

# Settling Disputes: The Changing Face of English Law

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## INTRODUCTION

I shall take it for granted that social conflict is unavoidable. The nature of social relationships is such that, although cooperation must on the whole be the normal situation, competition and hostility will remain inevitable. And yet although conflict will fulfil several vital social functions, it will not remain unchecked, for it seems to be equally inevitable that each society will generate its own motivation to limit conflict. The chain of social reactions which any conflict sets in motion is almost limitless, but all communities try to contain them and to avoid at least its more immediate damaging consequences. The general tendency in all conflict situations, as Schelling has stressed so clearly,<sup>1</sup> is for regression from hostility towards cooperation.

Disputes arising about legal rights and duties are fundamentally the same as any other kinds of social disputes; the difference lies merely in the fact that the social/economic/political technique we choose to call the law has developed certain conventional machinery for helping to settle them. When new kinds of disputes arise, we must always ask whether this legal machinery is adequate to process them, and in this paper I would like to concentrate on the basic question of how far some of our more topical kinds of social conflict can be controlled by the techniques of the law. Fundamentally, they are all old problems: for instance, nothing could be older than quarrels between husbands and wives. Again, both the control of disputes in industry and regulation of commercial quarrels have a respectable history in earlier centuries. And racial conflict in some form or other has been with us since the beginning of recorded history. All four topics have, however, given us in England cause for special concern in the changing social, economic and political conditions of the second half of the twentieth century.

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<sup>1</sup> Quoted in J.H. Skolnick, *Social Control in the Adversary System*, (1967) 11 J. Conflict Resolution 52, 69.

The view of law I shall take in this paper is not one that will be very novel to any reader familiar with the tradition of Otto von Gierke, Max Weber and Eugen Ehrlich. Ever since von Gierke's classic work on the inner ordering of the *Genossenschaften* over a hundred years ago, jurists have been able to accept the concept that multiple legal levels exist in all human societies. Each functioning sub-group of society may be seen as having its own legal system: the legal system within the family; the individual contract binding two parties; or the ordering of the workshop by the rules of the management, the union and the workers. Each contributes to and depends upon the monolithic structure of the legal system of the State as a whole.

My concern will be to examine rules and procedures at all the levels of the structure of society, not only in terms of what *should* happen but, as Ehrlich did, in terms of what *does* happen. Whenever there are patterns of social control existing independently of legal rules, I believe they should be incorporated into the study, not only because they modify the actual operation of the formal rules, but because they may have their own imperative force which is just as strong as that of the formal rules. They become by convention and usage yet another system of rules.

Let me illustrate this process with an example from commercial law. If a dispute arises because a garage repairs a customer's car badly, it may be resolved at many levels. The negotiations will in all probability be carried on at first without reference to the contract; complaint will be followed by excuse, rejoinder by compromise. Much will depend on the relationship of the car owner and the garage, for a valued and regular customer may get preferential treatment over a transient who has suffered a breakdown. Similarly, the size of the garage, the socio-economic status of the complainant and the possession of the car and the repair-payment respectively will all influence the outcome. Does the garage have a standard practice for settling complaints? How far is the claim covered by insurance?

At this point we begin to approach the second level, that of the contract between them. Has the garage effectively protected itself against the consequences of bad workmanship? More importantly, whether it has or not, how far is it prepared to rely on exemption clauses in the contract and if need be to bluff the customer into thinking that it has greater protection than is really true?

The third stage comes with the involvement of an outside agency. If what the garage will no doubt call "an amicable settlement" cannot be reached, can the trade association bring about a settle-

ment which will satisfy both parties? Or can it use its official arbitration procedure in a last attempt to keep them from each other's throats?

Finally, what are the prospects of the case being taken to court as a last resort? How close to the brink (or over it) is each side prepared to go, considering their respective economic positions? Will their solicitors advise that there is a "cast-iron case"? Or will the law and the evidence seem uncertain to one of them? It is to the techniques of settling disputes at these different levels that I shall now turn.

### THE TECHNIQUES OF SETTLEMENT

One technique of dispute settlement which I shall mention but briefly is that of *settlement by inertia*. By this I mean that when a dispute arises, one party to it, although recognizing the existence of the dispute, accepts a situation unfavourable to himself and does little or nothing about it. This is in all probability the most common way in which disputes are "settled". Such "settlement" sometimes reflects an unwillingness to involve oneself in expense and trouble, often results from individual personality problems, and occasionally represents an unhappy adaptation to an unfair situation which is healthy neither for the individual nor society as a whole.

For example, I was recently told with obvious cynicism by a public relations officer in a large commercial concern that customer inertia always operated in favour of the company. More often than not, dissatisfied customers did not complain; if they did, and received no reply for some considerable time, the chances were better than 50% that they would take no further action. The company then treated the complaint as "settled". Irresponsible policies can therefore succeed in the short term, though of course in the long term the public image of the company may suffer.

A second illustration comes from a recent Report of the Race Relations Board.<sup>2</sup> It pointed out that the Board regularly received complaints of racial discrimination which were never followed up. Humiliation and anger motivated the complaints in the first place but having registered their protests, the complainants become unwilling to make official charges or provide enough information for the matters to be investigated. They were understandably reluctant to re-live humiliating experiences, and disillusioned because they felt the Board could guarantee them no remedy. One must be wholly

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<sup>2</sup> Report of the Race Relations Board, 1969-70, paras. 67-68.

sympathetic to this dilemma and yet at the same time wonder how far the failure to pursue the complaint represents an adjustment to discrimination which can only help to perpetuate that discrimination.

The "normal" techniques of dispute settlement are four, and one can see them as forming a hierarchy corresponding to the level of social interaction existing between the disputants. The first level is *negotiation*, which simply involves the parties to the dispute trying to resolve their differences by themselves, and in spite of the dispute there is still intensive interaction between them. It is the failure of this procedure and a lessening of the interaction that usually leads to the second level of *conciliation*. Here a third party is introduced by one or both of the disputants for the purpose of bringing them closer together, sometimes to persuade one to accept the other's argument completely, sometimes to suggest a compromise, but normally to act as an organizer of and participant in the continuation of the negotiations. If conciliation fails, or is not used, the contestants will proceed to *arbitration* or *adjudication*. They are normally alternatives to each other, arbitration involving asking a mutually acceptable third person to make a decisive order as to what they shall do, and adjudication meaning taking the issue to a court for it to make an authoritative decision. These techniques will normally only be used when the relationship between the contestants has broken down, and indeed it is highly likely that the procedures themselves will encourage the further polarization of the parties. At the same time, even at the level of arbitration and adjudication, the door will normally be left open for conciliation to take place or for a settlement to be negotiated.

It is the main hypothesis of this paper, though an obvious one, that disputes are best settled at the lowest possible level, for three reasons:

- (1) The lowest level is always the cheapest and often the quickest, both of which are attractive characteristics of any procedure in modern society.
- (2) In broader social terms, the least damage is done to the community by a dispute that is localized and not allowed to have wider social and economic repercussions.
- (3) We should not provide decisions at the expense of relationships. As long as there is an ongoing relationship between the disputants which is worth preserving, techniques of settlement should be used which tend to hold together rather than force apart.

## 1. Negotiation

### (a) *Industrial relations*

There can be few countries in which the principle of voluntary negotiation between workers and management, both as to the actual terms of the relationship and as to dispute procedures, is more firmly entrenched than it is in England. It has even been written into the law as the first guiding principle of the *Industrial Relations Act* of 1971.<sup>3</sup> Recent government efforts to control an inflationary economy by first freezing and then restraining increases in wages and prices are still seen as exceptional measures, though they will slowly come to be accepted as more normal. These limitations apart, it is accepted that the basic terms of employment are to be bargained out between the two sides of industry, with each using its familiar techniques for applying pressure: the workers threatening strike action, go slow, embargoes, and picketing; and the management presenting the possibility of lay-offs, dismissals, plant closures and lock-outs.

The majority of industrial disputes are settled at the level at which they arise: on the shop floor, or at least within the factory. But so notoriously erratic have been British industrial relations in the last 20 years that many responsible people have begun to question the principle of voluntarism and to ask whether solutions to labour disputes can be imposed rather than negotiated. One particular question has been repeatedly asked, namely whether greater stability could be introduced into the system by making collective agreements legally enforceable and so reducing the area for negotiation. For it has not been a principle of our industrial relations that collective agreements between workers and management should be binding in law.

