is worth realising that the European Convention on Human Rights is a multilateral treaty (as opposed to domestic legislation of a particular country) and that it is being administered by international institutions (as distinct from the municipal courts of a sovereign state). The multilateral character of the Convention is demonstrated by Article 24 which enables each contracting State to refer to the Commission "any alleged breach of the provisions of the Convention by another High Contracting Party" (ie a State). One would not expect any distinction between citizens and aliens to be drawn under such a multilateral treaty administered by an international tribunal.

From this it does not necessarily follow that the municipal courts of the United Kingdom while construing the provisions of domestic legislation will adopt a similar attitude on this question. That the judicial attitude is likely to be divergent on this issue is shown by the discussion as to whether the Crown can plead an act of state against British nationals. Traditionally the view has been that the doctrine of act of state has no application in any case in which the plaintiff is a British Subject.(18) Yet in **Att Gen v Nissan**(19) Lord Wilberforce said, "... it appears to me to be impossible to accept the broad proposition that in no case can the plea of act of state ... be raised against the British subject".(20) Lord Pearson posed the question

"If the plea of act of state is not available in any circumstances against a British subject, what is the meaning of the expression 'British subject' for this purpose? Does it mean only a citizen of the United Kingdom and Colonies? Or does it include anyone who is a 'British subject' within the wide definition contained in s1 of the British Nationality Act 1948? Does it have some other meaning?(21)

These are the very questions that are likely to arise under a British Bill of Rights. A person who is deprived of his British citizenship on the basis of certain allegations, a Commonwealth Citizen who is

alleged to be an illegal entrant and sought to be removed from the country on that basis,(22) an Irish citizen who is deprived of his right to vote,(23) an EEC national is denied employment in the Crown service - would all these categories of individuals be able to claim the protection of the Bill of Rights?

## **Conclusions**

Changes of nationality law is at present the subject of heated political discussion in this country. Various parties and groups are formulating their own views on the matter.(24) If the Bill of Rights fails to provide a clear answer to the political question as to who would be entitled to claim its protection it would present the Judiciary with an immensely difficult task of deciding politically sensitive and controversial issues.(25) The undesirability of leaving such controversial issues to the Judiciary was stressed by the House of Lords in *Dupont Steels Ltd v Sirs*.(26) Lord Diplock said:

“My Lords, at a time when more and more cases involving the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the Judiciary interprets them ... In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and morally justifiable. Under our Constitution it is Parliament’s opinion on these matters that is paramount.”(26)

Lord Scarman sounded a note of warning against leaving politically controversial decisions to the Judiciary when he said “open-ended expressions” (in statutes which leave policy decisions to judges) will bring the judges inevitably into the industrial arena exercising a discretion which may well be misunderstood by many and which can damage confidence in the administration of justice.”(27) For these reasons it is submitted that Parliament ought to provide clear guidance on this question.(28)

## **Anti-Discrimination Provisions of the Bill of Rights**

Article 14 of the European Convention states, “the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The guarantee laid down under Article 14 has no independent existence since it relates solely to "rights and freedoms set forth in the Convention."(29) Consequently rights that are not specifically safeguarded by the convention eg economic and social rights, right to housing and employment, privileges conferred by administrative decisions such as licences, contracts or even cancellation of existing privileges could be subject to discriminatory practices without infringing Article 14. While this author is not arguing for inclusion of social and economic rights in a Bill of Rights(30) it is important to have adequate provision in a Bill of Rights against discrimination in the enjoyment of social and economic rights. Thus the late Professor S A de Smith wrote

"If the Constitution of Northern Ireland had been equipped from the outset with more detailed guarantees against religious discrimination coupled with efficacious machinery for their enforcement, it is just conceivable ... that the worst of the recent troubles might have been averted."(31)

Indeed the main grievances which have generated the present day troubles in Northern Ireland were found to be the allegedly discriminatory allocation of public housing, discrimination in local government appointments, distortion of local government boundaries and restriction of franchise to ratepayers, failure by the government properly to investigate complaints of unfair discrimination etc.(32) Should a devolved authority be installed in Northern Ireland with powers over these matters it would be of immense importance to have constitutional safeguards against power to discriminate in these matters. The enactment of the European Convention including Article 14 would provide no such safeguards. Consequently such a Bill of Rights would be of no relevance to Northern Ireland.

