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ABSTRACT

EARIS, Stanley Derek.

Thesis submitted for the degree of B.C.L. entitled:-

"A consideration of the concepts of Justice formulated by some twentieth century theologians and their application to some problems of English law in the 1970's."

This study in jurisprudence aims to discover what value and relevance some recent theological thought on the nature and application of Justice has on some of the practical problems of English law in the 1970's. To this end four theologians and two broad areas of legal concern have been examined and analysed.

The theologians studied are Barth, Maritain, Tillich and Moltmann. They have been chosen to span the whole of the century to date and to represent different theological traditions and approaches. Their life and general theological approach, their concept of Justice and their application of such a concept to issues germane to this study are examined.

Of the two legal areas examined the first is the 'equality' legislation which covers recent attempts to legislate for racial and sexual equality. The other is the recent legislation, or attempts at legislation, dealing with the 'right of life'. This covers such legal areas as abortion, euthanasia, the definition of life and the use of advanced medical technology. The legislative philosophy, the effectiveness of the legislation and its subsequent application by the Courts are all examined.

The final Chapters attempt to assess whether the theologians examined have sufficient unanimity to provide a coherent concept of Justice and a specifically Christian contribution to the matters under discussion. The conclusion being in the affirmative it is then examined to what extent Christian precepts enumerated by them have been influential or could be used as a critical tool for the possible amendment or extension of the legislation.

A CONSIDERATION OF THE CONCEPTS OF JUSTICE FORMULATED BY
SOME TWENTIETH CENTURY THEOLOGIANS AND THEIR APPLICATION
TO SOME PROBLEMS OF ENGLISH LAW IN THE 1970'S.

STANLEY DEREK EARIS

A Thesis submitted for the degree of Bachelor of Civil Law,
University of Durham.
Faculty of Law
1979

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No material contained in this thesis has been previously submitted for a degree in this or any other university.

The copyright of this thesis rests with the author. No quotation from it should be published without his prior written consent and information derived from it should be acknowledged.

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Derek Earis
Acomb, York.
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PART I

SOME TWENTIETH CENTURY THEOLOGICAL CONCEPTS
OF JUSTICE.

CHAPTER 1

INTRODUCTION

The 1970's have seen a great concern for legislation seeking to influence the social and moral fabric of society. This study in jurisprudence seeks to evaluate some of this legislation and its attendant legal problems by concentrating on one strand in the philosophy of law - namely recent theological thought on the nature and application of Justice. Historically our Christian heritage has had a great influence on the formation and evaluation of English law. It remains to assess its influence and potential in the present decade. For the purposes of this study four modern theologians and two broad areas of legal concern have been examined and analysed.

Part I of this study examines the contributions of the four theologians selected. These are Barth, Maritain, Tillich and Moltmann. Between them ^{they} span the whole of the century to date and they represent different theological traditions and approaches. In each case their own life and general theological approach are first examined. This is followed by an examination of their concept of Justice and concluded with their application of such a concept to issues germane to this study.

Part II of this study concentrates on the two broad legal areas selected for analysis. The first of these is the recent 'equality' legislation. This covers attempts to legislate for racial and sexual equality. The second is the recent legislation, or attempts at legislation dealing with the 'right to life'. This covers such legal areas as abortion, euthanasia, the definition of life and the use of advanced medical technology. These Chapters concern themselves with the background to such legislation both in terms of history and legislative philosophy. They consider the legal provisions enacted or proposed, the effectiveness of any legislation and its subsequent application by the Courts. The positive laws considered are those in the United Kingdom only. American or Continental European laws or societies are not considered in depth, although they may on occasions be referred to.

Part III of this study attempts to assess whether the theologians

examined have sufficient common ground to enable a coherent concept of Justice to be determined, and a specifically Christian contribution to be made to the matters under discussion. It further goes on to consider to what extent the Christian precepts enumerated by them have in fact been influential in current legislation or attempts at legislation, and to what extent they can be used as a critical tool for the possible amendment or extension of the legislation.

A central problem of linguistics exists in relation to this study. This is the terminology employed for that universal ethical doctrine called in German 'Naturrecht', in French 'Droit Naturel', in Latin 'Ius Naturale' or 'Lex Naturalis', and in English commonly 'Natural Law'.

The English terminology of 'Natural Law', although established by long usage, is linguistically imprecise and potentially misleading. By referring to the concept by means of the word 'law' it inevitably suggests, often quite erroneously, that the doctrine is part of the law of the land. Rather the concept normally referred to as 'Natural Law' is concerned with those universal principles that arise out of being human - i.e. from our human nature. Once formulated such principles have historically been regarded as beyond and superior to the positive law (i.e. the concrete laws of a particular country). They have therefore been regarded as reaching the realms of inalienable 'right'.

Hence to refer to the concept as 'Natural Right', the alternative, though far less widespread English terminology, seems linguistically and logically infinitely preferable. In this study, therefore, the concept will be referred to by the alternative terminology of 'Natural Right'. It should be noted that this is in all cases synonymous with the ethical concept of 'Natural Law', which term may still occur in this study when quoting the published terminology of a particular author.

It remains to point out that this study professes to evaluate and

reflect the situation which existed until January 1st 1979.

CHAPTER 2

MARITAIN

MARITAIN'S LIFE

Jacques Maritain was born in France in 1882. He was brought up a Protestant and early in his education developed a fascination both for the natural sciences and for philosophical questions about life and death. He was attracted to the Sorbonne in Paris by teachers who claimed to be able to relate the two. It was while at the Sorbonne that Maritain met his future wife - Raissa Oumansoff, a Russian-Jewish student. Both became disillusioned with the Sorbonne's scientism and began to attend lectures by the intuitionist philosopher Bergson. We will see that these lectures had a profound effect on Maritain's later philosophy and theology. They were also of dramatic personal influence at the time, for from Bergson Maritain came to realise his need for 'the Absolute'. In 1906, two years after studying with Bergson, Maritain was converted to Roman Catholicism.