There was a limited change in this position following the Conservative Government's *Industrial Relations Act* of 1971, now repealed: "limited" because all that the legislation laid down was a presumption that written collective agreements would be legally enforceable unless they contained a provision stating that the agreement or part of it was not intended to be a legally enforceable contract.

But it had a remarkable effect: every trade union bargaining official was issued with a rubber stamp saying "not legally bind-

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<sup>3</sup> *Industrial Relations Act*, 1971, c.72, s.1. The Act was repealed by the *Trade Union and Labour Relations Act*, 1974, c.52 (effective 31 July, 1974).

ing". The 1972 Annual Report of the Commission on Industrial Relations<sup>4</sup> commented that "the great majority" of collective agreements contained such provisions and most of those that did not appeared to have been the result of oversight. One apparently legally binding agreement contained a magnificent lawyers' clause to the effect that if either party broke any clause in the agreement, the whole agreement was to become invalid.

The reasons for this situation are basically twofold. Firstly, the kind of agreements which are common in British industry are often so vague that they are unsuitable for legal enforcement; and secondly, in the present climate of industrial opinion on both sides it is unrealistic to speak of legal enforcement (by which I mean decisions by courts or arbitrators) as a constructive way of promoting co-operation between management and workers.

At present, our collective agreements tend to lay down general principles meant to act as guides at a national level and to form the basis of detailed negotiations at a local level. Most agreements would fail to satisfy a lawyer that they were precise enough to be valid: a contract that cannot be given a specific meaning will be "void for vagueness". It is better to avoid the battle cry of "legal enforceability" and to concentrate instead on improving mutual understanding of the roles of management and workers by making more precise agreements at the local (factory and company) level and fewer general agreements at the level of the national industry.

I have used the word "roles" rather than "rights" when speaking of management and workers, because to speak of "rights" implies that there is rigidity in a situation which should in fact remain open to mutual adjustment. Also, it carries strong overtones of legal enforceability, which should be avoided. The nature of the relationship between the two sides makes constant adjustment, negotiation and renegotiation of the agreements imperative if they are to meet the needs of the individual work place.

The importance of maintaining this flexible relationship was emphasized by a leading commentator on British industrial relations. He was speaking of the possibility of unconstitutional action by workers and the reluctance of management to contemplate show-downs with their employees:

...after such action, the process of living together has inevitably to be resumed, and a conviction on either side that the other side has failed to play the game [by going outside the conventional framework of nego-

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<sup>4</sup> Annual Report of the Commission on Industrial Relations, 1972 (Report No. 37), 23, paras. 112, 113.

tiation] can scarcely be expected to make this easier. One rarely takes one's immediate family, familiars or neighbours to law. Positive steps to improve family relationships are likely to be preferable.<sup>5</sup>

(b) *Commercial Contracts*

It is remarkable how imprecise many business contracts are. Certainly most transactions of any significance are planned as carefully as possible, often after taking legal advice over the final form of the agreement. It is true, as well, that this creation of contractual relationships is nowadays more often achieved by standardized documents, in which there is no genuine consensus but simply the presentation of a form prepared by one party to the other for signature or just as a record. This is especially true in the consumer relationship. An organization marketing goods or services on a large scale, unwilling or unable to negotiate with individual customers, presents them with a "package" contract which they must take or leave. The customer, concerned to obtain the benefits which he knows to be at the heart of the package, will normally be happy to agree to the terms laid down by the organization without any clear understanding of them. Indeed, in many situations there may be a total lack of real agreement on the part of those who are actually engaged in "making the contract", as where an unsophisticated customer deals with an unsophisticated junior employee of the organization. Both know how to fill in forms, sign cheques and give receipts, but the actual consensus on the details of the contract will often be non-existent.

If such an agreement is broken, what happens? What does *not* happen is that the parties rush to court to litigate about their "rights" under the contract whose terms they "discover" at that moment. Rather, they usually enter upon a process of careful judgment of the balance of power. How important is performance for the parties in the social, economic and political situations in which they find themselves? What levers can be used to obtain performance? Who has what the other wants more badly? Has performance started? Has money passed? All these issues will have to be answered before negotiations can begin, for on the answers will depend the tone of the communications that pass between them.

Let me illustrate this process with an example from the travel industry. A tour operator agrees to take a client on holiday, provide return air transport and a hotel with full board, for an inclusive price.

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<sup>5</sup> A.I. Marsh, *Disputes Procedures in British Industry* (Royal Commission on Trade Unions and Employers' Associations, 1966, Research Paper 2 [Part 1]), para. 108.

The client pays a deposit and, some weeks before he departs, he pays the balance due. But before he actually leaves, the company asks him for a further payment to cover the "extra cost" incurred by the fall in the value of sterling; and when he arrives in the resort, he finds that he is accommodated in a totally different hotel from that which he booked.

The company will probably have protected itself by appropriate "booking conditions", which will give it the right to charge prices other than those advertised, and reserve to it the power to accommodate the client wherever it chooses, or even not at all. But for immediate practical purposes these conditions are largely irrelevant. Economic power is in the hands of the tour operator because he has already taken payment in advance; if the client wishes to complain and recover his money, it is he who will have to initiate the negotiations. And he may well feel, as many do, that he does not want to lose the chance of taking his holiday, which will have a greater personal significance to him than his payment will have to the tour operator.

Again, if the client's hotel is changed, he is usually at a complete disadvantage in relation to the operator. He may find himself in a strange country, often arriving in the middle of the night, with little alternative but to accept whatever accommodation is offered to him. What is more, he will normally be confronted by a resident representative of the operator who is employed explicitly to make sure that temporary malfunctions in the contractual arrangements are dealt with quickly and amicably.

If, on returning home, the disgruntled client writes a letter of complaint to the company, he may find himself alleging that the contract has not been performed properly, by which one should understand that it has not been performed as he anticipated it would be. But, as I have suggested already, he finds himself still in the weaker position, not merely because he may realize that the company has adequately protected itself in law, but also because he is trying to make it disgorge money. The onus lies on him to persuade the company that he ought to be given a refund.

What is especially intriguing is the way in which use is made of "law" in the process of negotiation that then takes place. As a lever, the client may claim certain legal "rights" and insist that he be given them; he may threaten to consult his solicitor or tell his story to the newspapers or TV. In all probability, the company will in fact have adequate legal protection under the contract but whether it will choose to rely on it is another matter. The problem is given special dimensions by the fact that the company will normally be dealing

with the client through its Passenger Relations Department and not through its lawyers. The settlement of the dispute will therefore take on much more the character of a public relations exercise than a legal dispute. The client's future custom should be retained if reasonably possible, adverse publicity as to the handling of the case is to be averted, and widespread advertising of the company's involvement in legal proceedings (win or lose) is to be avoided at all costs.

When there is a greater equality in the relationship, such as between companies which have a continuing business relationship, there is polarization much less quickly. A tour operator will handle a dispute with a hotelier somewhat differently from a dispute with a client. If the continuation of their contract is important, there will be great hesitancy in speaking of "legal rights" or threatening to sue. Often they will never refer to the agreement at all but simply make adjustments in their dealings to suit the needs of their future relationship. They will in fact be making new contracts though they would seldom choose to say so.<sup>6</sup>

(c) *Legal Assistance and Aid*

The redressing of the balance of negotiating power is a matter of public concern. The myth is still prevalent that there is equality between the educated and the inarticulate, the rich and the poor, in the face of the law, but it is only a myth. The educated can negotiate better, marshal arguments and explain dilemmas more clearly, and are therefore likely to get more positive responses than the inarticulate lower class group.

Educating complainants in the best ways of complaining is difficult; rather less so is providing them with professional help. It is certainly true that solicitors' letters make a bigger impact in industry than even the most articulate client's letter, since the company's answer has to be thought out more carefully and the dispute already begins to move to arm's length, with the prospect of court proceedings in the background.

