FREEDOM AND STATUS*

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The world is full of people who talk about freedom. They talk about political freedom and economic freedom and the freedom that can be guaranteed only by the "rule of law". They talk about freedom from fear and freedom from want and they refer to free speech, free trade, free enterprise and the free world. But there is more talk about freedom than analysis of it and it is not always recognised that the word freedom has different meanings in different contexts, that some kinds of freedom are inconsistent with other kinds of freedom, and that some kinds of freedom have more value than others. The word freedom is not included in the technical vocabulary of the law. Lawyers speak rather of rights, and a man is free when he has a right which the law recognises and protects by the imposition of duties on others. It is not inconceivable that a legal system designed to protect rights could appear to an outside observer to be a complex of stringent duties, particularly to an observer who did not understand or recognise the rights which are protected. Most people upon reflection would agree that where there are rights there are duties, and whether one sees society as free or repressive sometimes depends on which side of the right-duty relationship one is on. We all feel free in some things and unfree in others and indeed this is the essential characteristic of a moral individual.

Even after reflection and the recognition that duty and freedom are not two separate concepts, most English and American people would place a very high value on freedom. And naturally they have achieved a remarkably advanced realisation of freedom in their political, social and legal institutions. In particular we point with pride to the historical fact that whereas in early law people were not treated as individuals but as members of a class, by the beginning of the 20th century they were free as individuals to determine their place in society and before the law by the exercise of their own wills. "Ancient Law" it has been said, "was a jurisprudence of personal inequalities," which were based partly on social rank, partly on land tenure, partly on custom. These factors determined a man's status. Members of a family, slaves, serfs, infants, the clergy, free men and villeins, and, until quite recently, married women had a status which subjected them to legal disabilities or clothed them with legal immunities or privileges which were not subject to variation by contract. So that in 1866 Sir Henry Maine in his *Ancient Law* could say that "the movement of the progressive societies has hitherto been a movement from status to contract". And in a sense and in his time and within the limits of his definition of status he was right.

But in the 20th century it has been frequently pointed out that there is a growing tendency in English Law to restrict the freedom of individuals and to return to something in the nature of status. If this is

* Acknowledgment is gratefully made to the University of Otago Press, from whom copies of this lecture are available at 25 cents a copy.

true it may seem a strange kind of reversal for a people which has not only proclaimed freedom in the past, but continues to do so today.

Even when Sir Henry Maine wrote, some of the kinds of freedom which had undoubtedly developed over the centuries with the gradual dissolution of the bonds of tenure and status, had already tended once more to be restricted, although not of course by a return to tenure and status in a feudal sense. These had vanished with the system which had produced them. But in 1914 Dicey, in the second edition of *Law and Public Opinion in England,* could trace a reaction from freedom of contract to something in the nature of status. In particular the freedom of individual workers to enter into contracts with their employers had shown that some kinds of freedom were illusory. This led to the development of the process of collective bargaining by unions and employers, and to various kinds of direct statutory intervention into the contractual relationship.

Since Dicey's day the reaction from contract to status has developed extensively, and many of the freedoms which seemed to Maine to be the end result of a long development towards civilisation have been limited or taken away either by statute or by changes in commercial and industrial practice. It may be of interest if I outline and roughly classify some of the many kinds of restriction which are in existence today.

The contract of employment is now determined almost wholly by collective bargaining between union officials and representatives of employers, and many of the terms of the contract have been included in awards which have statutory force. Further, the minimum conditions of employment relating to wages, hours of work, holidays, and the safety of the worker are laid down in Factories Acts, Machinery Acts, Minimum Wages Acts, Coal Mines Acts, Harbour Board Regulations, Workers Compensation Acts, and many others.