Maritain's studies continued at Heidelberg from 1906-08 where he studied Biology. This was followed by an intensive study of Thomism in Paris, thus laying the classical foundation for Maritain's own philosophy. In 1913 he began teaching at the Institut Catholique, serving as Professor of modern philosophy (1914-1939). In 1932 he began a long association with the American continent when he taught annually at the Institute of Medieval Studies in Toronto. During part of the war he was visiting Professor at Princeton (1941-2) and Columbia (1941-2). He returned as Professor of philosophy at Princeton (1948-60) after serving as French ambassador to the Vatican (1945-48).

The second world war and its aftermath led Maritain increasingly to concern himself with the modern formulation of the doctrine of natural right ('droit naturel'). His book 'The Rights of Man', published in 1944 has been seen by many as influential on the later United Nations 'Declaration of Human Rights' (1948). 'The Rights of Man' can be seen as a fitting development of his previous political and philosophical studies. Examples of these are 'Freedom in the Modern World' (1935), 'True Humanism' (1938),

'Schol^asticism and Politics' (1940) and 'Redeeming the Time' (1943). Further developments of his politically motivated philosophy can be seen in 'Christianity and Democracy' (1945) and 'Man and the State' (1954).

In 1958 at the University of Notre Dame, Indiana, the Jacques Maritain Centre was established to further studies along the lines of his philosophy, but Maritain himself continued to publish to an advanced age - the latest of his major works being his 'Moral Philosophy' (1964) and his 'On the Grace and Humanity of Jesus' (1967). He died in 1973 at the age of 91.

A. MARITAIN'S GENERAL PHILOSOPHICAL BACKGROUND

Maritain's philosophy is firmly rooted in the classical tradition and heavily influenced by Aristotelianism and Thomism in its treatment of Christian doctrine. However Maritain's philosophy also goes far beyond the Scholastic tradition and draws on the breadth of his own education. So we find an important part played by science, anthropology, sociology and psychology as well as modern philosophy. Maritain believed that philosophy must always take into account data from other branches of human knowledge. Hence, science, poetry and mysticism are all among the many different ways of knowing reality.

Maritain's debt to Thomism and Aristotle can chiefly be seen in his acceptance of Aristotle's doctrine of natural right¹ as refined and Christianised by St. Thomas². St. Thomas, following St. Augustine, believed in three hierarchical levels of law. The highest source was the unchangeable eternal divine law binding directly on all men and all other creatures. At the second level came the unchangeable natural right, being divine law as man is given the heart and soul to understand it. At the third level is the temporal positive law which is changeable but which should respect the limits laid down by the divine law and the natural right. According to the Thomist position man discovers the natural right by ascertaining God's will through reason. God's will could be determined by intellect and by reflecting on human nature. Influential here can be seen Aristotle's belief that all things have an innate tendency to fulfil their own destiny - the Divine spark in all mankind.

We see that for Maritain also natural right not only expresses what is natural in the world, but also what is known naturally by men. To exist is to act according to certain fundamental tendencies. We will, however, see in the next section a refining of the Thomist position - particularly the dynamic element introduced through the influence of the philosopher Bergson.³ Bergson sought to examine the phenomenon of change in his philosophy. As such he challenged mechanistic theories of evolution for failing to recognise the true

nature of reality and the existence of a vital impulse or urge (élan vital). This intuitive level motivated consciousness and the constant phenomenon of change. Hence life is dynamic, has force and will, and struggles for richness and complexity through and beyond matter. Matter is the congealed residue of creation that has already taken place and, according to the laws of nature is in a gradual state of erosion. Morality and religion can be regarded in similar terms - having both a static principle combining nature's heritage and the accumulation of past forms and also a dynamic principle through which morality and religion remain always in crisis - always alive to contingency and growth.⁴

Maritain's own understanding of natural right and Justice, influenced by Aristotle, St. Thomas, Bergson and others led to a vital interest in the human person and the political community. For Maritain, although fundamentally the human person transcended the political community, nevertheless political institutions based on justice were essential. Men holding different beliefs must cooperate in their formation and maintenance. Maritain's philosophy, although profound is never abstract. It is developed to apply to the practicalities of human life. In the sphere of law it is one of the most comprehensive examples of naturalist legal philosophy in the twentieth century.

B. MARITAIN'S CONCEPT OF JUSTICE

1. The Nature of the Concept

For Maritain, justice is unquestionably an ontological concept. It is a direct emanation from God and part of His very being.

So:-

"True justice, the justice of the sages and the Saints descends from Divine reason and permeates all reality as a living impulse, leading everything to its end." 5

Here we see clearly the influence of Aristotle's belief that all things have an innate tendency to fulfil their own destiny. Maritain has put this in a Divine context. It is a conscious expression of God within His creation and not an act of arbitrary will:-

"Justice springs from His very Essence as He sees it in his Eternal vision and not from an act of arbitrary will." 6

Conversely, false notions of justice are those that do not issue from the Divine will - that which is not ontological. True justice implies true human personality - the recognition that man has the rights and responsibilities befitting a creature of God. False justice imperils the basis of such rights and responsibilities:-

"The worth of the person, his liberty, his rights, arise from the order of naturally sacred things, which bear upon them the imprint of the Father of Being, and which have in Him the goal of their movement." 7

It is from this belief in the sacredness of human personality that we are able to perceive, to a greater or lesser extent, Divine principles of justice in human affairs.