Thus, the question becomes how easily one can find a solicitor who will carry on negotiations for a complainant who is inarticulate and has little money. The answer is that the events of the last several years promise to make it easier. For many years, State financial aid has been available to those who became involved in civil court

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<sup>6</sup> For a fuller discussion of the techniques used in negotiations between parties of equal power, see especially Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, (1963) 28 Am. Soc. Rev. 55.

proceedings. Less available have been the services of a lawyer who would be prepared to sit down and write letters or conduct negotiations. These services have had to be paid for and the poor have suffered. The main support has come from municipal Citizens Advice Bureaux which have dispensed legal advice through volunteers acting on a part-time basis.

It is here that changes have been made. First, an independent legal organization (Legal Action Group) was set up in 1971, financed partly by subscription and partly by foundation grants, to bring together socially-aware lawyers, law teachers, and social workers. The Group provides free part-time services in 14 cities around the country, but goes beyond Citizens Advice Bureaux in that it is prepared to take up cases for clients rather than simply give impartial advice. Secondly, there has been the transplanting and development of the American concept of the "neighbourhood law centre" — including the setting up of full-time subsidized law offices in areas of cities which are easily accessible to poor people who have problems. Just as social services go to the client, or at least operate in the client's locality, so too the neighbourhood law centres are being conceived with accessibility as first priority. At present they operate partly on local funds and partly on foundation grants, but there is provision in the *Legal Advice and Assistance Act, 1972*, for setting up more offices with salaried solicitors paid from the Legal Aid Fund.<sup>7</sup>

Thirdly, there is the £ 25 scheme.<sup>8</sup> Since April 1973, people with low incomes have been able to retain without charge to themselves the services of a solicitor up to the value of £ 25 with a minimum of formality and without prior authority. Nearly all the services of a solicitor are available, though the scheme does not cover appearances in courts or other tribunals, but most important is the fact that the client will be able to employ a champion who will conduct negotiations for him. Once the £ 25 limit is reached, further authority will be needed from the area committee controlling legal aid, but one imagines that if negotiations are to be protracted, this will easily be obtained. The Government feels strongly enough about the value of the scheme to have allocated £ 300,000 to publicizing it, mainly in advertisements on television and in the press, and to have instructed the Central Office of Information to monitor its results. Theoretically, it should certainly help the poorer consumer, and one is perhaps left with *The Times'* wry comment that, now that the

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<sup>7</sup> *Legal Advice and Assistance Act, 1972*, c.50, s.7 *et seq.*

<sup>8</sup> *Ibid.*, ss.1-5.

legal services of the rich are taken care of by the rich themselves and those of the poor are taken care of by the State, it is the middle class that is disadvantaged, having not enough money to fall into one class and too much to fall into the other.<sup>9</sup>

## 2. Conciliation

### (a) *Family Problems*

Conciliation machinery to help to cement the relationship of husbands and wives is nothing new. It is perfectly usual for a husband or wife, unable to restore the balance of an unhappy relationship by negotiation, to seek the help of a willing third party, such as a friend or relative, priest, doctor or one of those organizations which exist to offer marriage guidance counselling. There is unanimity among those who have been involved in this work that the chances of success are greatest if help is sought at an early stage of the quarrel, and that by the time the husband and wife start taking legal advice, the chances of reconciliation are considerably diminished. When divorce proceedings are started, the chances are almost nil.

A major research study carried out into the attitudes of those husbands and wives who go to local courts for temporary orders (usually wives going for financial orders) has modified this accepted picture only slightly. The researchers found that before the court proceedings started, slightly over half the litigants would still welcome reconciliation facilities; after, the proportion had fallen to a quarter.<sup>10</sup> Both these figures are perhaps higher than would have been expected, but we must remember that we are not here speaking of proceedings for divorce. Whether they would welcome reconciliation facilities or not, the facts of the matter appear to be that about half these couples appearing in the magistrates' courts went on to divorce, and virtually all the others did not become reconciled but remained living apart.<sup>11</sup>

It is not surprising, therefore, that few people have great confidence in the power of conciliators in matrimonial disputes. The three committees that have considered divorce law in the present generation have all recommended against introducing compulsory

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<sup>9</sup> *The Times*, Editorial, April 2d, 1973.

<sup>10</sup> O.R. McGregor, L. Blom-Cooper and C. Gibson, *Separated Spouses* (1970), 133 (Table 90).

<sup>11</sup> *Ibid.*, Ch. 9.

conciliation on the ground that it would probably become a pointless formality with little prospect of success.<sup>12</sup> At the same time, our conventional approach to marriage means that we are driven to insist that conciliation is a valuable ideal. We tend to feel that, even though it may be late in the process of marriage breakdown, husbands and wives should be able to find out what marriage guidance facilities are available and have the opportunity of taking advantage of them.

There are therefore three official references to reconciliation in our modern divorce legislation. The first is the most important. The *Divorce Reform Act* of 1969<sup>13</sup> draws the attention of the lawyers in the case to the possibility of reconciliation, by making it possible for the petitioner's solicitor to give a certificate to the court to the effect that he has discussed reconciliation with the petitioner and given him or her the names of appropriate marriage guidance organizations. This is not to be regarded as a formal step to be taken in all cases no matter how poor the marital relationship is. It simply ensures that the lawyers have a list of the suitable organizations which they can produce to clients who may benefit from special guidance.

The second and third references to conciliation are of much less practical significance. A divorce court is given the power to adjourn a case before it if there is any reasonable possibility of reconciliation, but in the nature of things it is a very rarely used power.<sup>14</sup> And in the special circumstances of a divorce petition within three years of the marriage, which the court can only grant in very special circumstances of hardship or depravity, it is barred from making an order if there is any reasonable probability of reconciliation.<sup>15</sup> In practice, of course, the "hardship or depravity" will usually be so great as to make future marital harmony an impossibility.

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<sup>12</sup> Report of Royal Commission on Marriage and Divorce, 1956, Cmnd. 9678, para. 340; *Putting Asunder: A Divorce Law for Contemporary Society* (Report of a Group appointed by the Archbishop of Canterbury, 1966), para. 76; *Reform of the Grounds of Divorce: The Field of Choice* (Law Commission Report, 1966), Cmnd. 3123, para. 30.

<sup>13</sup> *Divorce Reform Act*, 1969, c.55, s.3(1), now *Matrimonial Causes Act*, 1973, c.18, s.6(1); and Practice Directions, [1971] 1 All E.R. 894, and [1972] 3 All E.R. 768.

<sup>14</sup> *Divorce Reform Act*, s.3(2), now *Matrimonial Causes Act*, 1973, s.6(2). See, for example, the Australia and New Zealand experience discussed in the Law Commission Report, *supra*, f.n.12, paras. 31-32.

<sup>15</sup> *Matrimonial Causes Act*, 1965, c.72, s.2(2), now *Matrimonial Causes Act*, 1973, c.18, s.3(2).

(b) *Race Relations*

A racially harmonious community is not going to be realized if disputes between races are allowed to polarize whole sections of the community into hostile camps. From the beginning of our modern race relations legislation in 1965, therefore, conciliation has been the key to the handling of all problems of alleged discrimination. The settlement of any dispute through the removal of the public wrong of discrimination and the remedying of the damage suffered by the victim is made dependent upon using certain official procedures.

The main instrument of settlement is the Race Relations Board which, in addition to its chairman and 10 part-time members, maintains a full-time staff of administrators and conciliation officers.<sup>16</sup> More importantly, the Board appoints conciliation committees to work in the different parts of the country; at present there are nine such committees covering the different regions, each with an average membership of nine people.<sup>17</sup> These are all persons with special knowledge of some aspect of the areas in which racial conflict occurs, such as employment, housing, and so on, and there are welcome signs that minority groups are being given increased representation on the committees. Although the responsibility for investigating complaints is shared between the national Board and the local committees, the majority of investigation takes place at the local level; the Board concerns itself mainly with cases involving central or local government bodies or those which have special features. Remembering the exclusivity of industrial relations procedures, it is hardly surprising that any complaint about discrimination in employment is automatically referred to the Department of Employment, which in turn passes it on to the appropriate voluntary machinery within the industry. Only if that machinery does not exist or is inadequate does the Board handle the case.<sup>18</sup>

Conciliation procedures are as expedient and straightforward as possible, and in fact in the majority of cases it is found that there is no legal dispute to conciliate. In 1970-71, it was found that there was discrimination in only a quarter of 530 general complaints made, and in only 7% of complaints of alleged employment discrimination.<sup>19</sup> Professional staff take statements and assemble the evidence, in-

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<sup>16</sup> *Race Relations Act*, 1968, c.71, s.14.