This is why it would be desirable to redraft Article 14 so as to prohibit discrimination in matters referred to above.

### **Remedies for Breaches of Guaranteed Rights**

Article 26 of the Convention states

"The Commission may only deal with the matter after all domestic remedies have been exhausted ... and within the period of six months from the date on which the final decision was taken".

Article 27(3) states

“The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.”

The European Court of Human Rights explained in *Deweer Case*(33) that

“What Article 26 in principle prevents in coming directly before the Commission with a complaint which has not first been litigated within the national legal order.”

If Article 26 is enacted in a British Bill of Rights coupled with Article 27(3) it is very likely to preclude collateral challenge of a decision or action involving a breach of a right guaranteed by the Bill of Rights.

“Any dispute which is not taken in proceedings specially designed by law for the purpose of having such a decision set aside, reversed, or modified constitutes a collateral attack.”(34)

The problem of collateral review is different from that of implied repeals, ie by subsequently enacted inconsistent statutes which is dealt with elsewhere in this work.

Collateral challenge provides an important method of judicial review. In the event of a Bill of Rights being enacted in the United Kingdom validity of legislation, statutory instruments, specific administrative actions or decisions are likely to be in issue collaterally in innumerable cases. The scope of collateral challenge is indicated in the following extract from S A de Smith's *Judicial Review of Administrative Action* (2nd ed) at p 17 where he states

“Questions of importance in administrative law may also be raised collaterally in enforcement proceedings. A person is prosecuted for breach of a statutory instrument or by-law; he may defend himself by contending that the instrument is *ultra vires*. A prosecution for non-compliance with an enforcement notice alleging contravention of planning restrictions may be met with the defence that the notice is invalid in substance or in form. Civil proceedings instituted for non-payment of taxes or to secure the discharge of other pecuniary obligations imposed by public authorities or statutory tribunals may be collaterally impeached on similar grounds. The binding force of an administrative contract may be impugned in an action for

breach. And questions as to the validity of administrative action may well be raised in proceedings to which the authority is not a party."

The American Bill of Rights is invoked collaterally in civil and criminal proceedings in a wide variety of circumstances. It would be a pity to close such avenue of challenge particularly in circumstances where a party had no means of knowing within a period of six months that the action he complains of involved a breach of his guaranteed right and consequently missed the bus of direct challenge.(35)

Articles 32 and 226 of the Indian Constitution(36) specifies the prerogative writs (as opposed to private law remedies such as declarations, injunctions, damages etc) as remedies for breaches of fundamental rights. Although the wording of the provisions of Articles 32 and 226 has enabled the courts to reform the writs to some extent,(37) a fairly high proportion of the cases have been won or lost on the ground of procedural technicalities eg the issue of certiorari and prohibition being dependent on whether the action or decision impugned was judicial or quasi-judicial as opposed to being administrative.

### **Remedies**

Lord Wade's Bill of 1979 has omitted the provisions dealing with remedies (Clause 5 stating "Convention" means Articles 1 to 18 inclusive and Article 60 of the said Convention; 'Protocols' means Articles 1 to 3 inclusive of the (First) Protocol to the said Convention. This means that the Bill of Rights will guarantee substantive rights but not the legal remedies for the enforcement of those rights. Dicey would have repeated his well-known statement with regard to such a Bill:

"... any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for provision of adequate remedies by which the rights they proclaimed might be enforced. The Constitution of 1791 proclaimed liberty of conscience, liberty of the press, the right of public meeting, the responsibility of government officials. But there never was a period in the recorded annals of mankind when each and all of these rights were so insecure, one might almost say completely non-existent as at the height of the French Revolution."(38)

This author has said elsewhere

**“The Stalin Constitution of the USSR of 1936 has an impressive list of rights but the lack of machinery of enforcing those rights explains its deficiency.”(39)**