In this Maritain is faithful to the Thomist position. He follows St. Thomas in believing that Justice is conformity with the Lex

aeterna. This is perceived in human terms as, on the one hand, the justice of God in terms of revealed Lex divina, and, on the other hand, in terms of Natural Right. Lex divina is expressed in the precepts of the Old and New Testaments. Maritain recognises that there are many precepts which are not relevant to the social life but only to the spiritual life. There are, however, some that are specifically directed to social relations - for example 'treat your neighbour as yourself.' However, Maritain, although maintaining the basic scheme, examines principally the philosophical and legal notion of natural right in order to give the concept of Justice substance. The basis and exposition of the rights of man in the modern age are his basic concern. These come from God:-

"Every right possessed by man is possessed only by virtue of the right possessed by God, which is pure Justice, to see the order of His wisdom in beings respected, obeyed and loved by every intelligence." 8

The basic philosophical problem is, however, how this form of Justice through natural right can be perceived. It is to Maritain's exposition of this that we now turn.

2. The perception of Justice through Natural Right

For Maritain the true idea of natural right must spring from the depths of our own being or essence. It "is regarded in an ontological perspective and as conveying through the essential structures and exigencies of created nature the wisdom of the Author of Being."⁹ It is that unwritten law that man comes to know through his understanding, intelligence, and Divine creation. As such it has a respectable Christian and philosophical pedigree. In the Christian heritage we can trace the concept to Grotius and before him to Suarez and Francisco de Vittoria. Thence back to St. Thomas, St. Augustine and St. Paul. In pre-Christian

philosophy to Cicero, the Stoics and Aristotle. 10

The notion of natural right does, however, take a number of philosophical points for granted. It takes for granted that there is a human nature which is the same in all men, and also that the human will seeks to attune itself to the necessary ends of the human being. So Maritain can proclaim:-

"There is, by virtue of human nature, an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the necessary ends of the human being. The unwritten right, or natural right, is nothing more than that." 11

To expound and elaborate his view of natural right Maritain discusses it with regard to two elements. The first is the ontological. By this:- "I mean the normality of functioning which is grounded in the essence of that being man."¹² This is inherently geared to achieving fullness of being in his behaviour. It is an ideal order relating to human reactions. Maritain is, however, careful to counter a possible misunderstanding:-

"I do not mean that the proper rule for every possible human situation is contained in our human essence Human situations belong to the existential order. Neither they nor their appropriate regulations are contained in the essence of man. I would say that they pose questions to that essence."

Hence to Maritain the natural right is both ontological and ideal. Ideal because it is grounded in human essence and ontological because human essence is an ontological reality.

The second element Maritain elaborates is the gnoseological - the natural right as known. Natural right is not written. This is bound to lead to relativism - men can know it with greater or lesser difficulty and in different degrees. It is subject to errors both in perception and in elaboration. The only self-evident principles are those of the broadest nature - for example 'do good and avoid evil.' Maritain follows St. Thomas

in seeing natural right not as rational knowledge but knowledge through inclination. Hence it is not clear knowledge:-

"It is obscure, unsystematic, vital knowledge by connaturality or affinity, in which the intellect, in order to form its judgement consults and listens to the inner melody that the vibratory strings of abiding tendencies awaken in us." 13

Nevertheless Maritain can see ^{natural right evolving} within the framework of history and civilisation for he believes that human knowledge of natural right is progressively shaped and moulded by inclinations of human nature starting from the most ancient social communities.

Here we see the great influence of Bergson's philosophy on Maritain. It was Bergson who taught Maritain about the progressive nature of insight and knowledge. For Bergson such progression was not necessarily a gradual unfolding but may well be in sudden leaps of intuition, sudden acts of creation - each of a violently imperative character. Hence for Bergson:-

"The modern idea of Justice has progressed in this way by a series of individual creations which have succeeded through multifarious efforts animated by one and the same impulse." 14

Interestingly for Bergson this is not a linear development of the new but a drawing out of pre-existing hypostasis:-

"Instead of realizing that some new thing has come and taken possession of the old and absorbed it into a whole that was up to then unforeseeable, we prefer looking upon the process as if the new thing had always been there, not actually but virtually pre-existing the conceptions of justice that followed one another in ancient societies were no more than partial, incomplete visions of an integral justice which is nothing more or less than justice as we know it today." 15

Maritain, looking to anthropology, similarly comments that it shows both a universal awareness of natural law and an immense relativity. Defective contents become whittled away with the passage of time. Man realises also from this process that natural

right enumerates both rights for himself and obligations or duties to others. The elaboration of these for modern society was one of Maritain's chief concerns.

By means of the ontological and gnoseological elements Maritain seeks to guard against a simplistic view of natural right which would endanger its credibility. Natural right on the one hand claims the utmost supremacy - an ontological rooting in man's essence, itself implanted by God. On the other hand it is not transparent. Its extraction without blemish is a matter of skill and delicacy. It is also subject to an evolutionary doctrine. The emphasis within both elements points out that the 'lex aeterna' is the ground of natural right. Belief in natural right is firmer therefore in those who believe in God. However, Maritain points out that belief in human nature and in the freedom of the human being is sufficient to convince us that there are unwritten rules and tendencies and to assure us that natural right is something as real in the moral realm as so-called 'laws' of growth and sensience are in the physical realm.