<sup>17</sup> *Ibid.* And see report of the Race Relations Board, 1972, para. 2, Appendices II and III.

<sup>18</sup> The special procedure in employment cases is discussed in detail in A. Lester & G. Bindman, *Race and Law in Great Britain* (1972), 313.

<sup>19</sup> *Ibid.*, 303 (Tables 1 and 2).

cluding where necessary expert evidence to assist them (such as that of the Vice-Chairman of the Hairdressing Council on the differences inherent in the cutting of Caucasian, Negroid and Asian hair).<sup>20</sup> The committees or the Board must then decide whether discrimination has taken place.

They cannot, however, behave like courts. It is important for their primary work of bringing people together that they cannot demand the attendance of witnesses or the production of documents. Nor can they make legally enforceable orders. The difficulty is that everything they do must depend on the co-operation of those complained against, but it is precisely because there has been no social co-operation that the complaint has been made in the first place.

When we speak of the Board "settling the difference" between the complainant and the respondent, what do we mean? The "difference" is what he alleges he has been denied, but of course it may well be that it is impossible for him to get that any more, or perhaps he does not even want it. A man cannot be given a house or a job that has already been given to someone else; and he may not want to eat or have a drink in a place in which he is not welcome. Very rarely, he has been given what he has been denied, but in the majority of cases the Board will simply be trying to make sure that the respondent sees the error of his ways and offers an apology to the complainant (which is usually all he will get), together with a written assurance that the discrimination will not happen again. The respondent may feel that he has to offer compensation as part of the reconciliation but as the number of cases in which this happens is negligible, and the largest amount paid (to the best of my knowledge) has been £ 150 for the loss of an employment opportunity, we cannot think of compensation as a significant aspect of settlement.

It is sometimes complained that the Race Relations Board is powerless. However, quite apart from the threat of legal proceedings, which I shall consider in the last part of this paper, it has many powerful levers that it can use in its work of conciliation. Not least is the fact that it can tell one party that he should not be behaving unlawfully: an injunction which is still not without effect in England, even though there is no effective sanction to back it up. Appeals to self interest may or may not succeed; but what must ultimately succeed in this particular conciliation process is the

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<sup>20</sup> Report of the Race Relations Board, 1970-71, para. 33 and Appendix V, case 4.

threat of inevitability. It is only rarely that communities can continue to remain hostile to each other while taking part in the same social, political and economic life. If widespread and genuine conciliation cannot be an immediate reality, local and individual conciliations will help to promote an atmosphere in which racial hostility will in course of time be substantially reduced. What is important is that a spirit of persuasion and voluntariness should be maintained at all costs.

(c) *Industrial Relations*

When industrial negotiations break down, it is taken for granted that the next step in the process of encouraging voluntary agreement shall be the use of a third party to bring about conciliation. Whoever the third party may be, the tradition of voluntarism in British labour relations requires two things: firstly, that he should see his job as helping the parties to achieve a settlement and not as imposing one upon them; and secondly, that he should delay his intervention until the parties' own settlement machinery has clearly failed to produce a result.

Conciliation machinery is a mixture of the formal and informal. It is the result that matters, not who brings the parties together. And so although the Department of Employment has a staff of conciliation officers who work on a national and regional basis, acting under legal powers conferred as long ago as 1896,<sup>21</sup> anyone who has enough prestige to influence the parties and enough motivation to try to bring them together can perform the conciliation function. At the top of the "official" hierarchy of conciliation are the Ministers themselves, though they intervene only when the professional conciliation officers of the Department of Employment have failed to bring the parties together.

These officers have in fact a remarkable record of success over the years, although their successes are usually unheralded by newspaper headlines because they are the result of discreet work behind the scenes, often at the informal level of telephone chats. In 1972, the conciliation officers settled 716 disputes (not counting the "telephone conciliations"), three quarters of them at the request of the unions involved and only a very small proportion on their own initiative. In the first half of 1973, the service had 605 requests for assistance and has already completed 415 cases successfully.<sup>22</sup> Just as important, the officers have combined their conciliation work with

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<sup>21</sup> *Conciliation Act*, 1896, 59 & 60 Vict., c.30, s.2.

<sup>22</sup> These statistics and those that follow are from *The Times*, Business News, August 31st, 1973, p. 20.

advisory work to industry on personnel management, and so maintain a reputation for helping positively to create a good climate of industrial relations in which the likelihood of dispute is reduced.

The success of the conciliation officers is contrasted by a surprising failure in a system of relationships normally dedicated to voluntarism and collectively bargained agreement. In August 1972, the Trades Union Congress and the Confederation of British Industry (the workers' and employers' associations respectively) launched a joint conciliation and arbitration scheme, which was to be free from the influence of the law and the Government. As a gesture of co-operation in industry it could not be faulted; but because it failed to offer any conciliation machinery demonstrably better than that of the Department of Employment, it has in the 15 months to the time of writing attracted only one application for its services. The Industrial Society, apparently believing that it could offer greater independence, set up similar machinery at the beginning of 1973, but it has only been set in motion six times in contrast to the official machinery's 605 times in the same period.

### 3. Arbitration

#### (a) *Industrial Relations*

Since the *Conciliation Act* of 1896, it has been possible for the parties to an industrial dispute to go to arbitration, either to a highly skilled individual arbitrator, or to the (now newly named) Industrial Arbitration Board. The Board is tripartite, consisting of a lawyer as chairman and representatives from each side of industry, though not the industry before the Board. The arbitrator's task is to make an award which will both satisfy existing claims and lay the foundation for future relations. In practice, as in all arbitrations, the award will be accepted by both sides.

#### (b) *Commercial Contracts*

In contracts between businessmen, it is common to provide that disputes under the contract which cannot be settled amicably, *i.e.* by negotiation, shall be referred to arbitration. The arbitrator will normally be drawn from one of the panels of arbitrators within the trade or industry concerned, or from one of the non-specialized groups of arbitrators in specific cities with a tradition of well-developed commerce.

The expertise of the arbitrator is fundamental. He is often able to make a rapid judgment on what is involved in the dispute because he is fully familiar with the operation of the trade con-

cerned. Often he will have personal experience in matters commonly put to arbitration, such as the quality of goods or services in a particular trade.

It was the lack of personal expertise that was probably at the root of the failure of one of the recent experiments in arbitration. Under part of the *Administration of Justice Act*<sup>23</sup> which came into force in October 1971, it was provided that a judge of the Commercial Court (the special branch of the High Court dealing with important commercial issues) could accept appointment as a sole arbitrator where the dispute seemed to him to be of a commercial character.<sup>23a</sup> Although three judges have been made available and the business of the Commercial Court has not been heavy (in 1972 it only heard some 50 cases), not one single appointment has been offered to a judge. Despite the advantages claimed for arbitration by a judge (his fees, which are paid to the High Court, are low compared with those of many experienced commercial arbitrators, and his award could be questioned directly in the appeal court and not in the High Court), there has been no sign that the commercial community has much need for arbitrations by the judiciary. Those professionally involved say that there are ample arbitration facilities available in particular trades, and there is nothing to suggest that a judge, forced to call witnesses to explain the workings and standards of a particular business, would enjoy much prestige within the trade. It is true that there is still widespread unawareness of the possibility of using judges in this way, and no doubt better publicity would yield more results. But until it is shown that the issues to be decided relate to law rather than business, the experiment will remain a failure.

Outside this rather special field, there are three modern developments in arbitration. All at the moment are being pursued separately, but all could in the future come together into a comprehensive scheme.

The Manchester Arbitration Scheme for Small Claims was begun in recent years as an exercise in providing quick and easy legal redress for consumers who have a dispute with manufacturers or retailers. Any individual who is claiming not more than £150 can put his case to the scheme, and have an arbitrator appointed by the President of the Manchester Law Society (the local professional association of solicitors). The overheads of the scheme are met by a grant from a foundation, and the arbitrators (who are usually lawyers) and expert advisers involved offer their services

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<sup>23</sup> *Administration of Justice Act*, 1970, c.31.