Even apart from contracts the terms of which are determined by collective bargaining or by statutes, there are many contracts which are not the result of individual negotiation. It would be impossible for many large institutions to enter into separate contracts with each of large numbers of people, and many small institutions are not willing, or would find it quite impracticable, to do so. They must treat the persons with whom they enter into contractual relations not as individuals, but as members of a class. University employees are an example. The contracting parties must accept the terms of the contract or refrain from entering into the contract at all, which in many cases is impossible under modern conditions. Most insurance contracts, building contracts, hire purchase contracts, transport contracts and contracts with lending institutions and Government and local bodies are of this type.

As a result of the standardisation of contracts and as a result of the recognition that even in contracts which are not standardised the parties are not always on equal bargaining terms, the State has had to interfere in many cases to protect the weaker party. Notable examples are the Hire Purchase Acts in England and New Zealand which insert into the hire purchase agreement a number of terms which the parties are forbidden to exclude, and the Money Lenders Act which dictates the form of any loan caught by its provisions.

The State sometimes compels people to make contracts, as in the compulsory third party insurance provisions of the English Traffic Act

or the New Zealand Transport Act, and the compulsory insurance required by the Workers Compensation Act against claims under that Act.

The State will sometimes fix the maximum price for certain commodities as under the Control of Prices Act 1947. A particularly important example of controlling prices was contained in the Land Sales Act 1942 which fixed the maximum price of land in order to ensure that owners of land would not obtain the increased valuation of the land which was caused partly by the demand for houses and partly by the improvement of the surrounding land. It is not impossible that some similar control will have to be re-imposed in future.

The State will sometimes refuse to allow some people to enter into certain kinds of contracts at all. So only a limited number of people are allowed to operate in the transport industry and the liquor trade, and then only under rigid conditions. Many other occupations now require a licence by the Government or a local authority.

Even when full competition is allowed the State may be forced to impose restrictions on certain commercial practices designed to achieve and maintain monopoly conditions, as for example by the Trades Practices Act 1958. Further control may be exercised by selective restrictions on imports or by the limitation of available exchange.

Most of the examples I have mentioned illustrate the restriction of freedom in the field of contract. In recent years a number of statutes have encroached deeply into the freedoms which for centuries have been deemed to constitute the very essence of the rights of ownership of land. In New Zealand the Tenancy Act 1936 restricted the landlord's common law right to possession of land both at the expiry of a lease and during the continuance of the term of a lease upon breach of certain conditions, and it also limited the rent which a landlord could charge to a "fair rent" to be determined by a Government Department or by a court. These principles are still in operation under the Tenancy Act 1955 although a large number of leases are now excluded from the operation of the Act. In England the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 and its many amendments, the Landlord and Tenant Act 1954, the Agricultural Holdings Act 1948, and the Furnished House (Rent Control) Act 1946, have given protection to tenants which goes much further than the New Zealand Act, no doubt because of the problems caused by the pressure of population and because of the fact that a much greater proportion of people in England live in rented houses.

The Town and Country Planning Act 1953 imposes extensive restrictions on the use of land "for the purpose of the conservation and economic development of the areas of land which come within the Act" and to ensure that the land will be used in such a way "as will most effectively tend to promote and safeguard the health, safety and convenience, and the economic and general welfare of the inhabitants and the amenities of every part of the area". Thus areas can be allocated for agricultural, residential, or industrial purposes. Industrial purposes may be sub-divided into heavy and light industry. Areas must be reserved for shopping and recreation facilities and so on.

Particularly striking and relevant for my argument is the English Agriculture Act 1947, in which following upon the almost total control which the State took over land and industry during the war, Parliament maintained a large measure of control over all agricultural