Throughout Maritain's exposition of natural right we see that reason has an important role to play. Maritain follows the classical formulation of natural right by Aquinas in stressing that man's reason is God-given and is the means whereby he can ascertain God's will and carry out the difficult task of discerning the natural right. Neither Maritain's ontological nor his gnoseological elements could be perceived unless reason takes this central role. It is precisely this importance given to human reason in the natural right tradition that incurred the wrath of Protestants like Barth. To them the foundation of human reason was one of sand for it was corrupted by sin and did not focus sharply enough on God. Maritain and the Catholic tradition ~~is~~^{are}, however, far more optimistic on the capabilities of human nature and reason.

3. Natural Right and Human Rights

For Maritain a belief in natural right necessarily implies a belief in human rights:-

"Every right possessed by man is possible only by virtue of the right possessed by God, which is pure Justice, to see the order of His wisdom in beings respected, obeyed and loved by every intelligence." 16

Here we see in a nutshell the close and essential relationship between Maritain's concepts of Justice, natural right and human rights. He stresses that this philosophical foundation is of importance if the human rights themselves are to be on a strong foundation. Different philosophies may ~~conclude~~^{deduce} the same human rights but only the correct philosophy can guarantee their continuance:-

"A kind of intellectual and moral revolution is required of us, in order to re-establish on the basis of a true philosophy our faith in the dignity of man and in his rights, and in order to rediscover the authentic sources of this faith." 17

However, from the point of view of pragmatism and of such documents as the Universal Declaration of Human Rights in 1948, it is fortunate that certain 'rights of man' can be agreed on a broad basis, although there is no unity of faith or philosophy in the minds of men.

In order to demonstrate the unique character of those human rights derived from the natural right, Maritain takes some care in distinguishing natural right from the law of nations and from positive law. He believes one of the errors of the rationalist philosophy of human rights has been to regard the positive law as a mere transcript traced off natural right which would prescribe in the name of nature all that which positive law prescribes in the name of society. This overlooks the immense field of human things which depend on variable conditions of social life and free initiative

of human reason. Natural right precepts must therefore be in broad and general terms which are in themselves, or are in the nature of things, invariable. Perhaps the most fundamental precept is 'do good and avoid evil' for all the rights and duties of natural law must be connected in a necessary manner with this first principle. Jus gentium or international law Maritain sees as being an intermediary between natural right and positive law - it is the common law of civilisation. Positive law, on the other hand relates directly to the variable conditions of social life.

Human rights therefore, emanating directly from the natural right, are inalienable. Maritain, however, carefully defines what he means by inalienable. He does not mean that they are by nature incapable of limitation, or that they are infinite rights of God. Some, like the right to existence, are absolutely inalienable. However:-

"Others, like the right of association or of free speech, are of such a kind that the common good would be imperilled if the body politic could not restrict in some measure the possession that men naturally have of them. We may say that they are inalienable only in substance." 18

Even absolutely inalienable rights are liable to limitation not as to their possession but as to their exercise. Thus a homicidal criminal may justly forgo the assertion of his right to live. At a less dramatic level it may be fitting for us to forgo the exercise of certain rights while acknowledging that we still possess them. Maritain quotes as an example that this might be the right course in a period of economic transformation in respect of private property or in a period of the development of an international community in respect of national sovereignty. Both of these examples have been proved to be very far-sighted.

When Maritain comes to the elaboration of human rights in particular, he reaches further important conclusions. These arise from his theory of the relativity of our knowledge of natural right:-

"In natural law there is immutability in regard to things, or the law itself ontologically considered, but progress and relativity as regards our human awareness of it." 19

Hence the mere elaboration of rights from the natural right is not sufficient without great care. It is all too easy to be selective with regard to human rights. We must never forget counterbalancing rights to the ones we are enumerating.

Hence there tends to be a conflict between old and new rights - for example the right to a just wage may be in conflict with the right to free agreement and private ownership. Maritain sees the rights of workers and labour as containing an important group of newly realised rights - for example the right to join a union, to unemployment pay, to a just wage and to social security. That these may counterbalance previous, and still existing rights of employers naturally leads to tension and antagonism. However Maritain believes that these seem irreconcilable only because there is also a clash between two opposed ideologies and political systems. If each of the human rights were unconditional and exclusive of limitation then any conflict would be irreconcilable. As far as their exercise is concerned there are, however, conditions and limitations. There are, of course, great difficulties in the counterbalancing and harmonisation of rights but Maritain believed that a process of 'dynamic unification' is possible. The extent to which this is possible depends on underlying political ideologies. He comments that both the capitalist and collectivist ideologies are defective and that 'dynamic unification' of rights will only come under a personalist system - i.e. one that stresses the common achievement of intrinsically human, moral and spiritual good and man's freedom of autonomy. In some passages Maritain comes close to saying that liberalism is the political ideology most congenial to natural right.

4. Equality and its relationship to Justice

Maritain, following the tradition of Aristotle, found it essential to relate theories of equality to justice. Indeed he devotes considerable space to the systematic philosophical exposition of equality - particularly in his book 'Redeeming the Time.' He begins by pointing out the difficulties of the concept of human equality:-

"It is surrounded by geometrical imagery that relates to those entities without ontological substance so characteristic of mathematical abstraction. Consequently, its application to human reality demands that the mind work constantly against the grain of this very imagery." 20

Problems of equality, Maritain maintains, concern at once man's psycho-physical nature and his social conditions and hence involve us in a multi-disciplinary study. He examines the concept with respect to three basic positions:

The first Maritain refers to as the 'Pure nominalist or empiricist notion of Equality' or the 'Anti-Christian Philosophy of Enslavement.' In this theory the unity or equality in nature between man is less basic than the inequalities. The ontological dignity of that nature or essence which all men have in common is overruled by the empirical observation of individual inequalities. Reality is then made to rest on these - i.e. the fact of inequality leads to a deduction of inferiority. Pseudo-scientific reasoning is often used to back this up. This is the philosophy used to justify racialism and slavery. Thus the Nazi Nuremberg declaration could proclaim that there is a greater difference between superior and inferior humans than between apes and inferior humans. This is plainly an anti-Christian philosophy of enslavement:-