<sup>23a</sup> *Ibid.*, s.4.

for low fees as a public service. A decision can be given on the basis of a written claim and answer if the parties prefer this; otherwise, they come before the arbitrators with any evidence they choose to bring with them, though they are not allowed to bring their lawyers. If necessary, the arbitrator can consult an expert or arrange for a test or inspection to be carried out. He gives his decision as quickly as possible and tells the parties who must pay the costs.

The scheme was set up experimentally to see if it might prove a satisfactory model for a national consumer court system. It has proved effective enough for a variation of the model to be established in London. The same foundation is responsible for financing the project, which will be operated by the Westminster Law Society. The amount which can be claimed under the Westminster scheme has been increased to £ 250 and the range of cases to be dealt with has been extended. Nonetheless, it is confidently expected that the majority of the work will be small consumer claims between £ 5 and £ 10.

These may be called "pro-consumer" schemes, in that they have been set up in consultation with consumer protection bodies to afford cheap and easy remedies. What is often not conceded in the pro-consumer movement, however, is that the retailers, manufacturers and others who are the target of pro-consumer activity are often themselves equally concerned to establish cheap and easy procedures. Their concern stems not only from a desire to give themselves the advantage of those procedures, but also because they may acknowledge that they have a public duty to respond to the growing sense of consumer consciousness.

Arbitration schemes have been set up, for example, by two trade associations on the same model: the Motor Agents Association and the Association of British Travel Agents. The extent to which they each provide a remedy differs. In the case of the Motor Agents Association, it is a condition of an agent's membership in the Association that he should agree to arbitration of disputes that cannot be settled amicably with the customer. A similar approach was recently considered by the Association of British Travel Agents, but there was apparently insufficient support from the major tour operators, who were confident that their internal settlement procedures were completely adequate to their task. As a result, membership in the scheme remains voluntary and very few members of the Association have joined.

In both schemes, participation by the consumer is simple and inexpensive. It costs the consumer a £ 5 deposit at most, and if

he succeeds, he will usually have that refunded together with whatever award the arbitrator makes. The decision is normally made on documents alone, though the travel industry scheme provides for an actual hearing in person if this is requested (and paid for). It is almost certainly in the client's interests to opt for the cheaper procedure and one would imagine that a travel company too, faced with the prospect of having to bring representatives back from overseas for an oral hearing, would prefer arbitration on the basis of documents alone.

Lastly, a development is now beginning which may encourage a consolidation of these existing private arbitration arrangements. A section in the *Administration of Justice Act, 1973*,<sup>23b</sup> lays the foundation for a new small claims procedure in the county courts. Claims of up to £75 (or more if the parties agree) may be transferred by the registrar to arbitration by himself, the judge or an outside arbitrator, even if one of the parties does not agree.<sup>24</sup> The case may, with the parties' consent, be heard exclusively on the basis of their statements and documents, and if a hearing is thought to be necessary, it is conducted informally, according to any procedure the arbitrator thinks convenient and fair. With the parties' agreement, he may consult a technical expert, call for an expert report or invite an expert to attend the hearing as an assessor.<sup>25</sup>

At the time of writing, the scheme had been functioning for too short a time to form any impression of its value. It may well leave something to be desired in financial terms, as no steps have been taken to bar the parties' lawyers from the proceedings, and the experts' fees for technical opinions may prove to be more daunting than modest. A procedure which is to be inexpensive enough to be valuable to the consumer will need to by-pass the legal profession; one which is based on access to the county courts, which is normally regulated by the advice of a solicitor,<sup>26</sup> is likely to remain more costly than the other existing commercial arbitration and small claims schemes.

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<sup>23b</sup> *Administration of Justice Act, 1973*, c.15.

<sup>24</sup> *Ibid.*, s.7, amending s.92 of the *County Courts Act, 1959*, 7 & 8 Eliz. II, c.22 and the County Court (Amendment No. 3) Rules, 1973 (S.I. 1973, No. 1412), r.4.

<sup>25</sup> Practice Direction, [1973] 3 All E.R. 448.

<sup>26</sup> Though for the middle class consumer, October 1973 saw the advent of not only the revised county court arbitration scheme, but also the first do-it-yourself book on civil procedure: *How to Sue in the County Court* (1973, Consumers Association).

#### 4. Adjudication

When a conflict reaches court, it can fairly be assumed that all other means of settling the dispute have failed or have been thought inappropriate, and that the protagonists have polarized their claims. In theory, an adjudication by a court looks to the events which have occurred and to the norms according to which judgment is to be reached. Putting the two together, the court hands down an authoritative decision which usually declares one side to be in the right and the other side to be in the wrong; for this reason, it is not usually in both parties' interests for a case to be decided in court.

##### (a) *Adjudication or Administration*

First, it is essential to discuss what courts should *not* decide. It is important that courts should genuinely be asked to choose between alternatives, and not merely be accorded a "rubber-stamping" role. The fields discussed above include two particular examples of what might be regarded as misuse of judicial time.

The first is divorce. Until the nineteenth century, divorce could only be obtained by Act of Parliament; since 1857, it has been granted by the courts. The 1969 reforms in our divorce laws, which were the most significant since 1857, represented a major step towards creating a divorce procedure in which, given the mutual consent of the husband and wife, administrative authorities would take the place of the courts. At present, the hearing of an uncontested divorce petition may take as little as five minutes of the court's time, but even this burden of time could more conveniently be put on to the shoulders of some other body.<sup>27</sup> Details of financial provision and child custody arrangements could be worked out by the husband and wife under the supervision of the social welfare authorities.

The second example relates to some of the powers of the National Industrial Relations Court under the *Industrial Relations Act*,

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<sup>27</sup> A typical list of undefended cases in the author's local county court in 1973 allowed an average of three minutes per hearing. A Practice Direction during the year, however, reduced the length of time needed to hear a petition based on adultery by making affidavit evidence the norm (Practice Direction, [1973] 3 All E.R. 180); and a revolutionary new procedure introduced in December 1973 allows a precisely-defined class of petitions based on two years' separation with the respondent's consent to be dealt with in a quasi-administrative manner without the appearance of either party (Practice Direction, [1973] 3 All E.R. 1182).

1971. In an emergency, the Minister could apply to the Court for an order forbidding the taking of industrial action in a defined area of employment for a period of up to 60 days. The conditions of the application were that industrial action had started or was likely, and that it would cause disruption which would be likely to seriously injure the national economy, endanger security or the lives or health of a substantial number of people, or create a serious risk of public disorder.<sup>28</sup> Again, in the same circumstances, if the Minister had reason to doubt whether industrial action was the will of the majority of the workers involved, he could ask the court to order a ballot of the workers in the area concerned.<sup>29</sup>

In both cases, if the Minister's facts were found to be true, the court *had* to make the order he asked for and could exercise no proper powers of decision. In other words, it was a fairly blatant attempt to force the hand of the unions by giving the Minister powers while pretending that the court was exercising them. The Government invoked them only once, in the 1972 railway dispute when they proved to be of little use, and even though faced with massive problems during 1973 in the gas, railway and hospital services, it did not dare to use them again.

*(b) Adjudication and Social Relationships*

If, then, it is important to see the role of a court as making a decision between competing alternatives, what kind of disputes should be entrusted to the courts to solve? My own view is that as far as possible, the courts should only be used to obtain a *final* determination of the rights and duties of the contesting parties. If a social or economic relationship is to be severed completely because it has deteriorated to a point at which no consensus exists, then a court may be the proper institution to sever it. It is for this reason that, given the tradition of voluntarism in British labour relations, I have some doubts as to the place of the courts in making decisions about industrial disputes.

Although all relationships function better if there is consensus, the industrial relationship is wholly dependent upon it. And what will make consensus harder to reach is one party dragging another into court against his will, polarizing the respective claims that litigation necessarily forces upon the parties, and yet continuing to insist that the relationship of management and worker should continue. This is not a consumer situation: the consumer can

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<sup>28</sup> *Industrial Relations Act, 1971, c.72, s.138. (Repealed, 1974).*

<sup>29</sup> *Ibid., s.141.*

always go to another shop, or take a holiday with another tour operator. It is not even a family situation: when husbands and wives go to court for divorce, they are already in an advanced state of hostilities and do not expect to be told that after the court's decision they must go back to bed with each other. But this is precisely what a court will tell management and workers after making a decision on legal rights in favour of one and against the other.