land. The Act laid down standards of good estate management and good husbandry and if the Minister was not satisfied that an owner or tenant of farming land was not reaching the standards, he could make a supervision order which would enable him to give directions to the owner or tenant. If these directions were not obeyed the land of an owner could be acquired by compulsory purchase or a tenant's lease could be determined. The stringency of this Act was considerably decreased by the Agriculture Act 1958 which removed the power of the Minister to give directions except under certain special circumstances and also removed the sanction of compulsory purchase. The change in the Act of 1958 is an example of how the movement towards control of land varies in tempo under different Governments with different political principles but the general trend is unmistakable. Whatever the change in tempo may be the increasing pressure of facts forces Governments of whatever political persuasion to control the economy. No similar Act is yet in force in New Zealand for the need for such an Act is partly determined by the large population of England and by the fact that it is an importing country. It is, however, interesting to note that by section 99 of the New Zealand Land Act 1948, tenants of Crown land under that Act are subject to an implied covenant that they will farm the land diligently and in a husbandlike manner. I understand that this section is not stringently applied, nor of course does it apply like the English Act to owners of land, and the implied covenant is simply a term in the standardised contractual lease. However, the long term renewable leases under the Act are akin to full ownership and it is not difficult to imagine a development by which such an implied covenant becomes applicable to owners of land which is not technically Crown land under that Act.

Other Acts which impose direct or indirect obligations on land owners are the Land Settlement Promotion Act 1952 which places some limits on the undue aggregation of farm land and gives the Minister power to acquire parts of very large farms for settlement; the Rabbits Act 1955 and the Soil Conservation and Rivers Control Act 1941 under which the duties which are primarily those of the occupier can be carried out by administrative bodies at the expense of the land owner by the operation of rating powers given by the Acts.

These examples show that Maine's use of the word "hitherto" was prophetic. In many fields of human activity freedom of contract either does not exist at all or is illusory. At least one party to many contracts has something in the nature of a status. He is regarded not as an individual but as a worker, a hire purchaser, a consumer, an insurer, or a borrower. He is a member of a class which is protected or restricted in some way by the State. He is not even fully free to enter into some kinds of contract for many of these contracts are necessary to him.

The statutes which deal with the relationship between landlord and tenant go a long way, particularly in England, towards giving tenants security of tenure and in this sense giving tenants a status which they did not have previously. The English Agriculture Act 1947 even as amended by the Act of 1958 goes further and imposes positive duties on tenants and retains power in the Minister to give directions to owners in the national interest.

The Town and Country Planning Act can perhaps still be explained in terms of the law of restrictive covenants. It is expressed mainly in the form of "must nots". But once the principle that the law can

impose positive duties on wide classes of persons has been accepted, it seems unrealistic to refuse to recognise that in fact many statutes do impose positive duties both on owners of land and on parties to contracts, even although many of the duties are expressed in negative form. Very often the difference between the positive and negative forms is inessential, the negative form merely paying lip service to a conception of legal freedom which would leave the imposition of positive duties to morality. In other cases (for instance under the Town and Country Planning Act) the statute leaves the owner a limited amount of freedom by saying that he must not for example, use land zoned as Industrial A, for purposes a, b, c, d, . . . but sometimes this is equivalent to forcing him to use it for purposes r, s, t, u, . . . No Government would dare to legislate to the effect that we must all get up at 6 a.m. but many Governments now declare that 6 a.m. is to be called 7 a.m. The form of freedom is preserved but the result is the same.

The general principle underlying these changes in the law of contract and land law is to be found in the modern tendency to expand public law at the expense of private law. This tendency is founded on the recognition that the acts and contracts of private individuals may adversely affect the public welfare. In the law of contract this principle operates to limit the freedom of the parties to many contracts in the interest of the weaker party. He is protected not only from the stronger party but from himself. And the principle goes further in restricting the freedoms of both parties in the interest of the community. In land law there has been an introduction of a conception of ownership which includes duties as well as rights. Land is not publicly owned but there is an increasing recognition that a land owner owns something which is of such vital importance to the community that he should be publicly controlled for at least some purposes. Provided that we remember the vastly different social and economic context it is not fanciful to see here the beginnings of a return to something in the nature of feudal tenure by which an occupier of land had to perform certain duties to his overlord or to the Crown, many of which were of a public nature. There would I think be general agreement today at least that an owner of land should not be free to say that he will not use his land at all. Of course, economic pressure will to some extent guard against this. But economic pressure is clearly not sufficient and other indirect pressures have had to be applied. The system of rating on unimproved value is one kind of indirect pressure which tends to force owners of urban land to use it. Other forms of taxation, particularly estate duties, have similar long term effects although they apply very unevenly to different kinds of estates. I can see no reason why the imposition of positive duties should not replace indirect pressures directed to the same end. Even in the United States where private rights are to some extent protected by a written constitution, the tendency of public law to expand is now powerful, and some recent American writers have referred to the resurrection of the feudal concept of "eminent domain". Some kinds of property are deemed to be held upon trust.

