

THE SOCIAL CREDITER

FOR POLITICAL AND ECONOMIC REALISM

Vol. 49 No. 4

SATURDAY, 17 MAY, 1969

1s. 3d. Fortnightly

The Common Law

Traditional Rights in a Collective Age

By the RT. HON. SIR HENRY SLESSOR*

"The common law is nothing else but reason", declared the great judge Coke at a time when it was in almost as great a peril as it is today, though for different reasons. The then fashionable desire to exalt personal sovereignty, which arose in repudiation of the medieval idea that the law was over all, had resulted in the surrender of many libertarian notions in the administration of justice; the inclination to continental principles of Roman law was exemplified in the Star Chamber Court and in the resurrection of notions of royal prerogative. The defeat of the claims of James II, pointing in a similar direction, enabled England to maintain the ancient traditional system of jurisprudence, dating from Saxon times, that spread throughout the whole Anglo-Saxon world, to the United States, and to the British Dominions. For nearly two centuries the common law stood unquestioned as the guardian of English rights; even radicals such as Wilkes based their claims upon it, as did other men so different in political outlook as Cobbett and the Chartists. It was the one subject on which nearly all Englishmen were agreed.

Of late years, however, a change has come over the judicial scene; the desire to effect alterations in the social structure has led to a vast spate of legislation in every field challenging the old static notions of legal right. Courts of law have been said to be incompetent to deal sufficiently speedily with modern problems. In many departments of State activity tribunals of varying kinds, administered often by persons untrained in judicial determination, have been created by statute and even by regulation or order. The power of the King's Bench to control such quasi-judicial bodies when they err in law by the old machinery of *certiorari* or *prohibition* has in some cases been deliberately removed. Examples are to be found in housing legislation and in many other laws; the immemorial right of a man to appear by counsel or solicitor is often specifically forbidden; local authorities, elected for administrative purposes, with no necessary knowledge of the juridical art, have been entrusted with purely judicial duties, as, for instance, in the case of the determination of what constitutes an "extortionate rent"—decisions which may have legal and personal consequences to an impeached landlord. Over and above all, the tradition in which the common law has been nurtured, that of respect for previous decisions in order to find the principles to be applied to a particular case and to ensure certainty, has no established place in these new tribunals, which may or may

not keep records of their previous determinations but certainly are under no obligation to follow them.

An outstanding illustration, soon to be tested in practice, arises under the new industrial injuries measure, which is to supplant the statutes dealing with workmen's compensation. Under the old law the Court of Appeal and the House of Lords have for years been concerned to lay down a *corpus* of principle whereby judges of fact may determine whether an accident "arises out of and in the course of the employment". A similar limitation of right, in similar words, appears in the new insurance statute. But will the new statutory tribunal be guided by the accumulated wisdom of the judges on this matter? We do not know, but there is no compulsion for it to do so.

Another disquieting feature is to be found in the curtailment of the independence of the judicial office. The reduction of the salaries of the judges in 1931, not by Act of Parliament but by an Order made under statute, caused much perturbation among jurists. It was pointed out that such a procedure invaded the principles of the status of judges laid down in Acts of William III and George I, which latter status purported to secure that the salaries of the judges were absolutely to be safeguarded. The age-long principle that the senior judge should preside in the Court was sought to be overthrown by a recent Act empowering the Lord Chancellor to appoint a Vice-President of the Court of Appeal, notwithstanding that he is not the senior Lord Justice, and still later the Lord Chancellor was given power to "direct" into which division of the Supreme Court a judge should be ordered to perform his duties.

Thus, little by little, both the functions and the status of the judiciary are being impaired. One is tempted to ask where and when will the process end. That the Crown is immune from suit is no new thing, but, as the ambit of the activity of the Crown extends, a further curtailment of the processes of law, unless something be speedily done to make the Crown responsible for the wrongs committed by its agents, is almost inevitable.