"Whether one looks at it from the point of view of the natural order and the natural truths confirmed by Christianity, or from the point of view of the supernatural life and the supernatural truths which it brought into being, clearly such a philosophy of enslavement wounds Christianity to the heart." 21

The second position Maritain entitles 'Pseudo-Christian Egalitarianism.' This is essentially an idealist deification of equality. Equality, implying sameness is the underlying principle to which all is made to conform. This alone is conceived as reality. Maritain sees this as logical and not ontological. The idealist sets up against natural inequalities a speculative denial. He minimises them as much as he is able, or thinks that they are above all the result of the artificial stratification of social life. Maritain points out that social inequalities spring from the diversity of the internal structures of society itself and from the diversity of the conditions of life. The idealist claims that these should not exist for man in himself cannot be unequal to himself. His essential dignity is outraged each time one individual is unequal to another, meaning each time one individual is different from another.

For Maritain the idealists' error lies:-

"not in thinking there is an essential equality in nature between man. It lies in the conviction that all human substance reflows within the abstract species alone, and that the reality and value of these individual inequalities which are inscribed in the world of what is peculiar and historic are as nothing. But these individual inequalities despite the burden of sorrow or injustice which the sons of men or the viciousness of institutions may superimpose on them, are in themselves as necessary for development and flowering of human life as the diversity of parts are for the perfection of a flower or a poem." 22

The idealist's concept of equality implies no vital depth, no variety in degree. The dignity of the person has been transferred to the mass. Any notion of distributive justice is impossible. Emotionally much of this concept of equality is motivated by a hatred of superiority, collective envy and resentment and the thirst to punish. In so doing all natural inequalities are rejected. All natural privileges, all privileges of the mind, natural gifts or acquired virtues must be levelled out. The movement as a whole leads to depersonalisation. Maritain claims that it is just as incompatible with Christian thought as the implications of the philosophy of

enslavement. Although it is less hateful than this it is in many ways more treacherous - for the great doctrinaires of this form of equality are motivated by the passion for justice. They often use the same words but not the same voice as Christianity. They are motivated by a false and non-Christian love. It is a dangerous and pseudo-Christian philosophy.

The third position Maritain outlines is the truly 'Christian Equality.' This is essentially ontological and concrete and is rooted in the mystery of the human species. As such "it is the natural love of the human being for his own kind which reveals and makes real the unity of species among men."²³ Such a realist conception of equality in nature is an inheritance of the Judeo-Christian tradition and is a natural prerequisite for Christian thought and life. It can be seen in the basic tenet of Christianity that all men are created in the image of God and all are called to the same supernatural dignity as adopted sons of God. They are called to coheirship with Christ and all are redeemed by his blood. While asserting the unity of mankind this does not mean that there should be no distinctions or hierarchies within human society:-

"It is because the Christian conception of life is based upon so concrete broad and fruitful a certainty of the equality and community in nature between man that it, at the same time, insists so forcefully on the orderings and hierarchies which spring and should spring from the very heart of this essential community, and on the particular inequalities which they necessarily involve." 24

No life or movement or communication is possible without differentiation and no differentiation is possible without inequalities:-

"the inequalities which lend variety to human life and intensify the richness of life's encounters, in no way injure the dignities which befit the unity of mankind and the rights which are grounded on this unity. On the contrary these inequalities make such a unity all the more manifest." 25

No man is capable of exhausting in himself the riches of the various perfections of which human kind is capable. Hence only diversity

can lead to wholeness.

Maritain asks the question "What is the Christian relationship between necessary equality and necessary inequality?" In answering it he sees equality as primordial and inequality as secondary. Equality is primary in as much as it relates to the fundamental rights and common dignity of human beings and (as equality of proportion) to Justice. While inequalities have a purpose in diversity there is also a danger that they will conceal primary equality. So:-

"it is an offence against creation, to treat as an inferior man a man belonging to some inferior part of the social structure, to make him conceive his inferior social condition as an inferiority of essence." 26

So to do is to attempt to negate those fundamental rights which flow from primary equality - for example the right to exist, to keep one's body whole, to found a family, the right to association and private ownership. These are fundamental and anterior to civil society.

If the primary equality relates to justice by the proclamation of certain natural human rights, the secondary inequalities are bound up with Distributive Justice. The individual should receive according to his talents and necessities:-

"Such notions as that of equality of opportunity or equality of condition which egalitarianism would make chimerical, become true and proper if they are understood in the sense not of an equality pure and simple, but of a proportional equality"

and

"in the domain of relations between the social whole and its parts, such a proportional equality is Justice itself." 27

The equality of proportion pervades distributive justice which deals with each according to his merits:-

"And thus, pervading and reconciling all inequalities, justice to a certain extent restores equality it pertains to justice to lead unequals to equality."

