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A CONFUSION OF POWERS: POLITICS AND THE RULE OF LAW*

IT is perhaps understandable that a non-lawyer invited to deliver this distinguished lecture, and even threatened by its publication in a law review of high repute, feels a sense of awe and embarrassment. I would like you to ascribe to these sentiments the somewhat cumbersome, if not contrived title which I originally gave to my lecture: "A Confusion of Powers. Politics by Jurisdiction and the Partisan Administration of Law." Today, and despite the fact that my sense of awe is undiminished, I can put in much simpler terms what I want to say: It is an *aperçu* in political theory, concerned with the question of what one might usefully do, if not only the law, but politics too is in a muddle, because the law is both a sought-after panacea and a resented intruder, and whether there is anything we can learn from looking at other countries, and at past masters of the theory of the separation, or distribution of powers. While in the course of this lecture I shall have to refer to several great and difficult issues, generally by quoting others, what I have to offer is no more than a footnote, a reminder of traditional wisdom. Let me try to present the problem as I discovered it myself, that is, by the puzzling contrast of German political experience and British political debate—*Willy Brandt* v. *Sir Leslie Scarman*, if you want to personalise the case. The story deserves our attention.

German politics since 1969 has been characterised by a heightened sense of controversy. Polarisation and emotionally charged disputes have replaced differences of view and calm debate. The first cause and expression of this new mood was the controversy surrounding a new *Ostpolitik*. In the attempt to normalise relations between the Federal Republic and Germany's East European neighbours, treaties were negotiated in the years after 1970 with nearly all East European countries as well as the German Democratic Republic. The first of these, those with the Soviet Union and Poland, were controversial, because while they were ostensibly aiming at "renunciation of force" agreements, they involved a *de facto* recognition of post-war borders. The ratification debate almost brought Willy Brandt's government

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down in April 1972; indeed it was completed only after the election victory of the coalition later that year. But it was the "Fundamental Treaty" with the German Democratic Republic which led the opposition to seek a reversal of the parliamentary decision before the courts. The Land Government of Bavaria (representing, in party terms, the most conservative wing of the federal opposition) started proceedings (in the form of action of one constitutional organ against another) against the Federal Government before the Constitutional Court, claiming that the treaty was unconstitutional because it violated the stipulation in the preamble to the Basic Law which calls upon all Germans to bring about reunification by free self-determination. The Court finally dismissed the case in 1973, but in doing so it interpreted the significance of the treaty in a manner which imposed severe restrictions on the Government's room for manoeuvre by re-emphasising the preamble of the Basic Law and thus diminishing the very certainty which the Eastern treaties were supposed to provide.

After 1973, the confusion of powers moved to domestic affairs. In 1974, the Federal Parliament voted by majority legislation declaring abortion during the first three months of pregnancy legal. Again, one of the *Länder* which had a government led by the Christian Democratic Union (which was in opposition in the Federal Parliament) went to the Constitutional Court, and gained an injunction against the Act. Then, the C.D.U. parliamentary party started action to declare the law unconstitutional. It is not irrelevant to mention at this point that in all these cases a guessing game went on in Bonn as to which of the two chambers of the Court would "get" the case: the "black" chamber (in which judges who had been favourites of the Christian Democrats on their election by a parliamentary committee have a majority) or the "red" chamber (with an assumed majority of members with Social Democratic inclinations). The "black" chamber got the abortion case and ruled that the act was contrary to Article 2 of the Basic Law which guarantees the basic right to "life and physical inviolateness," and was therefore unconstitutional. Broad hints in the argument provided guidelines for new legislation which makes legal abortion dependent on certain medical and social "indications" rather than a fixed term; the Bill has since been enacted along these lines, still against most opposition votes, and with the possibility of another case brought before the Court by the opposition as yet undecided. A little later, another piece of controversial legislation came up, this time about industrial co-determination. The Government, cautioned by its earlier experiences, made inquiries and had expert opinions prepared about the constitutionality of certain provisions, as a result of which—much to the chagrin of the Social Democrats, although to the pleasure of their Liberal coalition partners who in fact held the Ministry of the Interior which is in charge of such inquiries—it was decided that the right to property laid down in the constitution required that whenever there is deadlock on supervisory boards between the owners' representatives

and the workers' representatives, the owners will have to have the last word.