The 1971 *Industrial Relations Act*, in tiptoeing between the extreme claims of the traditionalists and the unions, gave to local industrial tribunals and the National Industrial Relations Court (N.I.R.C.) the power to carry out the function of adjudication in industry: the tribunals to decide individual disputes and the national Court to decide collective ones.<sup>29a</sup> What happened? The first and most obvious consequence was that the Trades Union Congress established an official boycott of the tribunals and the Court. No union which is a member of the T.U.C. ever appeared as a plaintiff in proceedings before them and some did not appear even in self-defence. Orders made against unions were therefore in a sense made without their concurrence; but in principle, of course, a court's order should be obeyed whether or not it has the concurrence of the person against whom it is made.

The experience of the 1971 *Industrial Relations Act* showed the weakness of the adjudication approach. We saw trade unions resisting orders to pay fines imposed on them for contempt of court and their assets being seized under sequestration orders until the fine has been paid.<sup>30</sup> We saw shop stewards committed to prison for contempt because they would not carry out orders of the Court, and subsequently released because the courts did not want to help create a new form of trade union martyr.

These were merely trials of strength which in my opinion did not show the true strength of the parties. If the unions choose to oppose management, or if their members insist that their leaders not implement decisions of a court, what can society effectively do? Here we are facing a unique problem of law enforcement: we cannot rely on the comfortable assumption that people will obey the courts just because they are told they should. Constant sequestration orders will weaken the unions financially and it may be conceivable, al-

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<sup>29a</sup> *Ibid.*, Part VI.

<sup>30</sup> *Ibid.*, s.101(3). The Amalgamated Union of Engineering Workers has been fined over £130,000 for contempt. For a recent fine of £75,000 and sequestration order in respect of £100,000, see *The Times*, October 11 and 23, 1973.

though unlikely, that the threat of bankruptcy will make them comply with policies with which they do not agree.<sup>31</sup> But this could well be disastrous to the industrial life of Europe, and in the long term it seems likely that consensual forms of management will emerge which will give the unions responsibilities more commensurate with their real power.<sup>32</sup>

Some years ago, a shrewd commentator said that if ever England set up a labour court, it would soon become part of the national conciliation machinery,<sup>33</sup> and this is precisely what happened. The Act required the Court to let the parties take advantage of all conciliation opportunities and it was enabled to adjourn its own proceedings.<sup>34</sup> The President of the N.I.R.C. said that he saw conciliation as having been one of the Court's most successful achievements. In February 1973, he pointed out that of the 30 complaints of alleged unfair industrial practice which had been disposed of by the end of January, 20 had been withdrawn following a settlement. Most of the 17 complaints then pending had been adjourned with a view to an agreed settlement.<sup>35</sup>

### (c) *Justiciability*

What then makes an issue "justiciable" by a court? There have been several intensive discussions of the problem in England in recent years, both in Parliament and among scholars. Yet one cannot but feel that, when one looks at the issue in broader perspective, much of the discussion appears spurious. This is mainly because it has proceeded upon the naive assumption that judges can only be trusted to apply rules and not create policy, and has presupposed that both judicial structure and the formal framework of litigation are established in moulds that cannot

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<sup>31</sup> There is some evidence that militant unions are transferring assets out of the jurisdiction to make it impossible to sequester them: e.g. the Association of Cinematograph, Television and Allied Technicians, *The Observer*, November 18, 1973.

<sup>32</sup> Quite apart from the draft EEC Commission Fifth Directive (requiring one-third worker representation at supervisory board level), informal domestic recommendations in the U.K. by a joint committee of industrialists and trade unionists support increased worker participation in management: see *Sunday Times*, July 15, 1973, and *The Times*, July 16, 1973.

<sup>33</sup> Marsh, *supra*, f.n. 5, para. 102.

<sup>34</sup> *Industrial Relations Act*, 1971, c.72, Schedule 3, para. 18(3).

<sup>35</sup> Sir John Donaldson, addressing the Glasgow Chamber of Commerce, reported in *The Times*, April 10, 1973.

be broken. Both assumptions are false, as experience has shown, but it has taken political initiative rather than jurisprudential persuasion to establish this.

Problems are normally presented to courts in small, narrowly-defined units. Judges are not usually expected to pronounce with authority on broad issues of social direction or economic development. But it now seems to be accepted that if the broad issues can be broken down into a series of more precise questions, then the courts can answer them.

(i) Presenting the Issues

This proposition can be illustrated with examples from a new court (the Restrictive Practices Court, set up in 1956) and from a court in which the terms of reference were changed in 1969 (Family Division of the High Court).

The Restrictive Practices Court was established to scrutinize restrictive trading agreements between businessmen, *e.g.* exclusive supply arrangements, price fixing, and so on. The basic legislation presumed that such agreements were against the public interest and should not be allowed to continue. The Court was to have the job of deciding whether any particular agreement referred to it did in fact serve the public interest, and whether its merits in this respect outweighed its demerits so that it could be salvaged.

The Parliamentary Opposition categorically opposed the creation of the Court. They privately suspected that the judges would be too economically conservative in their approach, but publicly concentrated more diplomatically on the vague constitutional principle that judges should apply laws and not create policies. Policy-making was a Parliamentary prerogative. Conducting the argument along these lines effectively played into the hands of the supporters of the Bill, because what they were proposing was not a general power for the Court to give an arbitrary "Yes" or "No" to any agreement, but a more limited power which admittedly called for judgment, but set bounds to the issue. A restriction in a trading agreement was to be deemed contrary to the public interest unless the Court was satisfied that one of seven situations existed: that the restriction was reasonably necessary to protect the public against injury in connection with the use of the goods; that the removal of the restriction would be likely to cause a reduction in export earnings; that the removal of the restriction would be likely to have a serious effect on unemployment in any area in which the industry was carried on; and so

on. An element of judgment was left in every one of these "gateways", but the decision became structured, the issues narrowed, and judicial inventiveness disguised to the extent of saying whether a practice was "reasonable" or not.<sup>36</sup>

A similar problem of justiciability was considered in 1969. After efforts had been made intermittently for a hundred years, the decision was finally made to change the basis of divorce jurisdiction. From 1857 (and before that in the church courts), the basis of divorce had been the proving of a "matrimonial offence". This was, the retentionists said, a very suitable approach. Some wrongful behaviour had to be alleged, be it desertion, or adultery, or cruelty, and the court's task was simply to see whether on the evidence it had been proved. In other words, the issue was treated without reference to the surrounding background, as if the husband and wife were in total opposition to each other.

The truth of the matter is, of course, that the majority of husbands and wives who appear as petitioners and respondents in the divorce courts both want a divorce, and formal dispute between them as to whether or not they should get a divorce is negligible. Indeed, it was argued, the so-called matrimonial offences may be only symptomatic of the breakdown of a marriage, and will not lead to divorce unless the relationship between the husband and wife has already deteriorated to a point at which it cannot be saved.

This brief background serves to set the scene for the debate that took place from 1966 to 1969. At the start of that period, a group of scholars examining the problem at the suggestion of the Archbishop of Canterbury advocated "breakdown of marriage" as the sole ground for divorce; in the same year, their proposals and others were reviewed by the Law Commission;<sup>37</sup> and the final distillation of legal, ecclesiastical and Parliamentary thought appeared in the *Divorce Reform Act* of 1969.<sup>38</sup>

The principle embodied in the 1969 Act is basically that divorce will be granted if it is shown that there has been an irretrievable breakdown of the marriage<sup>39</sup> and if as proof of this, evidence is given of any one of five situations which has arisen (adultery and intolerable behaviour, conduct with which the petitioner can-

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<sup>36</sup> See generally, Stevens & Yamey, *The Restrictive Practices Court* (1965), Ch. 3.

<sup>37</sup> *Supra*, f.n. 12.

<sup>38</sup> *Divorce Reform Act*, 1969, c.55.