Next, to deal with the rights of the subject rather than the powers of the Court, apart from certain specific doctrines of public policy (such as restraint of trade or immoral intention), the subject at common law was ever deemed free to make such contracts as he would—for he was a free man. But under the plea, good or unsound, of economic justice and necessity this right has been drastically curtailed of recent years. Combinations which were formerly only made illegal by statute—as under the Statute of Labourers or the

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*This authoritative article originally appeared in *The Times*, London, August 9, 1946 and, with the permission of both the author and publisher, was printed in these pages shortly afterwards. For new readers and because of its importance, it is printed again.

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FOR POLITICAL AND ECONOMIC REALISM

This journal expresses and supports the policy of the Social Credit Secretariat, which was founded in 1933 by Clifford Hugh Douglas.

The Social Credit Secretariat is a non-party, non-class organisation neither connected with nor supporting any political party, Social Credit or otherwise.

SUBSCRIPTION RATES: Home and abroad, post free: One year 45/-; Six months 22/6; Three months 11/6.

Offices: Business: 245 Cann Hall Road, Leytonstone, London E.11.
Telephone: 01-534 7395

Editorial: Penrhyn Lodge, Gloucester Gate, London NW1
Telephone: 01-387 3893

IN AUSTRALIA—

Business: Box 2318V, G.P.O., Melbourne, Victoria 3001

Editorial: Box 3266, G.P.O., Sydney, N.S.W. 2001
(Editorial Head Office).

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FROM WEEK TO WEEK

In an extraordinary article in the *Sunday Telegraph* (March 30, 1969), Peregrine Worsthorne writes: "What we are really faced with is . . . a death-wish of a body politic—a growing suspicion that somehow we are caught in a trap, not primarily of our own making, from which nobody really knows how to escape, however hard we try. It is this mood of informed defeatism . . . a despairing assumption . . . that Britain cannot do anything to alter the international financial context in which we are struggling to survive, in spite of the increasingly obvious fact that this country is the victim rather than the beneficiary of the existing rules and regulations."

We have abstracted the above statement from what Mr. Worsthorne wrote; but it requires further abstraction: "What we are really faced with is . . . a trap, not . . . of our own making . . . the international financial context in which we are struggling to survive . . . (We are) the victim(s) rather than the beneficiary of the existing rules and regulations."

Does Mr. Worsthorne mean that we are faced with a death-wish "of a Government", or does he mean purely and simply "that we are (i.e., have been) caught in a trap, not . . . of our own making"? If the latter, who constructed the trap, and who are the beneficiaries, and of whom are we the victims? If the former (inconsistent with the latter), is the death-wish of the Government directed towards itself, or against the British "struggling to survive"? What, and where, is "the body politic"?

Writing twenty-three years ago, Douglas remarked: "Either the world . . . is in the grip of blind fate . . . or it is exhibiting the results of a policy derived from thinking man . . ."

The state we are now in ("struggling for survival") is the state predicted by Douglas even more than twenty-three years ago because he perceived the operation of a policy "derived from thinking man". So whatever Mr. Worsthorne intended by what he wrote, it seems likely that the reality which he refers to as a death-wish is in fact an active policy of which the present British Government is acting as the agent. That is to say, the death-wish has a living origin, and is directed against the British through the British Government.

If Mr. Worsthorne is serious rather than merely metaphorical in writing of death, we hope he realises that he faces his own death.

Until it is absolutely clear that there is going to be "a ruthless, bloody-minded exertion of the national interest"—i.e., a definite and conscious, determined reversal of policy—a general election is worse than useless; it would merely be, as Mr. Worsthorne says, "a change of hands on the levers controlling the domestic economy". The present Government is in the position of responsibility for the policy it is carrying out. To dissolve it would be to dissolve its complicity. There simply is no question of competency. A definite policy has predictable consequences. Douglas identified the policy—centralisation, more government—fifty years ago, predicted the consequences, and now we have them. That policy produced two world wars and the great depression. Can anyone believe that a change of government in 1939 would have averted war? That question indicates the magnitude of the present problem. Indeed, it is the same problem; we are faced with a coherent policy fatally directed against our survival as a nation. The locus of this policy was embodied in Germany (temporarily) in 1939. Where is the locus now? Who are the beneficiaries?