I now suggest that the movement from contract to status is likely to gain momentum. I shall then suggest that such a movement is not, as some people fear, a regression and that it will not necessarily involve restriction of significant freedoms.

The first and most important reason for the movement to status is the growth of population. The term "population explosion" is now

a cliché but I am convinced that the implications of increasing population during the next 50 years have not yet been fully grasped. By the year 2000 there will be in New Zealand twice the present number of people to occupy the same area of land. I am not concerned now with the complex economic and social problems which will be created by this change, but only with its effect on the law. It seems obvious that many people who now own large areas of land must either give up land to those who have none or use it for their benefit. The State will have to impose not only restrictions but positive duties.

Increase in population will also increase our neighbours in law. In the case of *Donoghue* v. *Stevenson* [1932] A.C. 562 in the most famous single statement in law in the twentieth century Lord Atkin said:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The duties imposed by this principle must weigh more heavily on each individual as his social context becomes more complicated by an increase in population. Not only will there be an increase in population within our own country but there will be a growing sense of obligation to people in other countries which will ultimately affect the structure of the legal system.

A third reason for the development towards status lies in the increasing recognition of the rights and needs of man and the increasing recognition of the stringency of the duties which protect them. The development of the conception of status in the sense in which I am using it therefore involves two apparently contrary tendencies. Man is at once invested by the law with more rights which are protected by more stringent duties imposed on others, and with more duties which are the correlatives of the freedoms of others. He is at once invested with freedom and shackled with restraints.

I should pause here in my argument to explain more clearly the sense in which I am using the term status. Traditionally in law, the term status has been used to refer to the legal position of slaves, infants, persons of unsound mind, and, until comparatively recently, married women, and all those persons who have had imposed upon them by the law, certain legal disabilities or immunities. There is, however, no reason why the term status should not be used to refer to rights, duties, extra capacities, and even privileges, with which the law clothes a legal person. The essential characteristic of status is that it is a recognition by law of a person's position. No doubt morally a man is entitled to certain rights and subject to certain duties merely because he is a man. He has not achieved the kind of status I am talking about unless the law has recognised them and imposed the duties on him or upon others for his benefit. In this sense upon the passing of the Married Women's Property Act, which gave married women full legal rights, married women achieved status instead of losing it. In this sense the Declaration of Human Rights attempted to create the highest category of status. The development of law is the increasing recognition of human members

of a community as legal members also—the assimilation of legal status to natural status.

In the future therefore there will be more physical restraints caused by the mere presence of greater numbers of people and more moral restraints caused by the recognition by the law of the rights of each individual and both of these restraints will be reflected in the law.

Now this tendency of the law to reverse the trend noted by Maine still worries many people. For, they say, if the movement from status to contract was indeed a movement towards freedom (as indeed it was in some respects) then surely the movement from contract back to status is a movement away from freedom. Involved in this apparently simple argument are at least two fallacies. The first lies in the meaning of the term status. When it is said that Maine's proposition is being reversed it is sometimes overlooked that the term status is being used in a quite different sense. Whether a movement from contract to status is a reversal of Maine's proposition depends on the meaning of status. In my view the present tendency can be regarded as a movement towards significant freedom. The second fallacy lies in the assumption that status in the early sense really did involve lack of freedom. It did not necessarily do so either in practical affairs or in the sphere of morals. Some of the early forms of status imposed duties and it would be an odd use of words to say generally that a person who is subject to duties is unfree. Whether he is free or not depends on the nature of the duties. Further, it would also be an odd use of words to say that because earlier kinds of status involved disabilities or incapacities or restrictions, therefore the persons on whom the status was imposed were less free. A person protected from others or from himself or restrained in some way to protect others is not necessarily limited in any significant way.