For this there must exist such social justice as would really offer to each an equal opportunity (equal in the proportional sense). Aristotle's influence can plainly be seen in Maritain's thoughts on distributive justice and behind Maritain's theory of Christian equality summarised in the following passage:-

"Such a leaven of equality as has been disseminated by pseudo-Christian egalitarianism has filled the world with unhealthy fermentations; but there is another leaven of equality which is a level of justice and is a proper stimulant of human history and which tends to raise the human mass toward a way of life more truly human, wherein inequalities are not suppressed, but compensated, and subordinated to that high equality of the common use of the good things which nourish and exalt our rational nature. In sum, the error has been to seek equality in a regression toward the basis set up by "nature", and in a levelling down to this base. It should be sought in a progressive movement toward the end which is composed of the good things of rational life becoming in so far as possible and in various degrees accessible to all, and this, thanks to the very inequalities themselves, by justice and fraternal friendship turned away from seeking domination and towards helpfulness and cooperation. This equality I have been discussing should be called Christian equality." 28

Maritain's careful analysis of different philosophical forms of equality, with its conclusions as to the nature of Christian equality is of great value to the aim of this study which seeks critically to examine the recent legislation related to racial and sexual equality. Although the scope of such legislation would scarcely have been contemplated when Maritain was writing the bulk of his work, he has in his philosophical examination of the nature of equality, supplied us with an excellent critical tool for the examination of the philosophy behind recent 'equality' legislation.

C. GUIDELINES FOR LEGAL SYSTEMS

1. The Enumeration of Human Rights

In his book 'The Rights of Man', significantly published just before the end of the second world war, Maritain enumerates rights in three broad categories - viz, rights of the human person, rights of the civic person, and rights of the working person.

In relation to the rights of the human person Maritain believes that the transcendent nature of the person is of prime importance. Man has natural aspirations to the spiritual life and as such must transcend the state in importance. Moral laws and the right of conscience cannot be tampered with by the state, but a just state may educate in moral virtues. Human beings have, generally, the right to make their own decisions with regard to their personal destiny. In brief all the fundamental rights of the human person "are rooted in the vocation of the person (a spiritual and free agent) to the order of absolute value and to a destiny superior to time."²⁹ Maritain enumerates the rights of the human person as follows:-

The right to existence.

The right to personal liberty or the right to conduct one's own life as master of oneself and of one's acts, responsible for them before God and the laws of the community.

The right to the pursuit of the perfection of rational and moral human life.

The right to the pursuit of eternal life along the path which conscience has recognised as the path indicated by God.

The right of the Church and other religious families to the free exercise of their spiritual activity.

The right of pursuing a religious vocation; the freedom of religious orders and groups.

The right to marry according to one's choice and to raise a family, which will in its turn be assured of the liberties due to it.

The right of the family society to respect for its constitution, which is based on natural law, not on the law of the state, and which fundamentally involves the morality of the human being.

The right to keep one's body whole.

The right to property.

The right of every human being to be treated as a person, not as a thing. 30

In so far as all of these rights are dependent on the first enumerated ('the right to existence') we will see that they are of vital significance to the area of this study that seeks to relate Christian principles to legislation about this right.

Interestingly Maritain defines a human person as one who has a vocation to be a spiritual and free agent. Hence although a person cannot be so physically (as in the case of a foetus), or is not permitted to be free (as in the case of a prisoner), he still has rights. Rights such as the one to property and the right of every human being to be treated as a person, not as a thing have significance in relation to the current 'equality' legislation.

The rights of the civic person are political rights. These spring from the first principles of constitutions and as such should derive from the natural right. Hence there is a fundamental right to a constitution and government of the people's choice. Other rights are based on three ^equalities - viz, political equality, equality before the law and equal admission of all citizens to public employment according to their capacity. This includes free access of all to the various professions, without racial or sexual discrimination. Maritain enumerates the rights of the civic person as follows:-

The right of every citizen to participate actively in political life and in particular the right of equal suffrage for all.

The right of the people to establish the constitution of the state and to determine for themselves their form of government.

The right of association, limited only by the juridically recognised necessities of the common good, and in particular the right to form political parties or political schools.

The right of free investigation and discussion (freedom of expression).

The equal right of every citizen to his security and his liberties within the state as well as political equality.

The equal right of everyone to the guarantees of an independent judiciary power.

The right to equal possibility of admission to public employment and free access to the various professions. 31

Such rights - in particular the right to equal possibility of admission to public employment and free access to the various professions - will be seen to be an important part of the legislation dealing with racial and sexual equality. In the latter respect, whether Maritain extended the rights to single women only, or to both single and married women is open to question.

Maritain is especially interested in the more recent realisation of the rights of the working person. These are derived from "a consciousness of the dignity of work and of the worker, of the dignity of the human person in the worker as such." This leads to rights such as those for a just wage; for man's work is not a piece of merchandise subject to the mere law of supply and demand. He has, fundamentally, a right to work - although Maritain recognises that only when society is recast can this right become an actuality. Maritain enumerates the rights of the working person as follows:-

The right freely to choose work.

The right freely to form vocational groups or trade-unions.

The right of the worker to be considered as an adult.

The right of economic groups (Trade-unions and working communities) and other social groups to freedom and autonomy.

The right to a just wage.

The right to work.

The right to joint ownership and joint management of the enterprise and to the 'workers title' wherever an associative system can be substituted for the wage system.

The right to relief, unemployment, insurance, sick benefits and social security.

The right to have a part, free of charge, depending on the possibilities of the community, in the elementary goods, both material and spiritual of civilisation. 32

The enumeration of such basic rights is common to all working persons and as such will be seen to be of relevance to the 'equality' legislation examined. However they extend beyond this to fundamental principles of industrial and labour law.

2. Women and Equality

Maritain's thoughts on equality reach practical conclusions when he considers the status and position of women. There is, however, a clearly defined shift in his thought as his career progressed. His starting point can be found in his pre-war 'True Humanism' in 1938. Here he points out that Christianity has been a great liberator of women:-

"It is a platitude, which is nevertheless very exact, to say that Christianity has endowed women, otherwise and particularly in the East regarded as an object of property, with a sense of dignity and personal liberty." 33

This he sees as passing little by little into the temporal order and juridical structures.