"The geographical shift of the Storm Centre in Europe from Spain to France (the French Revolution), via Holland and England to Germany (First and Second World Wars), and now to Russia (*militant* Communism) is paralleled by the shift of certain activities, largely but not wholly Financial (the threat of war, *binding* International Agreements). This Storm Centre has, of course, its secondaries, its 'Fifth Column, (*organised* strikes; *co-ordinated* student unrest, permissiveness, drug peddling; racial violence; accelerating crime; . . .) everywhere.

"'Britain' is now apparently the target of the most venomous hatred by its manipulators, a position we have usurped from Imperial Russia; and the practical lesson to be learnt from this analysis is to direct our attention to the current Storm Centre. It is not in Russia, except as a fulcrum for Wall Street; Russia is finished; it is in New York." (C. H. Douglas, 1948.)

Unless this threat is faced by a nation united "as in war", our national extinction is imminent. As world war is probably now too dangerous to those who promoted the two world wars and were and continue to be the beneficiaries of them, it is worth risking war to obtain a reversal of policy. In this situation the run-down of British defences is *criminal*. If the present Government is "let off" its responsibility of either complicity or ignorance by a mere electoral defeat, probably nothing can save us. And, as Douglas wrote, "A firing squad may be necessary". A convincing threat of one might start a move in the right direction.

In these days of unenlightenment, it is refreshing to hear some public figure publicly stating our problems in a realistic way. Speaking to Northern Area Young Conservatives in Durham on March 30, 1969 (*Daily Telegraph*, March 31) Mr. Enoch Powell described the present Government as "a vast bureaucracy administering a wholly arbitrary system of government". He said that the system was exercised through the Prices and Incomes Board or through the Bank of England and the Treasury. "We are increasingly living in a society in which law is supplemented and superseded by a

compulsion which is not law. It is no accident that in any Socialist system . . . the rule of law must disappear, since you can't reduce to law those judgments which are required for the management of the economy."

Mr. Powell is evidently referring to rule by Regulation, as opposed to government in accordance with Common Law, much of which was expressly designed to protect the governed against the will-to-power of the Executive. The power of the Executive in Britain has steadily increased under Governments of all denominations, and there is nothing in the public statements being made by Mr. Heath to indicate that this process will be halted, let alone reversed.

It may well be questioned, however, whether the system is wholly arbitrary. It is forty years since Lord Hewart, then Lord Chief Justice of England, deemed it already "high time" to offer "a note of warning"*, and cited Lord Justice Bowen in a judgment given in 1893: "If no appeal were possible, I have no great hesitation in saying that this would not be a desirable country to live in". We are in the presence here of a force, which, like a force in dynamics, produces an acceleration; this force is the continuing application of a long-term policy of centralisation which, starting with suggestions of "rationalisation", proceeds through "nationalisation" and financial take-overs towards *monopoly*—monopoly of power both economic and political, and ultimately supranational in its control. Its operation on the individual appears arbitrary, just as military discipline appears arbitrary to the soldier. Grandiose plans require large groups of 'workers' or soldiers. The bureaucracy is simply the chain of command; the grander the scheme, the vaster the bureaucracy, from national to international. The commanding officers of little pyramids of power see in bigger schemes their way to their promotion as commanders of larger pyramids. Thus we see Heads of State, Heads of Departments, and droves of lesser commanders flying to confer all over the globe, visibly (for those with eyes to see) evolving the machinery of International Government—government of nations from outside nations, and ending in World Government without nations.

Thus seen from the top, the operation of the bureaucracy is anything but arbitrary. It is seen as necessary. It does not matter what happens to the individual if there are enough 'workers'; hence "Full Employment", and confiscation of savings by taxation.

The basic fact is that taxation is confiscation. The economic 'theory' which explains and justifies confiscatory taxation is a carefully devised *plan*. The sedulously promoted notion that high taxation 'controls' inflation is patently utter nonsense, believed in and professed by economists because they have been trained in that *theory*; and also because as 'advisers' to the government they share government power. It has been demonstrated decades ago that inflation could be halted and even reversed merely as a matter of accountancy. But if this were done individuals could accumulate savings, and 'workers' would gradually become free men; and then how could they be ruled over so as to fit in with global schemes of 'interdependence'?