<sup>39</sup> *Ibid.*, s.1 (now *Matrimonial Causes Act*, 1973, c.18, s.1(1)).

not reasonably be expected to put up, desertion, two years' separation with consent, or five years' separation without consent).<sup>40</sup> The justiciability of the issue is in fact made even more straightforward by so arranging the Act that if one of these facts is proved, then the marriage is assumed to be irretrievably broken down and the court must grant a decree unless it is satisfied that it is not.<sup>41</sup>

What has been enacted in the 1969 *Divorce Reform Act* is a modified version of what the Law Commission called "breakdown without inquest".<sup>42</sup> If the husband and wife are before the divorce court at all, that of itself is good indication that the marriage has broken down, and it is fairly clear that they will be better judges of the viability of their marriage than a court can be even with the most elaborate and searching inquest. With one or two qualifications, the courts are now simply concerned with putting their rubber stamp of approval on the assessment of marital breakdown. A few petitions are still contested but, as before, not usually because of a desire to remain married but merely in the hope of securing better financial provision or greater control over the children of the family.

(ii) The Composition of the Courts

One must bear in mind that the personnel of the courts are not a neutral matter. Who the judges are and what they are capable of doing is basic to the issues that can be entrusted to them.

The stereotypes of the English higher judiciary are important because they have played no small part in the political battles about the role of the courts in the social system. The Establishment sees the judges as men of the highest personal integrity, political independence and intellectual calibre. Quite apart from their judicial work, they can therefore be entrusted with inquiries into such sensitive areas as state security, military brutality and the sexual misbehaviour of Ministers of the Crown. They occupy high positions in the hierarchy and their decisions and reports command high respect.

To the cynical, the higher up the judicial ladder a judge may go, the less he remains a man of the people, the less intellectually liberal and the more socially, economically and politically conservative he becomes. And, as seems inevitable, he gets older, too.

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<sup>40</sup> *Ibid.*, s.2(1)(a)-(e)(now *Matrimonial Causes Act*, s.1(2)(a)-(e)).

<sup>41</sup> *Ibid.*, s.2(3)(now *Matrimonial Causes Act*, s.1(4)).

<sup>42</sup> *Reform of the Grounds of Divorce: The Field of Choice*, *supra*, f.n.12, paras. 71-76.

The judges' analytical powers are not usually questioned, though on one remarkable occasion recently a dissatisfied litigant threw animals' brains at three judges of the Court of Appeal, voicing the complaint that they did not have enough of their own.

I have become increasingly convinced that there are many areas of social activity in which court decisions can be made much more sensitive to social conditions if there is participation in the decision-making process by a wider range of people. This necessarily echoes the criticism that the higher judiciary may be too remote from or not widely enough experienced in human affairs. Sometimes this gap in experience may be filled through the participation of experts in the judicial process. For example, it has been argued that there should be a family court composed not merely of lawyers, but of social workers, psychiatrists and others with expertise in problems of interpersonal relations. Should the power of a judge to pass sentence be shared with others (psychologists, probation officers and criminologists) who have special expertise in the study of what happens to criminals after they have been sentenced? The question is not whether the legal issues are clear, or whether the judge knows the legal rules, but whether there are not broader issues at stake, issues which are not easily and clinically disposed of by a yes/no answer and for which a wider experience of social and economic problems may be needed.

The Restrictive Practices Court, mentioned above, was the first of the new courts to be set up with mixed legal and non-legal membership.<sup>43</sup> The non-legal members are persons with special experience in commerce and industry, and such is the pride of place given to them that in practically every decision given by the Court on a restrictive agreement, these specialists have outnumbered the judges. What may be of more lasting significance is that individual lay members have a tendency to remain judges of the court for longer periods than the legally-qualified judges who, after a period of service, are returned to the High Court to continue their ordinary judicial business or are promoted to the Court of Appeal. It is interesting that once the Court became properly established (and the lay members presumably acquired status and influence), its decisions became more pro-industry than its earlier ones had been.

The second, more controversial development on similar lines has taken place in the field of race relations. Whenever a county court hears a case brought by the Race Relations Board under the *Race*

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<sup>43</sup> *Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. II, c.68, s.4.*

*Relations Act*, the professional judge must sit with two assessors who have special knowledge of problems connected with race and community relations.<sup>44</sup> The decision made must be his alone, but he can draw on them for information and advice about the behavior and reactions of people in racial conflict. The objective was, as the Lord Chancellor explained in Parliament, to create confidence: decisions should not be "left to a judge who may have nothing at all to do with race relations or with coloured people".<sup>45</sup> However, the real fear of the coloured communities was that white judges would say that white defendants had not discriminated against them. Even though it may not have worked out precisely as feared, obvious deficiencies can be seen. The assessors appointed to serve on race relations courts are well-disposed, community-conscious people, though whether all of them have "special knowledge" is doubtful. But most importantly in terms of the crucial issue of confidence, not one of them is black.<sup>46</sup>

The latest venture into multi-judge courts has come with the setting up of the National Industrial Relations Court. Even more so than in the case of the two courts described above, the membership of the N.I.R.C. had to create confidence in the potential litigants. The trade union movement was bitterly opposed to the whole conception of the Court and had threatened to boycott all its proceedings. This proved to be the biggest political crisis of confidence in the courts in recent years. But if the conception of the Court had come to be accepted, it would have been its mixed membership which played a leading role in making it a functioning part of the industrial system, in much the same way as the laymen have made the Restrictive Practices Court sensitive to industry.

One must be careful about using the word "laymen": a judge publicly contradicted counsel who referred to the N.I.R.C. as being made up of one judge and four laymen. He stated that there were five judges, one of them a professional.<sup>47</sup> The non-legal judges were all persons with special knowledge or experience of industrial relations.<sup>48</sup> The "professional" judge was responsible for delivering the judgment of the Court, but as its President pointed out:

All judgments . . . are the result of careful and detailed consultation between all the members who have sat for the hearing of the case . . . . Each

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<sup>44</sup> *Race Relations Act*, 1968, c.71, s.19(7).

<sup>45</sup> (1968) 296 House of Lords Deb., col. 1572.

<sup>46</sup> Lester & Bindman, *supra*, f.n.18.

<sup>47</sup> Buckley, L.J., in *Secretary of State for Employment v. A.S.L.E.F.*, quoted in Rideout, *Practice and Procedure of the NIRC* (1973), para. 1-04.

<sup>48</sup> *Industrial Relations Act*, 1971, c.72, s.99. (Repealed, 1974).

member, whether Judge or industrial member [*sic.*], weighs and considers the evidence in the light of his own skills and experiences, and the resulting judgment records their joint conclusions.<sup>49</sup>

Given the English judiciary's lack of experience in dealing with this kind of problem, it is perhaps possible to take the President's words at their face value, making the position contrast sharply with the dominance of the professional judge in labour courts elsewhere in the world.

(d) *The Nature of Court Proceedings*

This paper has been mainly concerned with relationships which we have chosen in England to classify as "civil" rather than "criminal". The distinction between the two is by no means clear for many conflicts have both civil and criminal aspects and even civil and criminal procedures have much in common. There are, however, two characteristics of criminal proceedings that are of the greatest importance here and which both stem from the fact that crime is conceived of as a wrong affecting the State as a whole. First, labelling a wrong as a "crime" tends to affect the popular conception of the seriousness of that behavior. Insofar as this may lead to an intensifying of social disapproval, a greater degree of polarization may be achieved than by simply labelling the behaviour as a "civil wrong". Secondly, although it is not invariably true, the conduct of a criminal prosecution is usually in the hands of State officials, on behalf of the community as a whole, rather than its being left to each individual victim to maintain his own suit.

We have had to consider more than once in recent years the appropriateness of criminal procedure for dealing with different kinds of disputes. A survey published in 1970 of the experiences of husbands and wives who took their matrimonial disputes to the magistrates' courts showed that half the husbands and a third of the wives disliked the attitude of the magistrates to them and to their problems, and a good proportion of each of these groups objected that they were "treated like criminals".<sup>50</sup> The magistrates, who are almost entirely part-time lay judges, do in fact spend the majority of their courtroom time trying criminal cases, and though they should make a rigid demarcation between their criminal and their matrimonial adjudications, they obviously fail to do so. The experience of the juvenile courts, which since 1969 have been instructed to conduct "care proceedings" rather than criminal ad-

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<sup>49</sup> *Midland Cold Storage Ltd. v. Turner*, [1972] I.C.R. 236.