It is clear however that the modern intrusion of public law into private law and the much closer interest which the State now takes in very many matters which until recently were considered to be wholly within the choice of the individual, carries with it considerable danger, and I wish now to consider whether this tendency is good or bad. Part of the answer is clear and final. So far as the imposition of negative restrictions and positive duties is necessarily caused by increased population and the increased complexity of national and international conditions, it is ethical nonsense to consider whether they are desirable or not. What must be and what cannot be are ethically irrelevant. As Kant pointed out "the ought implies the can". The imposition of positive duties on a wide scale, which is a fairly new development in law, places legal obligations of a new sort upon individuals. According to the law these obligations "ought" to be carried out. If these legal "oughts" have moral content there is not necessarily any restriction on freedom involved in them. The concept of moral obligation or "oughtness" is one of the most complex terms in law or in ethics. The most elementary analysis of the experience of oughtness shows that it postulates a certain degree of freedom at the same time as it imposes an obligation. It is freedom and restraint at once and he who recognises his obligations does not in any way feel unfree because he feels obliged.

Absolute freedom has no moral significance. As Spinoza said, "If men were born free they would form no conception of good and evil as long as they were free." Whether particular freedoms are good or not must be determined by standards that freedom itself cannot supply. The truth is that man is a gregarious animal. As an individual he has

justifiable claims upon other members of his group and these claims crystallise in specific rights. As a member of a group he recognises the similar specific rights of others and he has duties corresponding to the rights of others. The true question is not one of right or of freedom, but of the complex right-duty relationship. At some stages of history and in different countries at different times the element of right is emphasised, at other stages and at other times the element of duty. It may be worth considering whether the United States does not over-emphasise the element of right, and the Soviet Union the element of duty.

The practical solution of the problem of freedom and authority in a State is not assisted by the use of the word freedom, I doubt whether man in fact does make a general claim to freedom. Many people would be frightened if they got it, others would be lonely. Men with the clearest conception of liberty seek obligation and find their greatest freedom in submission. He would be a poor lawyer who felt that he was significantly restrained by the fact that he is compulsorily a member of a society and subject to restrictions and positive duties as severe as there are in any profession. It is interesting to consider whether there is any relationship between this professional unionism and the kind of compulsory unionism which is at present in issue in this country. But although I doubt whether man claims freedom, I cannot doubt that he claims particular freedoms and it is here that the crux of the problem lies. It may be impossible to evaluate freedom but it is certainly possible, though not easy, to evaluate freedoms.

It is clear then that freedom alone and in the abstract is without significance for gregarious man and since man is subject to duties it is clear that some particular freedoms are also without significance. Some kinds of freedom are incompatible with the social order, some kinds of freedom are incompatible with the industrial order, some kinds of freedom are incompatible with the legal order and putting the matter generally some kinds of freedom are incompatible with the moral order. The problem which is increasingly forced upon us by the modern world is to decide what freedoms are really incompatible with the various orders or norms required in the community of man.

So many claims to particular freedoms have been made in the name of freedom that they have acquired a value much greater than their true worth. They have acquired an unearned increment of value from their association with a general concept of the same name which itself obtains its value from morality. Men have not hesitated to make use of this unearned increment to justify claims to freedoms which are not justifiable in themselves. The name freedom is used like a neon sign to dazzle and persuade the unwary. Within the law of contract the nineteenth century view was expressed in the classic statement of Sir George Jessel in *Printing and Numerical Company Ltd* v. *Sampson* [1875] L.R. 19 Eq. 462, 465:

> If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of justice.