In fact the remedies would have to be dealt with by the Rules of Supreme Court (RSC). Order 53 at present provides for the remedies against administrative authorities. As far as the writ of habeas corpus is concerned the courts have already closed the door to personal liberty by ruling that the courts cannot go behind the return to the writ containing the allegations against the applicant.(40) This means that so far as the Commonwealth Immigrants are concerned they could be removed from the country simply on the basis of an allegation that a certain person is an illegal entrant. Similarly a Commonwealth citizen who has adopted British citizenship could be deprived of his citizenship simply on the basis of an allegation of fraud without having to observe the procedure of enquiry under s20 of the British Nationality Act 1948 and removed from the country under the Immigration Act 1971.(41) Since the court in habeas corpus proceedings would not examine the factual basis of an allegation the substantive rights of the immigrant population rest solely at the mercy of the Home Office. **A Bill of Rights which does not improve the remedies in particular the writ of habeas corpus would not alter the position.(42)**

The object of a Bill of Rights coupled with remedies for its breaches ought to be to establish the principle that where there is a right there is a remedy (as opposed to the principle that where there is a remedy there is a right). For these reasons this author's recommendation on the wording of the Clause dealing with remedies for breaches of the Bill of Rights is as follows:

**“(1) Where appropriate (the superior courts) shall have power to issue the prerogative writ of habeas corpus, orders of certiorari, prohibition, mandamus or any of them or grant injunctions, or declarations, or award damages for breach of any of any of the rights guaranteed by this Bill of Rights Act.**

**(2) Where the remedies specified in subsection (1) of this section are inappropriate (the superior courts) shall nevertheless have power to rule to the effect that there has been a breach of any of the rights guaranteed by this Bill of Rights Act. Such ruling shall, in appropriate cases, be the basis of the operation of the machinery of enforcement of judgment or of pleadings in collateral proceedings.”(43)**

## **Judicial Review of Administrative Action**

There was a considerable discussion before the House of Lords' Select Committee on a Bill of Rights on the need for a system of administrative law in this country. It was hoped that a Bill of Rights would enable the courts to develop a system of administrative law. The "due process" clause of the American Bill of Rights has proved to be of immense importance in Judicial review of administrative actions. The existing power of the courts to review the legality of administrative acts in the particular discretionary acts are inadequate.(44) The only provision in the European Convention dealing with the matter is Article 18 which states

"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

Article 18 embodies the French doctrine of *détournement de pouvoir* which has a technical meaning and rarely arises in practice.(45) Furthermore the English courts may well draw the distinction between purpose and motive, the latter being unreviewable,(46) and may construe the wording of Article 18 to be inadequate for reviewing the motives of the actors unless the courts are empowered also to ascertain the motives of the administrator.(47)

### **Article 6 of the European Convention**

The provisions of Article 6 could be of immense value in developing a system of administrative law. Unfortunately the words "civil rights" in Article 6 have been understood to mean 'private rights' as opposed to rights arising under administrative law or public law.(48) It is submitted that appropriate alteration to Article 6 to render its provisions applicable to administrative law deserve consideration.

### **Judicial Review of Discretionary Powers**

The problem of judicial review of administrative discretion in particular subjective discretion raises issues central to the heart of administrative law. Where subjective discretion is conferred on a party the belief of the doer of the act need not be wise and it need not take account of the damage to innocent and disinterested third parties. Nor need the benefit deriving from the act be proportional to the damage it causes.(49) As a result there is very little scope for judicial review of such powers.

It is submitted that the Bill of Rights ought to contain provisions embodying the grounds for challenging the legality of actions of public authorities - grounds preferably similar to those contained in Article 173 of the EEC Treaty. Thus the Bill of Rights could provide

“The superior courts shall have power to review the legality of acts of the organs of the state on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Bill of Rights or of any rule of law relating to its application of misuse of power.”