However in 'True Humanism' Maritain believes that the crisis surrounding marriage has resulted from a false ideology of equality amongst other things:-

"In the same way, in the present day crisis affecting marriage and the family, a crisis principally due to economic causes, but also to a certain moral ideology, one may say that a pseudo-individualism, destructive of domestic society, whereby women claim an equality with man which is in some sort material and quantitative in its terms, and which otherwise is only too comprehensive as a reaction against that non-Christian but bourgeois conception of the family, is like a caricature and a mockery of Christian personalism." 34

This false idea of equality could be seen in Marxist and socialist theorists' views on the role of the working woman:-

"It is notable that socialist theorists in general accept these dissolving and inhuman results of the capitalist system (in particular, for example, the factory work of women) as in general they accept the economic heritage of bourgeois economy and push it farther." 35

He comments that Marxist theorists believe that generally an equality of economic conditions between men and women will give their life of affection the dignity and freedom of an earthly paradise. Rather Maritain believed that the aim of Christianity was that woman should rise to her full personhood as the Gospel intended:-

"In such a conception, which is one of a qualitative and proportionate equality, the married woman has not, except in exceptional cases, the same economic functions as a man; she cares for 'the humble kingdom of her house' and it is in the order of private life and in the domain of all humanity, the vigilance and firmness implied by these personal relations, that she will exercise her primacy." 36

It is plain that in such pre-war work Maritain fears that the relationships between man and his wife may be seen in terms of what he has defined as 'Pseudo-Christian Egalitarianism' where equality implies sameness. He rather sees their Christian roles as involving different yet complementary equality. Hence if a married woman is nourished by her husband, she will not thereby lose her liberty as a person. This should have full juridical recognition, implying a complete equality of rights in everything concerned with the institution of matrimony.

Two comments should be made on Maritain's pre-war comments on women and equality. The first is the obvious historical conditioning of pre-war society. The second is that his remarks are all based on the assumption that the woman is married. He does not comment specifically on the role of the single woman but it is clear that his conclusions on single women and work would have to be different. In his post-war thought in 'Man and the State' and 'The Rights of Man' Maritain alters his assumptions about women and work. As part of his scheme of basic rights he includes the free access of all to the various professions without sexual discrimination. In his rights of the working person he nowhere distinguishes between men and women. However, neither in his later work does Maritain repudiate his distinction of different types of equality or his assertion that the relationship between men and women in marriage is governed by his notion of 'correct' and 'incorrect' forms of equality. Maritain, no less than Barth, seems to draw a distinction between domestic relationships between men and women which have their own unique basis in what he would call 'Christian equality' and non-domestic work relationships, civic and human relationships which are governed by identical 'rights'. Nowhere, however, does he make this explicit.

3. Racialism and Equality

We have seen that many of Maritain's rights of man have implications which ensure equality between the races if they are implemented. Such basic rights will be seen as significant pointers towards modern legislation. However, in one passage Maritain directly relates racialism with his category of the 'Pure nominalist or empiricist notion of equality' otherwise known as the 'Anti-Christian philosophy of enslavement.' By pseudo-scientific reasoning this denies the basic human essence and thereby negatives all the basic human rights enumerated by Maritain. Such a denial reduces mankind to a biological inferno:-

"Racism is existentially related to this pseudo-theism, since in its reaction against individualism and in its thirst for communion in human animality, which, once separated from the spirit, is no longer anything but a biological inferno." 37

The racist tries to break down that natural unity of mankind proclaimed by Christianity - namely that based on the image of God. He tries to replace it with arbitrary notions of racial supremacy or inferiority. As such he is to a high degree irrational.

In conclusion we see clearly in Maritain's work the different levels and functions of Justice, all of which are worked out within a fundamentally Thomist scheme. Only after the fundamental concept of Justice is worked out starting from God and the 'lex aeterna' can specific rights be enumerated as principles for legislation. We have seen that there may be a tension between the working out of the concept of Justice (for example in relation to equality) and in the enumeration of rights, which in themselves of necessity presume a universal application, and an arithmetical notion of equality. Perhaps a solution may be found in the observation that rights derived from the fundamental concept of Justice may exist, but it may not always be according to that fundamental concept to

exercise them. There may be rights which the moral conscience view^s as counterbalancing. However, the enumeration of rights as such is of great help as a preliminary to legislation enabling the exercise of those rights, should the one who wishes to exercise them so desire. In a later Chapter we will see their significance in relation to current laws.

CHAPTER 2 - NOTESMaritain

1. Aristotle, Nicomachean Ethics, Book V Cp. VII, pg.124.
Aristotle, Rhetoric, Book 1.
2. Thomas Aquinas St., Summa Theologica, Parts I-II; Summa Contra Gentiles, Part III; cf. Copleston F.C., Aquinas, (1975).
3. cf. William Turner, History of Philosophy (1929);
Thomas Hanna, The Bergsonian Heritage (1962).
4. Henri Bergson, The Two Sources of Morality and Religion, (1935).
5. Jacques Maritain, Redeeming the Time, (1943), pg.33.
6. Maritain, Freedom in the Modern World (1935), pg.94.
7. Maritain, Rights of Man (1944), pg.6.
8. Ibid. pg.37.
9. Maritain, Man and the State (1954), pg.76.
10. cf. F.E. Dowrick, Justice according to the English Common Lawyers (1961), Cp.4.
11. Maritain, Rights of Man, pg.35
12. Maritain, Man and the State, pg.78ff.
13. Maritain, Rights of Man, pg.35f.
14. Bergson, The Two Sources of Morality and Religion, pg.63.
15. Ibid. pg.57.
16. Maritain, Rights of Man, pg.37
17. Ibid. pg.38.
18. Maritain, Man and the State, pg.92.
19. Ibid. pg. 93,94.
20. Maritain, Redeeming the Time, pg.1.
21. Ibid. pg.8.
22. Ibid. pg.10.
23. Ibid. pg.15.
24. Ibid. pg.17.
25. Ibid. pg.18.