It is not so often remembered that Mr Justic Byles as long ago as 1859 in *Mumford* v. *Gething* 7.C.B. (N.S.) 325 said, "It is a popular but in my judgment, a mistaken notion that parties ought to be at liberty to enter into contracts after their own fashion." It is true that

this statement was made in the special context of contracts in restraint of trade but the general principle involved has developed at the expense of the principle enunciated by Sir George Jessel. Freedom of contract is a significant term only if the parties to the contract are equally free, that is to say, of equal bargaining power, and even then only if the contract does not harm the interests of the community.

Similarly, excessive claims to freedom have been made by those who own land or control wide fields in industry or commerce. The conception that land is in some respects held in trust has already developed and will certainly develop in the future. The concept of "free enterprise" has been used as a basis for the most extraordinary claims which have led to monopolies, to price fixing agreements, and to over-production of some things and under-production of others. These internal controls on free enterprise have led to statutory restrictions to preserve free enterprise. This has been particularly noticeable in the United States. These developments reveal that large numbers of so-called restrictions, against which many people still re-act violently, are really restrictions on restrictions. Statutory intervention may be the way to an over-controlled monolithic state but it may equally be a way to freedom.

No one in British countries would seriously deny the value of the freedom of the press as a general principle, but can it be doubted that some of the freedoms which have been claimed, particularly in England and the United States, go far beyond what is desirable? Even more remarkable claims based on freedom have been made by those who oppose the fluoridation of water and the giving of blood transfusions. Similar questions could arise in respect of any proposal for compulsory immunisation against various diseases.

But however untenable many claims to freedom may appear when they are tested by their intrinsic worth or by their consequences, it is clear that man must for some purposes be free. He must certainly be free to develop to the highest degree his capacities, and he must certainly be free to exercise the choices without which he would be less than the autonomous moral being which we all believe man to be. He must, further, have some particular freedoms as a political being. He must have choices in all things which do not adversely affect the equal choices of others.

The problem then is two-fold. It is necessary to determine what freedom is essential to a man as an individual moral being and it is necessary to determine what kinds of freedoms a man may be allowed as a member of a group. The first determination may perhaps be based on certain *a priori* principles, though even here men have not agreed throughout the ages on what these *a priori* principles are. The second determination must be made pragmatically. It is sometimes said that the aim of good Government should be to ensure the utmost possible liberty for the individual, but this means little because what is possible depends on the social context and this can differ in different places and at different times. Surely liberty can not mean more than that man should be free from harmful restraints, and I suggest that harmful restraints are less common than is commonly supposed.

It is impossible to give exact and permanent definition to the proper limits of State interference with individual liberty. This must be discovered by sociological and economic analysis of the context of an individual at any given time. It may well be that the kinds of freedom necessary to man are very limited, though there can be no doubt that

these freedoms must be given a very high degree of priority. Since society is for the good of man, no society is entitled to limit these freedoms, except perhaps when the very existence of the society itself is at stake. As for those freedoms which society ought to allow so far as they do not harm others, there will be less scope for them in the increasingly complex and populous societies of the future.

The dangers of *a priori* thinking in this field can be illustrated by the statement of Herbert Spencer quoted by Sir C. K. Allen in *Aspects of Justice*—"It is better that the poor of our cities should die in epidemics than that State Boards of Health should curtail individual freedom or interfere with individual initiative or want of initiative; it is better that small-pox should ravage the community than that an inidividual should be made to vaccinate." Sir C. K. Allen adds that it was in the same spirit that a Bishop said that he would rather see England free than sober. Some claims to freedoms made today will seem as absurd 50 years hence, as some nineteenth century claims seem to us today. Amongst claims made today, many people give high priority to the exercise of the rights of private property, in spite of the fact that the law has already been forced to limit these rights. Yet there are people who are so certain that the light of reason reveals to them timeless truths that they are prepared to crystallise in a written constitution a concept which obtains its meaning and value and justification from its context in a changing environment.