A fuller account would qualify the examples somewhat, for instance by examining the dissenting opinions expressed in these cases. On the other hand, there are further examples including some from other branches of the meandering judiciary of the Federal Republic; and the elements needed for my analysis are all in the three illustrations given: the general question of overruling legislation by judicial action, the particular question of the definition of guidelines of political action by the judiciary, and the ugly suspicion that judges may be tempted to let their political views influence judicial decisions.

Before I go any further, let me spend a moment making it clear what I am not talking about in the analysis of these examples. In the first place, I am not concerned with the "personality of lawyers." This of course is the title of Walter Weyrauch's book which incidentally (or not so incidentally?) is based on interviews with German lawyers, and concludes *inter alia*:

> "It is doubtful that the activities of lawyers all over the world will effectively bar the recurrence of any of the more disturbing past events, such as antidemocratic movements, war and other forms of violence, extreme nationalism, race hatred and other prejudices, suppression of minorities, general suspiciousness, jealousies and resentments. Some of the personality features of lawyers even seem to encourage antidemocratic developments." [1]

I must confess to having done some such research myself, resulting in a paper on the social origin of German judges, with a view to predicting their behaviour.[2] Whatever the intrinsic problems of this approach, however, it is largely irrelevant to an analysis of institutions, the judiciary and the legislature, law and politics. Nor do I intend to analyse the German case as such. This again is a temptation to which I have yielded at other times,[3] and one which has produced a considerable literature. Ernst Fraenkel, for example, in looking at "Historical Obstacles to Parliamentary Government in Germany," wrote:

> "One of the most serious obstacles to German parliamentarianism was that it was conceived, not in the image of English constitutional reality, but according to the mirage of a system of constitutional law that was alien to the pragmatic English approach." [4]

It seems quite likely that a rigid conception of "the law," coupled with an implicit Hegelianism along the lines of "the State as the

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[1] W. Weyrauch: *The Personality of Lawyers* (New Haven–London, 1964), p. 280.

[2] R. Dahrendorf: "Bemerkungen zur sozialen Herkunft und Stellung der Richter an Oberlandesgerichten," *Hamburger Jahrbuch für Wirtschafts und Gesellschaftspolitik*, 5 (1960), p. 260 *et seq.*

[3] *Cf.* the chapter on "Lawyers of the Monopoly" in my *Society and Democracy in Germany* (New York–London, 1967).

[4] E. Fraenkel: "Historical Obstacles to Parliamentary Government in Germany," in *The Path to Dictatorship 1918–1933* (New York, 1966), p. 22.

reality of the moral ideal," has something to do with the history of democracy in Germany. But my examples were taken from the Federal Republic today, that is, from the one sustained successful period of German democracy. They are, if anything, illustrative of a more general trend towards "political justice" along the lines suggested by Otto Kirchheimer in a brilliant article written in 1955:

> "Since the First World War, political justice is progressing everywhere. It not only pervades the practice of communism and is widespread in the Third Reich. It was also a *leitmotif* of the Weimar Republic and belonged to the traditions of the Third Republic in France. More recently, it has gained a steadily increasing share in the shaping of political conditions in the United States. Among the leading countries only Great Britain is today distinguished by a large measure of reticence in this area." [5]

But here I must halt for a moment: Britain pragmatic where Germany follows a mirage, constitutional reality *v.* constitutional law, Britain hesitant to have the law impinge on political decisions when everyone else allows this to happen—this is certainly in keeping with prevailing beliefs, but is it also true? Or, more precisely: Is it still true that the strict separation of the two powers, the legislative and the judiciary, is an undisputed assumption of British society? It is not; and whatever the real position may be, public debate has certainly moved in a very different direction, towards Europe perhaps, or even towards the American tradition.