Conservatives, especially if they should aspire to be Leaders, would contemplate this situation with horror—so they don't contemplate it; they rationalise it. To a Leader,

leading the Gadarene swine, the bureaucracy does not appear as a bureaucracy; it looks like the necessary and most efficient means of carrying out the Government's firm policy. And the more comprehensive and inclusive the Government's policy, the less policy there is left for individuals. And the Government knows best, and the Government in office is the best Government, because they were voted for by a majority—which, of course, is sometimes a minority.

It is quite certain that the bureaucracy will increase in size ("can't take away a man's job, old boy") until there comes into office a Government which has renounced with all the conviction possessed by a wholly sincere convert to a religious faith, the sort of power governments now deploy. When is that likely to be? The bureaucracy is the work of the Devil. But politicians no longer denounce the Devil they just don't believe in him. That leaves them free to enjoy his works.

This is more than mere metaphor. Mr. Powell is thought by many to be a potential Conservative leader. Does he fully understand that in denouncing the "system of government" he is denouncing a system which has developed to its present monstrous and oppressive complexity just as much under Conservative as under Socialist Administrations? Does he understand that the bureaucracy is the *incarnation* of the *policy* of "thinking men"?

The bureaucracy *really* is an army (with the workers as its base), whose weapons are control of finance, and the power to make Regulations having the force of law. This army has a General Staff. Does Mr. Powell know where to look for this General Staff? Has he plans for entering into conflict with that army, with a view to defeating it?

Lord Hewart wrote: "A little enquiry will serve to show that there is now, and for some years past has been, a persistent influence at work which, whatever the motives that support it may be thought to be, undoubtedly has the effect of placing a large and increasing field of departmental authority and activity beyond the reach of ordinary law. . . . The citizens belief (that they are protected by Common Law) will stand in need of revision if, in truth and in fact, an organised and diligent minority, equipped with convenient drafts, and employing after a fashion part of the machinery of representative institutions, is steadily increasing the range and the power of departmental authority and withdrawing its operations more and more from the jurisdiction of the Courts." (Observe the judicial choice of words in this.)

Now quite clearly the "organised and diligent minority" cannot be identified with the incumbent Labour Administration (because it was there before the last election, and will be there after the next), so that merely defeating the Labour Administration will not even begin to defeat the diligent and organised minority. In fact, the reverse is true. If the blame for our present plight is put on the Wilson administration, and that administration is defeated in elections, the ruling minority will simply be given a fresh lease of life. And seen "from the top", that is the very strategy underlying the *use* of elections.

This is the very heart of the matter. Only a Government consciously determined and pledged to engage and defeat the organised minority could make any progress whatever. In this battle there would be real casualties, as in the form of disemploying very large numbers of bureaucrats. Has any potential alternative Government contingency plans for these

*The New Despotism: London, Ernest Benn Ltd.

casualties? Has it a strategy for getting at the organised minority", the General Staff? If it has no such strategy and no such plans, then an election is a snare and delusion, as all elections have been for decades.

If all this is understood, it will be realised that a real attempt to get "out of the trap" entails a very real risk of military war. Are there contingency plans for that likely eventuality? How does the run-down of British defences look in that light?

The fundamental situation is this: Practically every aspect of major Government policy is wrong, and is *anti-British*, and proceeds *ultimately* from an extra-British source. There is, *potentially*, a *British* solution for the problems arising from wrong policies. For example, a huge number of practical problems are derived from taxation *policy*. Now for a large number of people, Conservative as much as Socialist, even to realise that that is so means discarding a number of 'axioms' of thought. The taxation system is a *disincentive* system, and that is a, perhaps *the*, root cause of current economic problems. In this field, therefore, the policy required is to transform the taxation system into an *incentive* system. The way to do this would be to put the top executives of the Inland Revenue Department under penalty of dismissal without recompense if they did not provide satisfactory draft legislation to effect the transformation. To proceed from the assumption that this cannot be done is to commit suicide. It *must* be done; it is a condition of survival.