<sup>50</sup> *Separated Spouses, supra*, f.n. 10.

judications in respect of juveniles, is very much the same.<sup>51</sup> Indeed, it would be surprising if it were not, for the same group of lay magistrates are the judges of the juvenile courts. Both experiences may support the movement in favour of a family court in which legalistic procedures (and especially those associated with the criminal courts) are de-emphasized.

The first comprehensive body of law for coping with racial discrimination in England came into effect, as was mentioned above, with the passing of the *Race Relations Act* in 1965.<sup>52</sup> The first draft of the Bill provided in uncompromising terms that in certain circumstances, racial discrimination was to be a criminal offence. It was only a carefully judged withdrawal from this position while the Bill was passing through Parliament that saved the legislation. On the one hand, it was an open secret that the civil servants advising the Home Secretary believed it was impracticable to "legislate for conciliation", and on the other there was strong pressure from both sides of the House of Commons to look carefully at the American experience.

Finally, although it is probably true to say that most Members of Parliament neither understood the range of different procedures available in the United States, nor had any feeling for the social, economic and political dimensions of racial conflict in that country, a procedure was adopted which owed much to the law of New York. It involves, as we have seen, giving primacy to conciliation, but once the Race Relations Board fails to obtain a settlement of differences or a satisfactory assurance that discrimination will not be repeated, it may bring civil proceedings against the offending member of the public. It may claim: (a) an injunction to restrain the defendant from engaging in unlawful conduct in the future; (b) damages to compensate the victim of unlawful conduct; (c) a declaration that the defendant has acted unlawfully; and (d) revision of a contract or a term in a contract so that it does not contravene the Act.<sup>52a</sup>

These remedies are designed to give teeth to the *Race Relations Act* by making sure that behaviour which the State chooses to call unlawful does not go unquestioned. At the same time, they are teeth that do not bite hard: they do not draw blood, but merely leave an impression. They do not seek to polarize the communities of the white and the black, of the discriminators and those discriminated

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<sup>51</sup> *Children and Young Persons Act*, 1969, c.54, s.1.

<sup>52</sup> *Race Relations Act*, 1968, c.71.

<sup>52a</sup> *Ibid.*, s.19, 21-23.

against, because harmony and not hostility is the objective of the Act. It does not therefore strike with the big stick of the criminal law; rather, it administers a parental slap and in effect says "You have done wrong; don't do it again", and then leaves it to the individual's sense of public duty and the growing consensus of community opinion to restrain this kind of behaviour in the future. We have unfortunately no evidence that these measures promote better race relations, but we can without question point to the fact that none of the civil suits brought by the Board has irretrievably inflamed a difficult racial situation. To this limited extent, we may perhaps speak of the success of the policy.

It should be noted that these civil suits are brought by the Board. When civil remedies are offered by statutes, the normal assumption is that the individual citizen wronged may bring an action to seek these remedies. The *Race Relations Act* has broken with this tradition: it gives to the Race Relations Board the exclusive right to bring proceedings (in specified local courts only), and expressly avoids giving the citizen any standing to bring either civil or criminal proceedings to enforce rights under the Act.<sup>53</sup>

This may be a procedure with wide implications for future use. The Board (or in effect, the State) controls access to the courts. Not only does this mean that it can decide when and where<sup>54</sup> a particular issue should be ventilated in public and thus lay the foundation of a coherent and systematic enforcement policy, but it avoids the harm to race relations that might otherwise be produced by outraged and aggrieved action by a private individual. In this sense, it safeguards the harmonious interests of the community as a whole. Yet at the same time it protects the interests of the individual as far as it can by taking from him the financial and emotional burden of litigation and shielding him from symbolic confrontation as a plaintiff with the man who allegedly discriminated against him.

Finally, another new development promises to strengthen the bridge between civil and criminal proceedings. The *Fair Trading Act*,<sup>55</sup> which passed into law at the end of the summer of 1973, makes provision for a Director General of Fair Trading who will combine in his office all the powers of a supervisor and prosecutor. His duties are described in the broadest terms as keeping under review the carrying on of all commercial activities in the United

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<sup>53</sup> *Ibid.*, s.19(1) and (10).

<sup>54</sup> It further controls access by only giving jurisdiction to specified courts: see *ibid.*, s.19(2).

<sup>55</sup> *Fair Trading Act*, 1973, c.41.

Kingdom relating to goods and services supplied there, and keeping his eye upon all activities which may harm the economic interests of British consumers.<sup>56</sup> Firms or traders who persist in unfair trading practices can be asked to give written assurances that they will stop them, and if they break them or persistently break the criminal law or their civil obligations, they will become liable to proceedings before the Restrictive Trade Practices Court, which may order the offender to refrain from continuing that course of conduct.<sup>57</sup>

This will put on a formal footing a practice which has existed in consumer protection since the passing of the *Trade Descriptions Act*<sup>58</sup> in 1968. That Act gave teeth to consumer protection by penalising the trader who carelessly misled a customer by using a description of goods or services which was in fact false. The enforcement of the Act was entrusted to local standards officers (Weights and Measures Departments) and not to the police, so ensuring a continuous specialist involvement in the prosecution process. It is quite clear from even a superficial familiarity with their work that they are expert balancers of civil and criminal remedies. They most often become involved, of course, when they receive a complaint from a dissatisfied member of the public. They then exercise careful judgment whether the public interest will best be served by pursuing the offending trader in criminal proceedings, or by making him satisfy his civil obligations to the individual complainant. In certain cases, a company will be urged in no uncertain terms to give an explanation, an apology and a small compensation payment to a customer, so as to avoid a lengthy and expensive investigation and criminal prosecution. On the other hand, if the trading practice is genuinely and continuously misleading, prosecutions will be mounted and heavy fines levied. This happened in proceedings against members of the travel industry in the last two or three years: fines of £ 1000 to £ 1500 against the companies grossly outweighed the compensation orders of only £ 5 to £ 10 in favour of the clients.

## CONCLUSIONS

What lessons can be drawn from all this? I would like to suggest three:

1. The first is that concentrating on disputes and their settlement is bolting the stable door when the horse has gone. We should be trying to create systems of organization and control which will

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<sup>56</sup> *Ibid.*, s.2.

<sup>57</sup> *Ibid.*, s.34.

<sup>58</sup> *Trade Descriptions Act*, 1968, c.29.

prevent or reduce the number of disputes arising, as well as providing machinery for settling them. If we look at the problem in this way, we see at once how important are the new administrative bodies which have been set up to study, plan and coordinate work in the fields considered in this paper. The Commission on Industrial Relations, the Race Relations Board, the Commission on Monopolies and Mergers, the new Director General of Fair Trading are all permanent constructive forces whose main work is to try to make sure that the dispute settlement machinery has *no* work to do. To this extent, all the administrative and settlement machinery is part of the same process.

2. Though there are those who are genuinely concerned about the growth of administrative power, bodies such as these will have an increasingly large part to play in structuring the social and economic relations of the next generation. In particular, we may be seeing the beginning of a new approach to civil litigation in which access to the courts at the higher levels of the dispute settlement pyramid is restricted until lower level machinery has been exhausted. We may increasingly come to acknowledge, for reasons of economy as well as social effectiveness, the legal significance of the total range of settlement techniques, and perhaps succeed in putting adjudication by courts into its proper perspective. Much certainly needs to be done to modify the court-centred emphasis of legal education.
3. Lastly, and perhaps many would put this first, the English experience of the last few years has re-emphasized the importance of consensus as a basic precondition of law. And it has shown us how delicately balanced our social consensus may be. As long as citizens accept the authority of the State and the existence of rights and duties created by the State, conflict can be contained. But as soon as any major group in our society questions our complacent assumption that law should be obeyed just because it is law, the conflict moves into a broader socio-political arena. If workers will gladly go to prison rather than obey a court's order; if trade unions will refuse to submit to the jurisdiction of a court; if prisoners strike against the conditions of their imprisonment, we may well be faced with the need to consider a new social contract in our society as a whole. Consensus remains, as always, fundamental to the existence of the State and the law; how to maintain that consensus remains, as always, the most delicate political problem of all.