When Andrew Shonfield recently talked about British "law in a muddle," he had two issues in mind, industrial relations and devolution.[6] In the case of the Trade Union and Labour Relations (Amendment) Act of 1976—Shonfield argues—it was obvious to all that organised workers might and could abuse their power to restrict the effective freedom of the press. But the Government, and Mr. Foot in particular, were concerned with what they regarded as an overriding value, "and that was to avoid even the suspicion that the Government might wish to put the slightest legal constraint on the exercise of industrial power by any group of trade unionists." Similarly, and perhaps closer to the heart of the matter, the original government proposal for devolution was patently unconvincing. "It looks like a device for irritating the very people whom it is intended to placate." But it has its logic. "The answer is that leading British politicians will do almost anything in order to deny Scotland the right to turn to an independent, third party for a judgment on a difference between it and the British Government." And they will do so because they regard bargaining between parties, or even adversary debate and majority rule, as the appropriate method for resolving conflicts. Jurisdiction is not a concept that has any place in Britain's political culture.

Shonfield regrets this fact, and in doing so he has powerful allies.

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[5] O. Kirchheimer: "Politische Justiz," in *Politik und Verfassung* (Frankfurt, 1964), p. 98. My translation.

[6] A. Shonfield: "The Law in a Muddle," *The Listener*, March 25, 1976.

For while Sir Leslie Scarman, in his *Hamlyn Lectures*, carefully abstains from ascribing any political function to the law, he leaves no doubt that he is in fact talking about a new political contract, a redefinition of the British version of the distribution of powers. The common law, Scarman says, preceded parliament.

> " This strength, when ranged alongside the power of Parliament, gave it victory over the King in the seventeenth century and led to the constitutional settlement of 1688–89. But the true victor in that settlement was Parliament, whose sovereignty then began. Today, however, it is Parliament's sovereign power, more often than not exercised at the will of an executive sustained by an impregnable majority, that has brought about the modern imbalance in the legal system. The common law is no longer the strong, independent ally, but the servant of Parliament." [7]

In order to redress the balance, and above all to fill " the legal vacuum " which has emerged in certain public law areas, a new constitutional settlement is needed, based on " entrenched provisions (including a Bill of Rights), and restraints upon administrative and legislative powers, protecting it from attack by a bare majority in Parliament," and including " a Supreme Court of the United Kingdom charged with the duty of protecting the Constitution." [8]

This then is the problem: In a country in which there are legal institutions explicitly charged with the task of guarding the borderline between basic certainties and political variables of social life, a number of problems seem to arise which concern both the nature of politics and of the law. There is, or appears to be, an unfortunate confusion of powers. In a country, on the other hand, in which politics is at least in principle unfettered by codified rules, and the law is a mere development of the common law, the separation of powers appears to leave a gap, a vacuum, which has to be filled somehow and of which some feel that it is best filled by judicial rather than political institutions.

At this point, let me look a little more closely at the problems arising from the German examples. In doing so, I shall leave out of consideration technical matters of legal procedure, and concentrate on institutional structures. Moreover, I do not propose to imply that there is anything wrong in the way in which the German Constitutional Court handled the cases put before it, but examine the underlying questions which one has to answer whatever one's substantive views in these matters be.

The first of these questions concerns of course the vexing issue of parliamentary sovereignty and related to it, or even identical with it, of the assumed omnipotence of parliament. The assumption that all sovereignty in a country must ultimately reside in the decisions of the elected representatives assembled in parliament has occupied people

[7] Sir Leslie Scarman: " English Law—The New Dimension " (*Hamlyn Lecture*, 1974), p. 74.

[8] *Loc. cit.* p. 81 *et seq.*

long before the *Hamlyn Lectures* or even the European Communities Bill, of course. As early as 1788 James Madison for example regarded with great suspicion the "superiority" of "the legislative department." [9] Its constitutional powers are "at once more extensive and less susceptible of precise limits" than those of the executive and the judiciary. Above all, it "alone has access to the pockets of the people." Indeed, Alexander Hamilton, in referring to Madison's analysis a few months later, concludes that there is an "almost irresistible" tendency for "the legislative authority to absorb every other":

> "The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves; they betray strong symptoms of impatience and disgust at the least sign of opposition from any quarter; as if the exercise of its rights by either the executive or the judiciary, were a breach of their privilege and an outrage to their dignity." [10]