I have now suggested that there will necessarily be increasing restrictions on freedom in future and I have further suggested that even where the restrictions are not necessary, they may be desirable or at least not harmful. In some quarters such suggestions have a highly inflammatory effect. I am not by any means unaware of the difficulties and dangers involved in any view of social, economic or legal development which increasingly imposes restraints and positive duties on men. There is first, the very real danger of the growth of a bureaucratic state. There is secondly, the question of who is to have the power of choosing what restraints will be imposed. Thirdly, there is the question of whether one can or should enforce morality. Allied to these criticisms is a general theory that planning is in some way contrary to "the rule of law". In my view these criticisms are not as weighty as is sometimes believed. They are sometimes based on the personal reactions of those whose claims to freedoms are said to be inadmissible, they often involve a more acute appreciation of rights than of duties, and they are directed not at the roots of the problem but at incidental difficulties which may be serious but are not insoluble.

Freedom is a concept in the name of which many crimes have been committed, but it is equally true that many crimes have been committed in the name of morality. The problem of the relation between law and morality so far as it is relevant here, has two aspects. First, the criticism is made that no person or Government knows better than anyone else what morality is, and that they are not therefore entitled to impose their views on others. The problems of drinking and gambling are striking examples. Secondly, it is frequently said that you cannot legislate for morality because legislation deals only with external conduct. I cannot accept either of these criticisms. We frequently do legislate for morality and the law pays a great deal of attention to motives and intentions. Further it is impossible in making judgments to distinguish clearly between external acts and the experiences which accompany

them. The moral judgment is a complex one which judges both, and the absence of some kinds of intention and motive, as in negligence or inadvertence, is as much the proper object of a moral judgment as the presence of malice. It is true that law is founded on morality but it is equally true that morality is founded on law. Each is both cause and effect.

It is beyond the capacities of many individuals to make the *a priori* and pragmatic judgments necessary to evaluate freedoms. A man may know what he wants (even this is not always true) but he does not necessarily know what he needs. If he does know what he needs he may not know the different ways of satisfying his needs nor can he know in full the effects upon others of his actions. Even where his claims are just, he needs a framework within which they must operate. Law therefore is far more than a command with a sanction attached to it. It must give a precise definition of a man's relationship to his fellow men in the form of detailed right-duty relationships. In this sense law teaches and is no more restrictive than any other kind of teaching. Children are first taught to behave and it is hoped that the inculcation of proper external behaviour will be increasingly accompanied by the appropriate mental experiences. Is it really improper for the law to do likewise? Sometimes law must prevent people from doing what they want to do, but sometimes it helps people who are prepared to do their duty but are in doubt what their duties are. The law is not forcing them to be free but providing the means by which they can be free. No doubt a practical, workable legal system cannot develop too far ahead of the moral ideas of the community, but it cannot lag behind and in many fields it should set goals which the majority of people have not yet envisaged, or which they are unable to obtain without legislative assistance. The law may never be able to reach the moral standards which are desired by enlightened individuals but it can set standards higher than those of the market place.

It is also said that the law does and may only deal with external actions and does not consider their subjective quality, which is the chief concern of moralists. This is simply not true. I have already pointed out that the control of external behaviour can lead to proper mental attitudes, but quite apart from this the law is closely concerned with intentions and motives, and the fact that law students are taught that guilt and malice and fraud and intention are all to be inferred from objective indicia means little, because how else can anyone judge the content of a man's mind? The judgment is made on the basis of *objective* indicia but they are still objective *indicia.*

In their day the statutes which protected children from working long hours in factories, which created the system of workers compensation, which created the whole system of social security and many other Acts which have long since been fully accepted in civilised states, were ahead of the moral climate of the day. Even democratic Governments must lead and no less in the field of morals than in the field of mere social order. The moral duties which have been crystallised in the Social Security Act have been better and more efficiently fulfilled by the legislature than they would have been if they had been left to the local, spasmodic, uncontrolled and less powerful operations of well intentioned individuals and societies.

