DO WE NEED A BILL OF RIGHTS?

The title of this paper perhaps savours more of popular journalism than of the solemn measured language of jurisprudence. I hope nevertheless you will acquit me of choosing it solely on that account. There is in some quarters a rising tide of enthusiasm for a so-called Bill of Rights, and I have accordingly chosen this title as a means of submitting to you a few thoughts of my own. If these are found to be at all provocative this may at least serve to trigger off a stimulating discussion. At the same time I am aware of the ambiguities of this title and that some preliminary explanations are needed if I am to avoid appearing under its guise to advance views which I in no way wish to maintain. I will therefore begin by indicating in the first place certain lines of thought which I am not seeking to controvert, or which it is not my intention to raise or discuss at all in this article.

In the first place, it will hardly surprise you to receive my assurance that I do not at all seek to oppose the idea of human rights recognised and protected by law.

Secondly, I have no wish to contend that certain of such legally recognised and protected rights may not properly be treated as more fundamental or more significant than others and may thus be deserving of some special form of legal protection.

Thirdly, it is not my intention in the present context, to stir up again the familiar controversy regarding natural rights: Whether these exist or not; how if they do they might be identified or defined; whether their place must be acknowledged in any legal system worthy of the name; these and similar intriguing issues are not those that I am now seeking to discuss.

Lastly, I have no intention at this moment of embarking upon what is really a technical exploration of the question whether the United Kingdom may or may not be under a legal obligation to

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1 This is the text of a paper delivered on April 5, 1975, to the second Conference of the United Kingdom Section of the Association for Legal and Social Philosophy held at Cambridge. The paper was in fact written in August 1974, several months before the delivery or publication of Sir Leslie Scarman's masterly Hamlyn lectures, "English Law—The New Dimension." Part II of which, as is well-known, contains what is certainly the most important and influential recent statement of the case in favour of a Bill of Rights. Some references will be made to this work in the notes added to this article hereafter.
incorporate into the actual texture of our law the precise terms of any particular international convention, whether it be the Universal Declaration of Human Rights, the European Convention or any other such document. Although I am willing to disclose that my own view is that we are under no such obligation, if it were demonstrated, so far as the issue is capable of demonstration, that I am wrong about this, I would still regard it as proper and valid to contend, in the context of the issues raised in this paper, that we do not need a Bill of Rights.  

Having thus endeavoured to put aside those matters which I desire to exclude, I now turn to the more positive task of indicating to you what I suggest is implied in my particular choice of title.

First, I should clarify what in my view is meant by a Bill of Rights. I of course recognise that this may well be a matter of controversy and that my own concept enjoys no pre-emptive claim to acceptance. However, I think you will agree that in order to try to avoid a purely semantic debate I should at least attempt to identify what is the particular creature that I am now inviting you to scrutinise, so that at least you will recognise what it is that I am going to say we either do or do not need.

To my way of thinking a Bill of Rights is a document in the nature of a constitutional code of human rights which are enumerated comprehensively, though in a form which will of necessity be somewhat broad and generalised. Such a code I take it also is to be more than a resounding piece of rhetoric hopefully aimed at exerting moral persuasion but is to have conferred upon it legal effect. Moreover such legal effect is to be of a special and indeed far-reaching character. There may be disagreement as to what precisely this should entail but, for myself, I would stress four particular points:

(a) The code should be given some sort of over-riding authority over other laws.

(b) Power should be vested in the judiciary (whether generally or by way of a Constitutional or Supreme Court) to interpret the rights set forth in the Bill of Rights and to determine judicially their proper scope, extent and limits, and their relationship inter se.

(c) The judiciary will possess the power to declare legislation invalid which it holds to be repugnant to the rights guaranteed in the Bill of Rights. Such rights can thus be treated as fundamental not only in the sense that they are regarded as essential, or of vital significance or morally compelling, but as being given a special status in the constitutional structure of the legal system.