Both Madison and Hamilton seem to approve of Jefferson's categoric statement in his "Notes on the State of Virginia": "An elective despotism was not the government we fought for." [11]

This is not of course what the English debate about the European Communities or devolution is about, nor is it the lesson of the German example. Indeed, it is probably true to say that parliament is, and was at all times, bound by numerous invisible bonds. Its theoretical omnipotence was and is severely curtailed: by precedent, for its ability to overturn earlier legislation invariably has consequences for its credibility; by external obligations, for its right to ignore treaties, if exercised, ultimately leads to impotence in international affairs; by groups and forces outside parliament; for "the people" never were an unstructured public of isolated individuals; by the assumptions built into the settlement which sets up a parliament with such powers, for without the rights of man guaranteed, freedom of expression and coalition, the inviolability of life and even of an individual's possessions to some extent, there can be no independent legislative power of any importance. The question is, rather, what there is to be gained by spelling these restrictions out, by codification and the consequent change in institutional balance. The result may be—as the German case shows—a parliament (and a government) that looks over its shoulder, and is afraid to use its sovereignty for what it is worth. Much as some may approve of the substantive consequences of such attitudes, a certain centripetal force perhaps, or a deterrent to extreme positions, it clearly leads to a de-politicisation of the legislature, and whatever despotism results is certainly not "elective."

I shall return to this point, but first let me look at a second implication of the German experience which follows from the first,

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[9] *The Federalist*, No. 48.
[10] *The Federalist*, No. 71.
[11] Quoted by Madison in *The Federalist*, No. 48.

although it invites sociological rather than institutional analysis. It is probably fair to say that one of the crucial virtues of institutions is their elasticity. Times change, and with them the interests and views of people as well as the conditions under which these views are expressed. A constitution which provided a comprehensive description of conditions in a society at a given time, and crystallised them into "the law," would soon be out of date. Once it is out of date however, the demand for change is of necessity a demand directed against "the system," the constitution itself. Inelastic institutions, including certain kinds of constitutional settlements, breed extra-institutional extremism; the ability to combine firm statements of principle with openness for change in practice is the sign of a wise constitution. It is here that the American constitution has proved so admirable, whereas the German constitution presents evident problems. It is hardly surprising that in 1948, the fathers of the Basic Law wrote a statement about German reunification into its preamble; in fact, at that time, Germany, while occupied by four powers, was still one territory. But today this clause, however laudable it may appear as a statement of long-term intentions, may restrict a government's room for manoeuvre; more than that, it has become misleading in at least some respects. It simply does not make sense for a court to state (as the Federal Constitutional Court did) that there is no difference between the border separating the Federal Republic from the German Democratic Republic and that separating Bavaria from Hesse. A court which reminds the government that such legal fictions are nevertheless "valid," risks the preparation of far more radical changes than are intended at this time.

Perhaps this is a case where the personality of lawyers, especially as it derives from training in certain kinds of legal tradition, makes a difference. There are legal systems which encourage a certain dynamism in the thinking of lawyers, especially judges, and others which do not. The latter sanctify a text to the point at which jurisdiction becomes philology as much as judgment, and it is not unreasonable to assume that those who judge are tempted to do so along protestant rather than catholic lines, to examine the original texts and the motives of their authors rather than to wonder what they would have said if faced with a new situation. (Although it has to be admitted that the American Supreme Court has taken the catholic line more often than not.)

This then is the dual danger surrounding a written constitution where it impinges on the political process: it may serve to decelerate change to the point where only major changes involving the constitution itself satisfy existing demands; by appearing to be an instrument of moderation, the constitution may in fact promote radicalisation. It may also lead to hypocritical behaviour, paying lip service to the law as it is laid down while proceeding in directions of dubious legality; by appearing to be an instrument of stability, the constitution in fact becomes irrelevant. I am not saying that either of these is

happening in the Federal Republic to any considerable extent. But it is quite conceivable that pressure for greater power of employees over the decisions of enterprises will continue to grow to the point where constitutional provisions about property (Arts. 14, 15) as they may be interpreted by the Constitutional Court will force those demands to become unconstitutional and thus radical, if not revolutionary. It is equally conceivable that over time, governments would find it expedient, possibly with the consent of the opposition and indeed in the interests of the people, to ignore the provision about reunification and act as if the Federal Republic were a state like any other state, and not in need of "completion" by unification with another state, in which case the constitution would have to be ignored, but would remain an awkward reminder of past concerns, Either way, it would be difficult to argue that the law had actually helped society.