It is sometimes said that the dangers of leaving many of these things to Government are so great that we should retain all the so-called

traditional freedoms even if in some cases they do harm to others, because freedom once lost is never regained. We cannot take this view in the middle of the twentieth century. The pressure of facts is too great. The dangers are undoubtedly there, but if we wish to avoid them we must rely not on an emotional attachment to freedom but on the "rule of law", on the operation of democracy, and on justice.

There are people who claim that planning is contrary to freedom and the "rule of law". Notably, for example, Professor Hayek in that curiously wrong-headed book *The Road to Serfdom* which is so popular in some quarters. The "rule of law" is a term frequently used but less frequently understood. It is a misleadingly compendious term for a group of rules which have been developed in the legal systems of democratic countries to provide a framework for the essential democratic principles of equality and protection from executive power. There are three related rules designed to uphold these principles. First, all persons should be treated equally before the law; secondly, no person, including the State and its officials, should be a judge in his own cause. This rule is part of what we mean when we refer to the separation between the executive and the judiciary. The third rule is that what the Americans call "due process" should be observed. This is a complex of subsidiary rules of evidence and procedure which ensure that all persons called to account civilly or criminally before the law should know precisely what they have to account for, that they are given proper notice and a reasonable opportunity to prepare a defence, and that they have a right to appear and to cross-examine witnesses against them. The fundamental object of these rules is to prevent arbitrary administration of justice. So far as these functions prescribe freedom then so far is it true that the "rule of law" protects freedom, but the concept of the "rule of law" contains no guarantee of any particular freedom nor does it involve valuations of particular freedom except the freedom involved in equality and "fair play". The "rule of law" is a procedural framework within which substantive rules of law must work if the law is to be justly administered. It can operate equally well in a legal system based on rights and a legal system based on duties, in a planned and an unplanned economy.

If these principles are maintained we need not fear a return to status or an increase of planning. While democracy continues there is always a final court of appeal in the people. On the whole, given democracy, there is no reason to believe that there can be a morally bad legal system. There may be morally bad laws but they can only be few and temporary for otherwise too many individual senses of injustice would be outraged. During the twentieth century the gradual development of the conditions of status has not in fact evoked sufficient criticism to prevent the trend continuing, and while some would see in this fact evidence of the apathy and lack of foresight of those to whom freedom means little, I prefer to conclude that the movement towards status is in accordance with justice as it is conceived by the ordinary man. Historical comparisons are notably hazardous, but I submit that it is clear beyond doubt that because of, and not in spite of, the increase in apparently restrictive legislation, the great majority of people in 1961 are more free in all significant senses than they were in 1861.

I conclude therefore that the movement in law from contract to status is a necessary and desirable aspect of the development of society from a less complex to a more complex one, from a less populous to a more

populous one, and from a less moral to a more moral one. If we use Maine's somewhat narrow definition of status we might conclude that a return to status is a reversal of the movement towards freedom. There are those who would come to the same conclusion even if the term status has the wider meaning I have given to it. My own view is rather that the movement towards status, and the recognition of rights and the imposition of duties which it involves, is a recognition of the dignity of human personality. The over-privileged will recognise this less clearly than the under-privileged. In the world of the future, planning for freedom will be as valid and as necessary a process as planning for order was in the past. Indeed they are the same process. The difference is merely one of emphasis within the dynamic right-duty relationships which constitute the detailed social framework within which man fulfils himself as a free and moral being. It is a matter of balance determined by values. In the framework of law, freedom and status are not and cannot be irreconcilable. If we look after justice, freedom and order and freedom and planning will look after themselves.