2 Sir Leslie Scarman (op. cit. p. 18) postulates only two alternative courses (i) to ignore the Human Rights movement, making the assumption that existing English law substantially complies with our international obligations, or (ii) to introduce a new constitutional settlement accepting entrenched provision. However (i) does not of course entail a rigid and inflexible acceptance of the present perfection of English law regarding human rights but rather a readiness to amend and improve it by parliamentary means when deficiencies come to light, whether as a result of international decisions (e.g. under the European Convention) or arising out of the pressure of public opinion (as in the case of race-relations).
I would add that though such a judicial power is normally associated with a rigid type of constitution, including a separation of powers, this is not absolutely essential. Thus it is possible, as for instance now exists in Canada, for a weaker form of judicial power derived from or indeed dictated by acceptance of some kind of parliamentary sovereignty, which may inevitably place ultimate power in the legislature. On the Canadian pattern the Bill of Rights accordingly retains the status of an ordinary statute in the sense that the legislature which passed it may equally repeal or amend it, but while it stands it does confer a statutory power on the courts to invalidate ordinary legislation in certain circumstances. Nor is a federal structure essential though here again legally operative Bills of Rights are most commonly located in federal constitutions, doubtless because it is in constitutions of this type that the judicial power over legislation is needed in any event if there is to be effective control over the legislative powers as distributed by the constitution between the federal and regional organs.

(d) Lastly, I would say that the Bill of Rights will almost of necessity exert control or at least powerful influence over the whole area of legislation both primary and subordinate and of judicial decision-making.

So much for the meaning of a Bill of Rights. It remains for me to explain further that when I pose the question in the form, do we need a Bill of Rights, I understand by “we” the United Kingdom, with particular reference to the law of England and Wales, and perhaps also of Scotland, though as a mere English lawyer I would not have the temerity to try to tell Scotsmen what rights they should or should not enjoy. Nor do I desire to embark upon the very special problems arising from the situation in Northern Ireland, save to say that these are happily unique and therefore for this purpose can properly be put on one side. I would just like to emphasise that my arguments which, after all these preliminaries, I am, you will be relieved to know, at last about to unfold, are confined to the particular situation of this island, blessed or damned, whichever you may regard it. I would therefore disclaim any intention of contending that a case may not be made out for a Bill of Rights in some other jurisdictions, whether federal, as in the case of the United States; or by reason of the introduction of a new constitution to take the place of a totalitarian system which has been overthrown, as with Western Germany; or in the case of newly-founded states freed from

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3 In Canada by all accounts the effect has been pretty slight. Despite this, Michael Zander still contends for such a solution in the United Kingdom. (See A Bill of Rights? (1975), pp. 45, 51-52).

4 Sir Leslie Scarman refers to the “deeply disturbing practice of interrogation” resorted to in Northern Ireland, and suggests this would not have occurred if we had had a fully-developed code of fundamental human rights (op. cit. p. 18). Even if true, which I think very doubtful, there has been no need for such a code in order to bring about an impartial investigation resulting in the stopping of such objectionable practices as were brought to light.
colonialism, as in Africa; or in an attempt to blend the values of a non-western civilisation with those of a western humanitarian approach, as in present-day India.

Having thus indicated the field of inquiry, I would like to begin by one general observation before coming down to my more specific arguments.

The introduction of a Bill of Rights can be heralded as a sort of charter for the judges. By this I mean that it confers upon them a constitutional role of first importance in the task of determining and delimiting what are the operative values in their society and, as guardians of those values, gives them the vital function of invalidating any legislation that in their opinion violates those values. It is at least partly for this reason, I venture to suggest, that so much support will be found among academic lawyers for such a constitutional development. Academic lawyers spend much of their time studying, expounding and criticising the case-law provided by judicial decisions, and in their eyes the interest and indeed excitement of case-law is vastly increased if it can be made to embrace, often with elements of high drama, decisions directly bearing upon the policies and indeed the politics which arise in the context of a Bill of Rights under the guise of litigation between a plaintiff and a defendant. One only has to think of a court of law being called upon to decide burning policy issues on such matters as racial segregation, the lawfulness of the Communist Party, or of capital punishment to realise the way in which a Bill of Rights serves to put the judiciary right in the centre of the arena where fundamental issues of policy are determined. Once established there the judges will then possess and exert the power to impose on legislature, government and citizens alike their own conception of how such issues are to be resolved.