This leads me to a third question arising from the German examples, which is no less big, and indeed I begin to feel quite embarrassed about dealing with great questions of the ages in such a casual manner. It is the question of what the law, and the judiciary, are actually about. Alexander Hamilton, in the inimitable style of that great document in pragmatic political theory, *The Federalist*, turns the philosophical question into one of practical politics: "the mode of appointing the judges," "the tenure by which they are to hold their places," and "the partition of the judicial authority between different courts, and their relations to each other." But he knows that there is more to his questions than strikes the pragmatic eye:

> "Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." [12]

Perhaps this is what Montesquieu meant by his puzzling statement that the third power, the judiciary, is "*en quelque façon nulle*," somehow non-existent.[13] In fact, I shall argue in a moment that some political cultures overcome such limitations. But the point is hard to

[12] *The Federalist*, No. 78.
[13] Montesquieu: *De l'Esprit des Lois*, Book XI, Chap. VI.

dispute that the capacity of the judiciary for self-defence is limited. There is no constitution which can guarantee that a supreme court remains in operation, let alone that its sentences are observed. Governments have found many ways of rendering the judiciary irrelevant where they found it expedient, ranging from downright abolition or suspension of constitutions through the use of the judiciary for political purposes to the more subtle instruments of control, such as the refusal to appoint the number of judges necessary for providing a constitutional quorum. In a technical sense, the law is powerless, and no amount of rhetoric or parchment will change this fact.

The positive aspect of the same point is that the power of the law, and of the judiciary, is in its independence. There are excellent reasons why notions like respect and dignity should be associated with the law above all. There are equally good reasons why the appointment of judges, and their tenure of position, should be arranged in such a way as to emphasise that they are not dependent on any other branch of public authority, at least once they have been appointed. The power of the law and of those who administer it is in the very fact that they are not competing with the more partisan powers of the executive and even the legislature. Such independence of the "judicial department" may indeed be regarded as the very definition of the "rule of law"; it is certainly an important part of it. If the law and the judiciary come under government control, they cease to be necessary as such; if courts become a part of political struggles, they merely simulate parliament and parties and lose their function. Either way, the partisan administration of law is in fact the perversion of law, and the denial of the rule of law.

Now it is nice and easy to make statements about independence and detachment, but difficult, if not impossible to put them to the test of practice. In fact, there is no such thing as "objectivity," "impartiality," or even independence from controversial values in human life, for if there were, we would have that certainty which we are forever denied. In the face of the fundamental uncertainty of knowledge and of judgment in which we find ourselves, there are essentially two possible approaches; to accept differences and build them into the process of making decisions, even legal decisions; or to try to achieve as much impartiality as is humanly possible. Both approaches have their dangers. The former is of course the German one, by which, for example, High Court judges are appointed by a parliamentary committee in which political parties bargain for relative advantage. Logical as such an approach may be, or at any rate realistic, it results in talk of a "black" and a "red" chamber of the Constitutional Court, and perhaps even in a certain inclination to pronounce on matters which are politically controversial. The other, and less likely approach is the one preferred in Britain. Not only the professions, the civil service and the B.B.C., but above all the judiciary are removed from the adversary struggles of politics

and endeavour to prove their independence by non-involvement rather than by representative involvement. I cannot deny that I find this preferable, but I suspect that it is totally incapable of translation to other cultures; for it requires attitudes rather than institutions. Elsewhere, therefore, the presumption of reticence will have to take the place of the practice of impartiality as a safeguard of independence. Nine times out of ten, judges of a Constitutional Court should say that they have nothing to say, in order to make sure that their power of independence is not jeopardised. In any case it is clear that the suspicion of the partisan administration of law in the end hits the law and its legitimacy itself. In this way, a written constitution can come to weaken rather than strengthen the assumed constraints on political action.