But it is highly probable that any attempt to implement satisfactory legislation would precipitate essentially military sanctions—in the first place internal, via the Communist organisation; in the second place external, via 'binding' international agreements which if broken would be a pretext for the use of force.

This year 1969 is essentially 1939 all over again; but this time the locus is not in Germany, and the threat to survival is not *primarily* a military threat. The threat is as great, and is backed by the *potential* threat of military sanctions. It is an economic Battle of Britain, an economic Dunkirk. It was patriotism, British character, and British inventiveness and initiative that saved Britain after 1939. In this light, does Mr. Wilson appear as a Churchill, or a Quisling? And how does Mr. Heath look?

The problem for a true Leader of Britain is to mobilise all that is best in the British, and go to work to restore British Greatness "under threat of war". And if at this stage we cannot say who our enemies (Mr. Worsthorne's "beneficiaries") are, we can force them to disclose themselves. This might transform the military situation.

A Heath-Wilson Sketch

"He asked himself, as he always did at moments of crisis, what his illustrious ancestor, the other Napoleon, would have done in such a position. And he had been forced to admit that he could not imagine Bonaparte ever having allowed himself to get into such a position. He realised, now it was too late, that he had been poorly advised by most of his Generals. They had deliberately deceived him as to their merits. But what was he to do? If he led the army himself, and rode out to meet the Germans, he was—in the not unlikely event of the enemy's contriving to slip round his flank—leaving the whole heart of his country ready and exposed

for the knife that was waiting to be thrust into it. Besides, he had never studied the actual tactics of battle. He had left that to the General Staff, whose job it was. It was the larger strategy of wars that fascinated him—great sweeps with a ruler across the maps of continents."

—From *Anna*, a novel by Norman Collins.

The Common Law

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Combination Acts—are once more to be controlled; we hear much of the control of monopolies and the complimentary restrictions of the activities of trade unions. The old common law right of a citizen to end his contract by due notice, either individually or in concert, is no longer acceptable to the modern legislator, be he of one party or another.

The final question arises: Is it possible to maintain the old traditional common law in this collective age? The impact of continental notions from the Roman laws or from Communist sources in these days of international tribunals and the abatement of the claims of national sovereignty are not to be discounted. Only in the greater part of the British Empire and in the United States has the common law found favour; an old practitioner in the common law may be excused if he points out the coincidence that only in those countries has that peculiar blend of liberty and order, of toleration and duty, found a permanent footing.

"The Common Law of England is in its origin a Christian system of law", writes Mr. Richard O'Sullivan, K.C., an acknowledged authority on the subject. Speaking of one of the fathers of the common law, Henry Bracton, he continues:

Taking a text, now from the Old Testament, and now from the New Testament, anon from the writings of the Roman Civil lawyers or from the Canonists, who were the ecclesiastical lawyers of the Church; again, from a master of Jurisprudence of the Law School of Bologna, or from the precedents set by his predecessors of the English Bench, Bracton passed them all through the fires of justice and hammered out a set of legal principles which gave to the world, in the language of a famous Judge of the United States Supreme Court, "a far more developed, more rational, and mightier body of law than the Roman".

These rules and principles of the English Law were constantly being refined and polished in the law schools of the Inns of Court, and by the Clerks of the Chancery, who gave us English equity. They were carried by the King's Judges, going the circuits, to the great towns and cities of England and to all the shires. In the course of time the Common Law was carried beyond the realm to Ireland, to what are now the great Dominions, and to most of the Colonies; and to the plantations and States that now form the American Union. And so the tradition of the Common Law is to-day a bond of Commonwealth and Empire, and a link which unites the English-speaking peoples all over the world.

The future of the Common law is plainly much more than a matter for lawyers. The Law of England is a unique contribution to Christian civilization; its decay may prove to be one of the greatest tragedies of our age.

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Printed by E Fish & Co Ltd Liverpool