It is perhaps not surprising, in the light of the dramatic change in judicial role that this development would entail, that our judges (with a few noteworthy exceptions) would probably greet such a change with a good deal less enthusiasm than would be evinced by academics. Of course we all know and recognise these days that courts do have a role in making policy judgments, but under our system these still remain marginal, and our judges still cherish the belief that there is wisdom in keeping them apart from political controversy. Are we to say that this is a foolish or outmoded view which fails to measure up to the contemporary needs of our society? I will say at once at this stage that I do not take this view but, on the contrary, consider that there are powerful arguments in favour of confining the judges to their traditional role. I will therefore now put before you what seem to me to be strong grounds for

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5 Zander (op. cit. p. 27) summarises Brown v. Board of Education, 347 U.S. 483 (1954) in these terms: "The court strikes down the country's entire educational system as not conforming with the requirements of equal opportunity for black and white citizens."
resisting the introduction of a Bill of Rights into the framework of our constitutional and legal system.

First, I would argue that from the point of view of legal technique we already possess a better method, tried and tested over generations, for establishing, delimiting and enforcing human rights, than the proposed substitute of a pre-determined Bill of Rights under judicial control. Quite simply that better method, to my way of thinking, is a democratically elected parliament invested with sovereign legislative powers. In support of this contention I would urge the following points:

(i) Parliament is a representative body containing virtually all shades of political opinion and it conducts its affairs by way of open discussion which is fully reported—at any rate in the absence of a printers' strike!—is freely accessible through its individual members to the pressures of public opinion, and of any groups who may desire to have their views taken into account. It operates in the full light of day and is exposed continuously to the full weight of public criticism and discussion through the Press and broadcasting media as well as by way of public meetings and writings. It is accordingly composed of a much wider cross-section of the population than the judiciary and commands a much wider range of opinion and can inform itself and make inquiries in ways that are not open to a court of law engaged in the task of reaching a decision in relation to a particular piece of litigation that is before it. The attempt to remedy this latter deficiency in the United States by the method of the "Brandeis Brief" (so-called) points clearly to this problem of deciding policy in the restricted ambit of litigation: nor has this solution provided an adequate substitute for the process of legislative policy-making.6

(ii) The judges are not particularly well-equipped to arrive at fundamental policy decisions of this character. Their background and training naturally tend to render them cautious and timid rather than imaginative and even at the present-day they tend to lead rather sheltered lives which do not bring them into close contact with the feelings and attitudes of large sections of our society. The other day for instance I noticed that one newspaper considered it worthy of special comment that one of our Law Lords had been detected regularly travelling to and from his place of work by public transport, and even availing himself for this purpose of his old-age pensioner's free pass! (A very considerable proportion of our senior judges do, needless to say, fall into that category.)

(iii) Judges are appointed because of their known capacity for rigorous inquiry into disputed sets of facts and for preserving their

6 In the United States of America such matters as abortion and obscenity have led to virtual codes of rules being laid down by the Supreme Court in particular decisions (see e.g. Roe v. Wade, 410 U.S. 113 (1973) and Miller v. California, 93 Sup.Ct. 2607; 36 L.Ed. 2d (1973)). Is not parliamentary legislative provision a better technique for resolving both the issues of policy and the governing rules which are to give effect thereto?
impartiality in deciding between the conflicting claims of those who appear before them. But decisions resolving the scope and limits of human values are not so much matters which call for impartial scrutiny as for moral and political convictions. No degree of impartiality for instance can decide whether and to what extent a citizen should be free to leave his own country. And if a Bill of Rights declares such a right to exist, is a judge the best person to decide (and if so on what basis) whether such a right is to be absolute? Is it to be left to the decision of a judge whether a medical student should or should not be obliged to spend some time in practice in this country after the end of his medical studies, because these have been paid for or subsidised by the State? This is the kind of question which in my view is better dealt with by Parliament, either directly or by delegation, than by the judicial process of litigation. And even if judges rightly possess a high reputation for impartiality, how does this help them in a case of this sort? What is needed is moral and political wisdom, which is not the particular prerogative of the judiciary.