It is submitted that such a provision coupled with the *detournement de pouvoir* principle and the jurisdiction of the courts (a) to consult the records of legislative history to ascertain the purpose of law and (b) to issue the legal process for discovery of documents and information to ascertain the intention of the administrator would suffice for the purpose.(50)

#### Emergency Measures Under a Bill of Rights

Article 15 of the Convention permits derogation from observance of its provisions for this purpose. In spite of the rulings of the European Court of Human Rights to the effect that the Court can examine the necessity for derogations(51) the extent of justiciability of acts done or measures taken under an emergency remains to be ascertained. Would the courts, be able to review whether emergency legislation as alluded to in the Fifth Report of the Standing Advisory Commission on Human Rights 1978-79 were compatible with the Bill of Rights? Or would the courts be without jurisdiction to question the validity of emergency measures once the necessity for their adoption has been found to exist?(52) Would the courts be entitled to concede to the executive partially or completely the authority to determine the question of existence of necessity for derogation(53) eg where the statutory provisions are so widely drawn as to make them virtually non-justiciable,(54) as had happened in Northern Ireland.(55)

This author has explained elsewhere(56) that

“There are two methods of making provisions for an emergency in a Bill of Rights. One is to sanction departure from observance of the Bill of Rights eg by way of suspension of the rights or remedies or of both during an emergency.”

The European Convention which under Article 15 provides for derogation from observance of its provisions is an example of this model. Con-

sequently the answer to the question posed above is that once an emergency has been proclaimed and the Bill of Rights suspended all the issues concerning excess, abuse or otherwise of legality of emergency measures would be non-justiciable. This would mean that as far as Northern Ireland is concerned such a Bill of Rights would have no application so long as the emergency continues.

“The alternative model is one that does not authorise suspension of any right or remedy arising under the Bill of Rights. The Bill of Rights’ provisions themselves . . . permit measures adequate to deal with emergencies.(56) The American Bill of Right is an example of this model. Under this model the questions of legality, excess of abuse of emergency measures as well as the factual basis of the claim for their justification are justiciable.(57)

The difference between the two models ought to be clearly perceived before a decision as to a choice between the two is made.

#### **Derogation : Lord Wade’s Bill of Rights Bill 1979**

Clause 4(4) of the Bill seems to nullify not only the rulings in the **Lawless Case**(58) and **Ireland v United Kingdom**(59) (which assert that the courts can examine the factual basis of a claim that there exists an emergency) as far as the Bill of Rights is concerned but also the common law power of the courts to ascertain the existence of emergencies.(60) In such an event a conflict would arise between the European Convention as administered at Strasbourg and the British Bill of Rights. As a result the United Kingdom would continue to be liable both under the European Convention and under Clause 4(3) of the Bill.

#### **Entrenchment : Judicial Review of Acts of Parliament**

Is Clause 3 intended to abolish implied repeal? If not, does it add up to anything, there being no such thing as ambiguous repeal?

The background to Clause 3 of the Lord Wade’s Bill of Rights 1979 is as follows: Lord Wade’s original Bill of 1976 provided “In case of conflict between any enactment subsequent to the passing of this Act and the provisions of the said Convention and Protocols the said Convention and Protocols shall prevail unless subsequent enactment shall explicitly state otherwise.(61)

This provision was based on the view expressed in the Cobden Trust publication entitled "Civil Liberties and a Bill of Rights."<sup>(62)</sup> that while a Bill of Rights could not preclude the possibility of an express repeal of its provisions by a post-Bill of Rights enactment it could be effective against an implied repeal. This author had argued at the time that Parliament while retaining its sovereign character could not be bound by any particular enactment including a Bill of Rights. Consequently an ordinary Bill of Rights could not be insured against an implied repeal.<sup>(63)</sup> This author's argument was vindicated by the Report of the House of Lords' Select Committee on A Bill of Rights 1978 which stated (in para 17)

"The Committee have . . . felt unable to accept the assumption . . . that a Bill of Rights could protect itself from being overridden by implication. It is contrary to the principle of Parliamentary sovereignty . . . Under that principle Parliament cannot bind itself as to the future and a later Act must always prevail over an earlier one if it is inconsistent with it, whether the inconsistency is express or implied."

Clause 3 of Lord Wade's 1979 Bill accepts the position stated in the House of Lords' Select Committee Report but nonetheless seeks to provide safeguards against ambiguous repeals. However, there is no such thing as ambiguous repeals.