But here I must check the flow of my argument and turn to the central point at issue: Is all this, the example of politics by jurisdiction and the possibility of the partisan administration of law, a case against a written constitution? Is the upshot of my case the claim that Britain is actually better off by not having a constitution and a supreme court than those countries which have to worry about infringements on the sovereignty of parliament, the inelasticity of written constitutions, and the partisan administration of law? The answer is not simple; it cannot be. In a sense it is Yes and No at the same time (and I suppose I have to apologise for such indecision in a culture in which idiosyncratic certainties are held in high esteem). Many of Sir Leslie Scarman's points are in my view irrefutable. The challenges to the common law system are evident; and it is difficult to see how they can be met by merely extending interpretations of the common law further and further. The restrictions on parliamentary sovereignty are also evident; and it is difficult to see why they should not be codified in order to provide people, members of parliament and other citizens alike, with a more reliable guide than uncertain memory can. Yet I think that there is something wrong about the delight with which some embrace the idea of a new constitutional settlement. The experience of other countries seems to indicate that while there may be a case for change, it is a difficult case and one that requires careful analysis of implications. Codified norms cannot hold up real social developments for any length of time; and at times they may become the source rather than the remedy of conflicts. When I made this point at a recent seminar Professor R. M. Dworkin replied:

> "Professor Dahrendorf says that although an entrenched Bill of Rights and judicial review cannot prevent a civil war it might well cause one, and in a certain sense it did. The United States has only had one civil war and the decision of the Supreme Court in the *Dred Scott* case probably contributed as much to the Civil War as anything else. It was however a decision not to intervene in the name of the Constitution rather than a decision to intervene. Recent United States history suggests some qualifica-

> tion of Mr. Justice Jackson's opinion that a judicial decision can't prevent a civil war. I do not know whether in the next two decades we may have a racial civil war or if a decision of the Supreme Court will have been in any large part responsible for preventing it. I also think that in the long term the decisions of the Supreme Court may have been instrumental in preventing a different kind of civil war." [14]

For an amateur like myself it is almost embarrassing to disagree with an authority of Professor Dworkin's stature. In the terms of the seminar on Sir Leslie Scarman's lectures to which I have just referred, however, my sympathies are with Mr. Timothy Raison who said:

> "I for one believe that the real need is to strengthen Parliament against its outside rivals: after all, the rule that no Parliament can bind its successor enables it to get rid of obnoxious legislation as well as to impose it—so long as there is no outside force to block it." [15]

But I have rushed ahead of my argument. What I am trying to say is that if there is a need for some kind of codification of human rights and perhaps federal arrangements, it is important to approach the task in the right spirit. I would argue that this spirit should be political rather than juridical, and that the more Britain retains the specific flavour of its institutional tradition, the more likely it is to avoid some of the pitfalls of different approaches, be they European or North American.

Like the division of labour, the separation of powers is a very theoretical concept indeed. It is above all a concept, and not a fact; what we see is not the division of labour, but its combination in the co-operative structure of organisations; it is not the separation of powers, but their co-ordination and sometimes their confusion. It is useful to think of government, parliament and the judiciary as separate functions; it may to some extent be important to institutionalise this separateness, for example by safeguarding the independence of the judiciary; but the theoretical separation of powers is merely the preface to the main volume of practical problems of how the different and possibly separate powers should be co-ordinated. James Madison saw this even more clearly than Montesquieu himself, who of course realised that the powers of legislature and executive in Britain were anything but separate. Like Montesquieu, Madison preferred the term "distribution of power" and proceeded to look for "the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct." [16] And this seems quite clear to Madison, as it does to common sense, that it does not make sense to assume "that the legislative, executive and judiciary departments should be wholly unconnected with each

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[14] *Cf. English Law and Social Policy.* A Symposium based on Sir Leslie Scarman's 1974 *Hamlyn Lectures.* (Centre for Studies in Social Policy, 1976), p. 38.

[15] *Loc. cit.* p. 6.