(iv) One great disadvantage of a Bill of Rights would be its relative inflexibility. For if a matter is once decided by the courts then the legislature (at least in the normal case where there is a separation of powers) will have no power to overrule that decision, however contrary it may seem to public opinion or political wisdom or justice. Any change (after the appeal process has been exhausted) will have to wait upon the accidents of further litigation and a possible reversal of the earlier decision by a later judgment. This seems to be a highly unsatisfactory method of deciding issues of vital public policy involving controversial value judgments which can be fully debated but not ultimately decided by the legislature itself. The recent experience, under the unlamented Industrial Relations Act of 1972, of highly controversial issues being left to the decision of a court, does not encourage the view that the judicial process would inspire particular confidence in this area or that it would provide an adequate substitute for detailed law-making by the legislature itself.7

(v) Experience, especially in the United States, where this kind of constitutional development has had the longest history, demonstrates how this process has brought the courts fully into the dust of the political arena.8 I would be the first to acknowledge that the

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7 One thing that a Bill of Rights would undoubtedly do is to provide a field day for litigation. The experience of the United States of America shows the endless range of constitutional issues which can be raised by the ingenuity and pertinacity of lawyers. Nor is the outcome always necessarily to be applauded, e.g., freedom of the press in the United States of America has been largely responsible for introducing "trial by newspapers."

8 In a radio discussion Sir Leslie Scarman has argued that the courts should be able to control and override the overweening power of Parliament (October 12, 1975). But is this not to confer a purely political role on the judiciary? It will be recalled how, over long periods, the United States Supreme Court was engaged in striking down important social welfare legislation in accordance with its concept of what
distinctive features of the United States, its vast size and huge population, its complex regional and federal structure, raise problems very different from our own and have dictated solutions and methods which have produced many benefits, but also I would think, raised many fresh difficulties and problems. Again, in such a country as West Germany it is understandable that recent history has not inspired confidence in the unfettered sovereignty of a politically controlled sovereign legislature. Nor would I wish to deny the obvious fact that our own parliamentary system is itself now under a good deal of criticism and attack and that it is plainly in need of some and perhaps drastic improvement. All the same I can see nothing in the admitted imperfections of our system to warrant handing over a vital political function to a small group of judges; nor do I think that our judicial system and the administration of justice would benefit noticeably from such an injection of political steam.9

My final contentions relate to the state of human rights under our existing system. For if it could be shown that, notwithstanding the arguments I have already adduced, there remain serious deficiencies which are incapable of remedy under the present system, then the need for a Bill of Rights may have to be conceded at least as a possible method of repairing those deficiencies. Here again I can only say that this is not a view to which I find myself able to subscribe.

At the risk of being thought to have become complacent in my old age, I would venture the general opinion that in the field of human rights we have not done at all badly, especially having regard to a number of recent reforms in hitherto neglected areas.10 Equally I would not deny that there still remain areas which arouse disquiet, for instance certain ill-defined police powers, or the granting of bail, as well as others, such as privacy, where the case for a new right is more controversial. Indeed the so-called "right of privacy" infringed fundamental constitutional rights. (See _Lochner v. New York_, 198 U.S. 45 (1905); and Friedmann (1956) 19 M.L.R. 461.) Lord Hailsham of St. Marylebone, speaking perhaps as a politician rather than a lawyer, is on record as urging the need for a Bill of Rights in order to restrain "socialist" legislation. (See _The Times_, May 16, 19 and 20, 1975.) And, according to Zander (op. cit. p. 31), Sir Keith Joseph seems to believe that a Bill of Rights would prevent a Government from enacting legislation providing for compulsory purchase of housing.

9 Such an enactment as the Community Land Act 1975 has been strongly opposed as contrary to human rights. Do we really wish to see our judges brought into the heart of political controversy by being empowered to declare such an Act invalid and _ultra vires_?