## **8. Houses of Parliament as High Courts and a Bill of Rights**

In the United States the working of the Congressional Committees during the MaCarthy era posed a serious threat to civil liberties. In this country the Houses of Parliament have the status of being High Courts with power to sub-poena, interrogate, try and punish persons for contempt. In 1979 Parliament set up major committees to act as watchdogs on the government departments. The Committees are asserting their powers to sub-poena Ministers, civil servants and others for interrogation.<sup>(64)</sup> Furthermore, boundaries of jurisdiction between the courts and the Houses of Parliament over alleged privileges and contempt remain undermarked.<sup>(65)</sup>

In *Re Special Reference No 1 of 1965*<sup>(66)</sup> the Indian Supreme Court ruled that the status of the Indian legislatures as High Courts is inconsistent with the guarantees of fundamental rights of the Constitution. The ruling of the Privy Council in *Kielly v Carson*<sup>(67)</sup> is also to the similar effect.

It is submitted that guarantees of rights under a Bill of Rights would be inconsistent with the powers of the House of Parliament acting as the High Court.(68) For these reasons, it is submitted that there should be clear provisions in the Bill of Rights to indicate that powers and privileges of the Houses of Parliament to infringe the rights protected by the Bill of Rights are abolished.

**Deletion of the Provisions of the European Convention Relating to the Council of Europe, the European Commission of Human Rights, and the European Court of Human Rights.**

It is submitted that provisions relating to composition, functions procedure etc of the above should be omitted from a British Bill of Rights. Presence of these provisions is likely to cause confusion in judicial construction of the Bill of Rights. As for instance a member state of the Council of Europe "by exercising its power of reservation under Article 64 as regards Article 15 . . . can retain for its executive the exclusive powers to assess the factual basis (or necessity) of an emergency."(69) As a result the presence of Article 64 in a British Bill of Rights can have the effect of further complicating the question of justiciability of measures taken to deal with an emergency. Clause 5 of Lord Wade's Bill of 1979 by defining 'Convention' to mean Articles 1 to 18 and 64 has in fact deleted these provisions.

**Lord Wade's Bill of Rights Bill 1979**

**Reservations**

Clause 1 states "The Convention . . . shall, subject to any reservations thereto by the Government of the United Kingdom . . . have the force of law . . . ." Clause 5 states "'reservations' means the Reservations made to the (First) Protocol (Article 2) by the United Kingdom under Article 64 of the said Convention." There is a conflict between the the ordinary meaning of the words "subject to any reservations thereto" and the definition clause. One view is that "when an interpretation clause states that a word or a phrase 'means . . . ' any other meaning is excluded.(70) Another view is that "The ordinary meaning of words is not taken away by any interpretation clause.(71) Still another view is that "statutory definitions only apply if the contrary intention does not appear in the context, whether this qualification is expressly stated or not."(72)

Statutory context is ascertained by reference to the whole of the Act(73) The words "subject to any reservations thereto" are repeated three

times in the Bill (in Clauses 1, 2 and 3). This might suggest the statutory context of the Act. This, coupled with the fact that the United Kingdom Government will have retained its power of reservations with regard to other protocols, might persuade the courts to let the ordinary meaning of the words "subject to any reservations thereto" prevail over Clause 5. If this were to happen the government of the day would be in a position to nullify the Bill of Rights' guarantees by simply making reservations under Article 64 of the European Convention. Consequently the risk of leaving any ambiguity on the matter is too great.

### Conclusions

For the reasons stated above the European Convention in order to be adopted as a British Bill of Rights, ought to be adjusted so as to suit the requirements of the United Kingdom. This is particularly so in view of the needs of Northern Ireland. This would involve redrafting of some of the provisions and deletion of others. The anti-discrimination provision of Article 14 deserves special attention for this purpose. The experience of human rights legislation in Canada both in federal and provincial laws has shown the need for further elaboration and clarification of the anti-discrimination provision. This is also borne out by the awareness of the needs of various groups in the United Kingdom.