[16] *The Federalist*, No. 47.

other"; on the contrary, the real question is how they are "connected and blended." [17]

From this point onwards, however, I would part company with Madison. For he advocates a balance of powers which, while plausible in theory, has not in fact characterised any one society over any considerable period of time. The fact is that societies vary in the way in which they blend and connect government, parliament and the judiciary, and these variations have a great deal to do with our problem. There is not only the elective despotism of omnipotent parliaments, but also the authoritarian despotism of unfettered governments and even the despotism of a greedy judiciary; and there are, more relevant perhaps, benevolent versions of the three. Government, the executive power of the sword, in control of that "monopoly of physical force" which for Max Weber defines the state, is clearly the least expendable of the three powers. It is for that reason the most likely to usurp the others, or even to prevent their emergence and growth. The history of liberty is in one respect a history of wedging power from omnipotent governments—S. Huntington and others, although not myself, would say to the point of making them impotent and our societies ungovernable. The despotism which was uppermost in Montesquieu's mind as the system to be avoided was one in which government controlled not only the sword but also the will of the people and the scales of justice. And our own world is unfortunately littered with examples of the curtailment and even abolition of parliamentary and judicial institutions in the name of "effective government": how sad it is to see the name of India added to this list of shame. And in order not to sound hypocritical let me add that one of the fundamental differences between variants of the despotism of governments is between those which restrict the powers of parliaments, and those which curtail the independence of the judiciary. Democracy is precious, but the rule of law is indispensable, and the two often do not go together. If a case were made for an Indian government having to take measures which no elected parliament can reasonably be expected to approve, so that the powers of parliament have to be suspended for some time, it would be hard to accept and likely to be a great error; but there may be times when it is difficult to reject such a case out of hand. However, at no time can it be acceptable to cross the boundary between expediency and morality, and suspend the rule of law in the sense of leaving elementary human rights in the partisan and often soiled hands of governments. Bismarck's Germany was not democratic, but it observed the rule of law; Hitler's Germany abandoned both and thus turned into tyranny. One must hope that Mrs. Gandhi's India will not follow the same downhill path. For the point which I am trying to make is that there are differences even in the disagreeable area of the despotism of governments.

[17] *The Federalist*, No. 48.

However, my subject is really that of the relation between the judiciary and the legislature, and of the encroachments of one upon the other. I have quoted Sir Leslie Scarman's and Andrew Shonfield's doubts about exaggerated claims for parliament, and the fears which the authors of *The Federalist* papers expressed in this regard nearly two centuries ago. But there is another way of co-ordinating the distributed powers of government, parliament and the courts, and I can find no better way of describing it than by quoting a memorable passage from Judge Learned Hand's Oliver Wendell Holmes Lectures of 1958 in which he re-stated the case for a Bill of Rights:

> ". . . it was probable, if indeed it was not certain, that without some arbiter whose decision should be final the whole system would have collapsed, for it was extremely unlikely that the Executive or the Legislature, having once decided, would yield to the contrary holding of another 'Department,' even of the courts. The courts were undoubtedly the best 'Department' in which to vest such a power, since by the independence of their tenure they were least likely to be influenced by diverting pressure." [18]

While this sounds convincing, it is not without problems. As I have tried to show, there can be a judicial despotism as well, a tendency for the judiciary to encroach on the political process to the detriment of the elasticity of the system as well as the very independence of the judiciary which gave it its power in the first place. There are in fact traces of this in Germany; it is a part of the continental tradition in other countries as well; and it may be argued that the United States have moved in the last decade (if not much longer) into the direction of that political justice in the sense of Kirchheimer, in which the courts do not adjudicate between conflicting "departments" in the light of agreed rules, but endeavour to serve a creative function, progressive as it may be in the United States by contrast to the more retarding influence of courts in continental Europe. Judge Learned Hand was not unaware of this possibility, for he continues his plea like this:

> "It was not a lawless act to import into the Constitution such a grant of power. On the contrary, in construing written documents it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking. That is no doubt a dangerous liberty, not lightly to be resorted to; but it was justified in this instance, for the need was compelling. On the other hand it was absolutely essential to confine the power on the need that evoked it: that is, it was and always has been necessary to distinguish between the frontiers of another Department's authority and the propriety of its choices within those frontiers. The doctrine presupposed that it was possible to make such a distinction, though at times it is difficult to do so." [19]

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[18] L. Hand: *The Bill of Rights* (New York, 1974), p. 29.
[19] *Loc. cit.* p. 29 et seq.