10 Sir Leslie Scarman argues (op. cit. p. 15) that when times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual, but when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will, however frightened and prejudiced it may be, of Parliament. He gives as an example the helplessness of the courts to "correct" the retrospective effect of the Immigration Act 1971. But not only is retrospective legislation not necessarily always objectionable but a decision invalidating a parliamentary provision such as this would be essentially a political act and might even be regarded by the majority party as provocative.
underlines rather strikingly just the sort of difficulties which are posed by a ready-made Bill of Rights. In the first place there is no real agreement as to whether such a right does or does not or should or should not exist. As Maurice Cranston recently pointed out courts in some jurisdictions have ruled that it is a fundamental right, while others have declared that there is no right to privacy at all. He adds that though the word occurs repeatedly in the current literature of human rights it is not to be found in earlier documents. But even if its existence is to be admitted, what scope and extent is to be afforded to such a right? The Universal Declaration of 1948 contents itself with laying down that no one shall be subjected to arbitrary interference with his privacy. The European Convention is no less cryptic in stipulating that everyone has the right to respect for his private life. The West German Basic Law appears to leave it to be dealt with under provisions declaring that the dignity of man is inviolable and that everyone has the right to the free development of his personality. But what do these gnomic utterances involve in concrete terms? No one can possibly say until the courts have created—if given the chance—a whole body of jurisprudence on what is or is not lawful within these pious expressions of generalised principle. It is my contention that such matters are much better resolved by a decision (fortified by investigation and report by such a body as the Law Commission or, as in this instance, by an ad hoc committee, such as the Younger Committee on Privacy) to deal with the matter in detail by ordinary legislation, which can lay down both the governing principles as well as provide many details to render the law reasonably predictable for lawyers and laymen alike. To my mind the vital area of human rights concerned with racial discrimination is far better dealt with by a Race Relations Act than by a resounding and overriding statement of principle contained in a Bill of Rights. Such an Act not only leaves the policy where it should reside: namely with the legislature and not the judges, but it also enables a full and detailed scheme, involving both judicial and administrative action, to be worked out and applied with a breadth and depth unattainable by judicial intervention alone, even in the hands of the most creatively-minded judges. The recently passed Rehabilitation of Offenders Act provides another example, whatever may be one's views of the merit or otherwise of that legislation. And in the event of legislation proving inadequate it can subsequently be amended more easily and more comprehensively by fresh legislation, rather than by waiting upon the outcome of successive pieces of litigation before the courts. Nor is there much force in the objection, sometimes raised, that Parliament cannot or will not find time for such legislation. On the contrary, it is quite remarkable to see the speed with which law reform of this kind can be got through the parliamentary machine, however old-fashioned and cumbersome this may seem from some points of view.
My final point is that I do not relish the prospect of the judiciary being invested with the ultimate power to declare invalid the laws emanating from the will of Parliament on any subject at all and certainly not on human rights. Do we really desire to confer on our judges the power to declare the Race Relations Act void, wholly or in part, because for instance it is held to infringe the fundamental right of free speech? Or to hold that the Public Order Act violates the constitutional protection of the laws in favour of free speech or free assembly? Or that the supreme penalty of capital punishment is or is not constitutionally permissible by reason of a judicial interpretation of a provision in the Bill of Rights?  

I hope no one will infer from what I have said that I am in any way seeking to launch an attack on the ability or integrity of the judges. On the contrary, I fully share the view that our judiciary is, within its limits, of the highest calibre and that the maintenance of its present quality lies at the heart of our system of law. It is indeed for that very reason I would prefer it should not be given tasks beyond its scope which are more properly left to other organs of the Constitution. Equally I hope my remarks will not be interpreted as implying a Blackstonian belief in the perfection of our existing constitution. I think I am as aware as most of its deficiencies and that there are many areas, including that of human rights, which are manifestly in need of repair. I would simply urge that despite our enthusiasm for law reform there may still be merit occasionally in leaving things as they are.

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11 It is sometimes said that the code would lay down the principles and the courts would merely have to interpret these, e.g. Sir Leslie Scarman argued (in the radio discussion referred to in note 8) that judges are as well equipped as anyone to decide what is a "cruel punishment." But is it right or wise in a democracy to leave the issue of capital punishment to judicial rather than to parliamentary decision? It is idle to ignore the wide discretion which the ill-defined parameters of a Bill of Rights would inevitably confer on the judiciary.

12 The real question is who, in the last resort, is to have the final word, Parliament or the courts? Sir Leslie Scarman's answer is, "it is the duty of the courts to protect even against the power of Parliament" (op. cit. p. 20). I find this argument both inexpedient as well as difficult to reconcile with democracy.

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