- (1) 3 Am Jur 2d Aliens and Citizens p 852.
- (2) **Hampton v Mow Sun Wong** 426 US 88: held: United States Civil Service Commission's Regulation generally barring resident aliens from employment in the federal competitive civil service was unconstitutional as having deprived lawfully admitted resident aliens of liberty without due process of law under the Fifth Amendment.
- (3) 3 Am Jur 2d Citizens and Aliens p 856. In **Mathews v Diaz** 426 US 67 the Supreme Court stated that the Fifth Amendment as well as the Fourteenth Amendment protects aliens within the jurisdiction of the United States from deprivation of life, liberty or property without due process of law; even one whose presence in the country is unlawful, involuntary or transitory is entitled to such constitutional protection. This does not, however, mean that all aliens are entitled to all the advantages of citizenship; a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to another.
- (4) **Hirabayashi v US** 320 US 81.
- (5) **Wong Wing v United States** 163 US 228
- (6) **Takahashi v Fish Game Comm** 334 US 410; **Olympia v California** 332 US 633.
- (7) Annotation: 68 L Ed 266.
- (8) **Re Chana and Minister of Manpower and Immigration** 74 DLR (3d) 491 (1977); **Re Jolly and Minister of Manpower and Immigration** 54 DLR (3d) 277 at 288-9 (1975).
- (9) In **Ealing London BC v Race Relations Board** (1972) AC 342 it was held that the words "national origin" appearing in the Race Relations Act 1968 did not prevent discrimination on the ground of nationality. In **Re Dickinson and Law Society of Alberta** 84 DLR (3d) 198 (1978) it was held that prohibition of discrimination on the ground of "place of origin" in the Individual Rights Protection Act 1972 (Alberta) was not effective where the enrolment as a member of The Law Society was restricted to "Canadian Citizens" or "British Subjects".
- (10) In **Re Lodge and Min of Employment and Immigration** 86 DLR (3d) 553 (1978) special measures aimed at persons of specific nationality were upheld in spite of somewhat explicit and unequivocal wording of the Canada Human Rights Act 1976 77.
- (11) **Basu's Commentary on the Constitution of India** (5th ed) vol I, p 498.
- (12) For this reason the Administration of Evacuee Property Act 1950 does not violate Article 14: **Muhammad v Deputy Custodian General** AIR 1961 SC 1157.

- (13) The following rights do not belong to aliens in India: (i) some fundamental rights belong to citizens alone - see Articles 15, 16, 18(2), 19, 30; (ii) right to hold the offices of the President (Art 58(1)(a); Vice-President (Art 66(3)(a)), Judge of the Supreme Court (Art 124(3)) or of a High Court (Art 217(2)); Attorney-General (Art 76(1)), Governor of a State (Art 157), Advocate-General (Art 165); (iii) right of suffrage for election to the House of People of the Union and the Legislative Assembly of every State (Art 326), right to become a member of Parliament (Art 84) and the Legislature of a State (Art 191(d)). Furthermore rights and disabilities of aliens are left to legislation by Parliament under entry 17 of List 1 of the Constitution.
- (14) J E S Fawcett, Application of the European Convention on Human Rights (OUP 1969) p 18.
- (15) (1973) 3 All E.R. 34 796 (CA).
- (16) In the Case of Ireland v United Kingdom of 18 January 1978 para 238 at p 78.
- (17) (1978) 21 Yearbook of the Convention 284.
- (18) Viscount Finlay in *Johnstone v Peddler* '1921) 2 AC at 272; *Walker v Baird* (1892) AC 491 at 494; Sir James Fitzjames Stephen, History of the Criminal Law of England (1883) vol 2 p 65.
- (19) (1969) 1 All ER 629 (HL).
- (20) (1969) 1 All ER at 657- 658.
- (21) (1969) 1 All ER at 662. Lord Reid was inclined to limit the plea of act of state to citizens of the United Kingdom and Colonies: (1969) 1All ER at 639.
- (22) See M A Fazal, "The Immigrants and Their Basic Rights".
- (23) Mr Edward Gardner QC MP expressed this view while explaining the recent Conservative Party's document on nationality: see The Times, March 17, 1980.
- (24) See British Nationality Law (Cmnd 1795, 1977) (Labour Government's Green Paper); Who Do We Think We are (Conservative Political Centre 1980); on the Statement of the Roman Catholic Bishops' Conference of England and Wales as endorsed by the British Council of Churches see M A Fazal, "Immigration and Nationality Part I: Citizenship"; British Nationality Bill 1981.
- (25) This difficulty has already been experienced by the Judiciary in immigration cases. See M A Fazal "Reforms of Criminal Procedure" -A Submission to the Royal Commission on Criminal Procedure pp 21-26; "The Immigrants and Their Basic Rights".
- (26) (1980) 1 All ER at 541. Emphasis added.