In other words, it is not a matter of course that the law should be given the role of co-ordinator in the process of distributing powers, and if it is, its boundaries have to be defined as well as its territory.

It is here that my concluding argument may gain some force. In one way or another, the three great powers of the sword, the will and the judgment are present in all human societies. The possibility to distinguish between them is in itself a sign of the advancement of liberty; its extension leads to powerful parliaments and independent courts of justice. At this stage, however, the question begins to arise how societies choose to co-ordinate the distinctive powers, how, in Learned Hand's terms, they see to it that the system does not collapse. Some continue to trust government above all and thereby render both democracy and the rule of law precarious. The problems of despotism arising from such tendencies are by no means obsolete or even anachronistic. Other societies, and notably those which place great reliance on written constitutions including entrenched clauses, tend to trust the judiciary with the task of co-ordination. In doing so they invariably run the risk of politicising the administration of law by inviting jurisdiction over matters of political controversy. The German examples which I gave at the outset are cases in point. Then there are societies which are cast in a parliamentary light. Here the law tends to become the "servant of parliament," to use Lord Justice Scarman's words, although not in the sense of the politicisation of the law, but in that of its inability to restrain parliament where this may be tempted to transgress boundaries defined elsewhere by a Bill of Rights. In this way, the judiciary loses relevance and, which is worse, the citizen loses protection where he needs it most.

In reality the choice is not as stark as it appears in such simple statements. There are shades of elective despotism in Britain, and of judicial despotism in Germany and perhaps the United States; moreover, both whiffs of despotic dominance are linked in definite ways with the power of the executive, government. Yet in some sense a choice has to be made. This is bound to be a choice in place and time. All countries have government; all countries should have the rule of law, and the strengthening of the hand of the judiciary may therefore be the prime issue in India and elsewhere in the developing world; in one sense democracy is desirable everywhere, for it is the only form of government which allows for non-violent change, but it may have to take second place to the rule of law. So far as Germany is concerned, moreover, a certain strengthening of democracy, of parliament, would not destroy the rule of law, the power of the courts, including the constitutional court. This may not even require a rewriting of the constitution or any part of it, but merely its confident use by parliament. Conversely, in Britain, some greater emphasis on the rule of law may not come amiss, including possibly the explicit recognition that the sovereignty of parliament is not a sufficient guarantee of human rights, or of a balanced relationship

between the individual and government, various institutions, or indeed the constituent parts of a federal structure. This may involve the creation of a codified Bill of Rights and a Supreme Court of the United Kingdom.

But—and I apologise to those who now find that I have made rather too many words in order to give reasons for this final "but" —it seems essential that any move towards greater judicial power should be a grudging response to needs rather than an enthusiastic embrace of apparent ideals. A written Bill of Rights and a Supreme Court not only solve problems, but they also create problems. There may be some justice in complaints about rapid changes in government policy, the power of extreme wings within parties, and the effects of adversary politics; but the opposite faults are equally problematical: the absence of necessary changes in policy, the awkward scrummage in the political centre, and the dangerous boredom of consensus politics. Even apart from the question of what exactly the effect of new institutions is in a given context, it may be useful to remember that a society cast in a political rather than a legal mould is also one which is capable of responding to exigencies which find more rigid societies stunned and dumb. This is not true for any kind of politics, of course; I should perhaps make it clear that I am advocating the world of A. V. Dicey and not of Carl Schmitt, of democratic politics and not of any political magic in and by itself. Ultimately, the guarantee of liberty cannot rest with government and will not rest with courts of law, but it is in the hands of the people and their representatives. There is no way around parliament if a people wants to avoid confusions of powers which threaten liberty. Parliament may be an untidy and often disappointing institution to trust, but in this respect as in others it merely reflects the imperfections of human nature.

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