- (27) (1980) 1 All ER at 554.
- (28) This author's proposals for a Bill of Rights are intended in their scope to be similar to the American Bill of Rights. Thus Clause 1 (Anti-Discrimination Provision) protects "anyone lawfully within its jurisdiction". However, definition of 'discrimination' permits legitimate distinction between citizens and aliens where there is a compelling public interest in so doing. See M A Fazal, *Drafting a British Bill of Rights* pp 72-91.
- (29) M A Fazal, *Drafting a British Bill of Rights* pp 23-24.
- (30) *Ibid* 62-64.
- (31) *Constitutional and Administrative Law* (3rd ed) pp 439-40.
- (32) See the Report of the Cameron Commission on Disturbances in Northern Ireland (Cmd 532 (NI 1969)) S 229; Report of The Scarman Tribunal of Inquiry on Violence and Civil Disturbances in Northern Ireland in 1969 (Cmd 566 (NI 1972)).
- (33) *Deweer Case* (ECHR) of 27 February 1980 para 29, p 13.
- (34) Amnon Rubinstein, *Jurisdiction and Illegality* (OUP 1967) pp 37 38.
- (35) In *Barnard v National Dock Labour Board* (1953) 2 QB 18 the plaintiffs came to know of the illegality of the action after the expiry of six months through discovery of documents.
- (36) Article 32(2) provides "The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by this Part".
- Article 226(1) provides "Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."
- (37) M A Fazal, *Judicial Control of Administrative Action in India and Pakistan* (OUP, 1969), Chapter 5.
- (38) A V Dicey, *Law of the Constitution* (1959) pp 198-199.
- (39) M A Fazal, *Drafting a British Bill of Rights* (1976) p 97.
- (40) M A Fazal, "The Immigrants and Their Basic Rights".

- (41) **R v Secy of State ex p Akhtar** (1980) 1 All ER 1089 citing the case of **Sultan Muhmud** (1980) 3 WLR p 312. **Zamir v Secy of State** 2 All ER at 772 (HL).
- (42) For an attempt to improve the remedies see Fazal's Bill of Rights Clause 6: M A Fazal, *Drafting a British Bill of Rights* pp 76, 96. Clause 6 read in conjunction with Clause 2(2) is expected to remedy the defects of habeas corpus.
- (43) For comments on this wording see M A Fazal, *Drafting a British Bill of Rights* p 96.
- (44) M A Fazal, *Drafting a British Bill of Rights* pp 25-27.
- (45) M A Fazal, *Drafting a British Bill of Rights*, p 92.
- (46) Such a distinction was drawn in **Westminster Corpn v L & NW Railway Co** (1905) AC 426.
- (47) See Fazal's Bill of Rights, Clause 2(1) and (2) at p 74 of *Drafting a British Bill of Rights*.
- (48) In the **Konig Case** of 28 June 1978 the ECHR held that the right in question (ie the right to practise medicine) was a private right and fell within Article 6(1), it being unnecessary to decide whether "civil rights" in Article 6(1) extend beyond rights of a private nature. This was further explained by the Court in the **Konig Case** of 10 March 1980 at p 14, para 18.
- (49) Per Lord Diplock in **Express Newspapers Ltd v MacShane** (1980 1 All ER 65 (HL).
- (50) See Fazal's Bill of Rights, Clause 2(1) and (2) at pp 73-74 of *Drafting a British Bill of Rights*.
- (51) **Lawless Case** 4 Yearbook of the Convention 438 at 472 (1961); **Case of Ireland v United Kingdom** of 18 January 1978 p 69.
- (52) In **Rex v Allen** (1921) 2 IR 241 Molony CJ spoke of justiciability of martial law in these terms: "Where martial law is imposed, and the necessity for it exists . . . this Court has no jurisdiction to question any acts done by the military authorities".
- (53) In **Ex parte Marais** (1902) AC 109 it was argued that once it appeared that ordinary courts of law could be and was being maintained, a state of war did not exist and martial law in the case could not be applied to civilians. However, the Judicial Committee did not accept that view.
- (54) See the Emergency Powers Act 1920, 1964, s1; s2 states "Where a proclamation of emergency has been made . . . it shall be lawful for His Majesty in Council . . . to make regulations . . . and those regulations may confer on a Secretary of State . . . such powers and duties as His Majesty may deem necessary . . ."

- (55) eg in **McEldowney v Forde** (1971) AC 632.
- (56) M A Fazal, *Drafting a British Bill of Rights* pp 60-62.
- (57) See on this **AG of St Christopher v Reynolds** (1979) 3 All ER 129 (PC).
- (58) 4 Yearbook of the Convention 438 at 472 (1961).
- (59) Judgment of 18 Jan 1978 p 69.
- (60) See on this **AG of St Christopher v Reynolds** (1979) 3 All ER 129 (PC).
- (61) See the Report of the Select Committee on a Bill of Rights (HL 1976) 1978 p 41.
- (62) Peter Wallington and Jeremy McBride, *Civil Liberties and a Bill of Rights* (1976) pp 85-87, 114.
- (63) "The whole document (i.e. the Cobden Trust publication) stands or falls on the question whether Parliament could be precluded from repealing any provision of the ordinary (unentrenched) Bill of Rights impliedly. This document assumes that this is possible without discussing it. There are certain remarks to this effect in the Canadian case of the **R v Drybones** (1970) SCR 282. However, these remarks should not be taken too seriously. The Act in question in the **Drybones'** case was a pre-enactment (ie pre-Bill of Rights) legislation and not a post-enactment statute. Thus an earlier statute was held to have been repealed by a later statute. Any legislation can achieve this. It does not have to be a Bill of Rights to do that. Secondly, the **Drybones'** case was nearly overturned by the Supreme Court subsequently (see **A G v Lavel** (1974) 38 DLR (3d) 481). The remarks in **Drybones** alluded to above merely amount to an assertion that a properly entrenched Bill of Rights (ie one without the non obstante clause) is capable of binding Parliament (M A Fazal, "Entrenched Rights and Parliamentary Rights" (1974) Public Law 295 at p 313). A Bill of Rights to be binding on Parliament must involve a re-arrangement of the relationship between the Judiciary and the legislature. If the arrangement of this relationship maintains or permits parliamentary sovereignty (as the Cobden Trust document does) then Parliament cannot be precluded from repealing the Bill of Rights' provisions impliedly. The Privy Council cases involving the Ceylon Parliament would be relevant to this issue. The Ceylon Parliament operates within framework of a written constitution which has been declared to be a rigid one (**Bribery Commission v Ranasinge** (1965) AC at 198). Yet it has been able to repeal the constitutional provisions (not merely ordinary legislation which the Cobden Trust Bill of Rights would be) impliedly by means of simple statutes (**Kariapper v Wijesinha** (1968) AC 716). The explanation for this lies in the fact that the Ceylon Parliament is a sovereign legislature (See M A Fazal, *Drafting a British Bill of Rights* p 12) and the constitution imposes merely procedural and no substantive limitations on legislative powers. This reasoning would apply with greater force to a British Bill of Rights (the British Parliament not operating within the framework of any written constitution and the British Constitution being a flexible one). Consequently the Cobden Trust document's proposal for a Bill of Rights is a non-starter. It has no chance of survival against implied repeals" M A Fazal, *Drafting A British Bill of Rights* (1976) pp 104 -106.

- (64) See The Times, February 19, 1980.
- (65) See Keir and Lawson, Cases in Constitutional Law, Chapter on Parliamentary Privileges.
- (66) AIR 1965 SC 746.
- (67) (1841-42) 4 Moo.
- (68) The position that the court in an application for habeas corpus must defer to the warrant from the Speaker of the House of Commons stating that the applicant had been detained by the House (see the **Case of the Sheriff of Middlesex** (1840) 11 A & E273; **Regina v Paty** (1704) 2 Ld Ray 1105) would be inconsistent with article 5 of the European Convention.
- (69) M A Fazal, Drafting a British Bill of Rights, p 60.
- (70) Cross, Statutory Interpretation (1976) p 103.
- (71) Odger's Construction of Deeds and Statutes (1967) p 316.
- (72) O Hood Phillips, A First Book of English Law (1977) p 135.
- (73) Craies on Statute Law (1971) p 159.