26. Ibid. pg.20.
27. Ibid. pg. 24, 25.
28. Ibid. pg.27.
29. Maritain, Rights of Man, pg.45.
30. Ibid. pg.60f.
31. Ibid. pg.61.
32. Ibid. pg.61.
33. Maritain, True Humanism, pg.180f.
34. Ibid. pg.190f.
35. Ibid. pg.191f.
36. Ibid. pg.191.
37. Maritain, Twilight of Civilisation (1946), pg.19.

CHAPTER 3

BARTH

BARTH'S LIFE

Karl Barth was born in 1886 at Basle in Switzerland, the son of a minister of the Swiss Reformed Church. While Karl was still a small child his father became first lecturer and then Professor of New Testament and Early Church History at the University of Berne. Barth himself went to that University to study theology at the age of 18. Here he became vitally interested in both Kant and Schleiermacher. He wished to continue his studies with the great neo-Kantian theologian Wilhelm Hermann of Marburg but under the influence of his father went instead to Berlin. Here he was fascinated by the lectures of the liberal theologian Harnack. In 1908 he realised his ambition to study with Hermann. At 23 he was ordained into the Lutheran Church. Then followed twelve years in the pastoral ministry - first at Geneva (1909-11) and then in Safenwil (1911-21). In 1913 Barth married.

The 1914-18 war was formative in his flight from liberal theology and the working out of his own theology based on the word of God. This can first be seen in written form in 1919 in his 'Der Romerbrief' (Commentary on the Epistle to the Romans). The first edition was followed by a second, corrected, enlarged and reconsidered, in 1921. The book created a profound impression. The term 'Barthian' signified the position of his followers in the subsequent theological ferment. The book was also instrumental in Barth's rapid promotion. He became Honorary Professor of Reformed Theology in Gottingen (1921-5), Professor of Dogmatics and New Testament Exegesis in Munster (Westphalia) 1925-30 and Professor of Systematic Theology in Bonn (1930-35). In 1922 Barth, Thurneysen and Gogarten inaugurated a journal to propound their theology entitled 'Zwischen den Zeiten' (Between the Times). In 1927 came the first volume of Barth's 'Die Christliche Dogmatik' (Christian Dogmatics) - his first attempt to work out his theology as a whole. This was abandoned and a new attempt begun in 1932. Church Dogmatics was to be his magnum opus - in its final state it consists of 12 volumes and spans 1932 - 1959.

Whilst in the full flood of working out his theology Barth found himself in a dramatic situation in Germany with the rise of Hitler. His opposition to Hitler's National Socialism was not merely a political stance but also involved a theological conflict which sharply divided German theologians - including the alienation of Barth from his former friend Gogarten. Theologians were divided into those who supported or who were willing to acquiesce in the actions of the State, and those whose theology made it impossible to acquiesce. Barth's own description of his position makes his stance perfectly clear:-

"In the summer of 1933, the German Church, to which I belonged as a member and teacher, found itself in the greatest danger concerning its doctrine and order. It threatened to become involved in a new heresy strangely blended of Christianity and Germanism, and to come under the domination of so-called German Christians - a danger prompted by the successes of National Socialism and the suggestive powers of its ideals. And it so happened further that the representatives of other theological schools and tendencies in Germany - Liberal, Pietist, Confessional, Biblicist - who had previously in opposition to me put so much weight on ethics, sanctification, Christian life, practical decision and the like, now in part openly affirmed the heresy and in part took up a strangely neutral and tolerant attitude towards it. And it happened further that, when so many fell in line and no one seriously protested, I myself could not very well keep silent but had to undertake to proclaim to the imperilled Church what it must do to be saved." 1

Because of his stance Barth was discharged from his position at Bonn and had to operate from Basle in his native Switzerland in his task of the preservation of the "true Church and the just state." Thus began Barth's long association with the University of Basle. The Nazi phenomenon above all focussed his attention on Justice.

After the war Barth, travelling extensively, continued a vital interest in politics. Many of his lectures and correspondence can be seen in a valuable collection 'Against the Stream'. Here Barth attempts to come to terms with the post-war world and provide a mature reflection on the role of the Church in the State. Barth's later publications include a new emphasis on God's relationship

with man in 'The Humanity of God' (1956) as well as the completion of his 'Church Dogmatics.' In 1962 Barth gave his final lecture as "Professor Ordinarius" at the University of Basle, followed by an active and happy retirement until his death in 1968. So ended a fulfilled and vitally important life for our century - his humanity, his love of culture - especially his beloved Mozart, but above all his vital contribution to theology and its implications for the state in terms of politics and law have all become legendary.

A. Barth's General Theological Position

Barth began as a disciple of liberal Protestant theology. At the turn of the century this was dominated by Harnack² building on the foundations of Kant and Schleiermacher. Much of this theology was based on the human experience of God. It was this aspect that Barth first began to suspect in the early days of his pastorate. In particular he desired that his sermons should not be merely his own words but in a real sense an expression of the Word of God. The first world war convinced him of the inadequacy of liberal theology in its basis in human experience. He was continually challenged by the Bible and believed that in viewing it as man's view of God the liberal theologians had grossly perverted its doctrines. Rather Barth increasingly viewed it as God's view of man and hence as the Word of God. This led to a new emphasis on the fundamental discontinuity between God and man - the righteousness of God and the righteousness of man. The liberal view of Schleiermacher³ that man's religious consciousness was the basis, the theme and the criterion of theology was turned on its head. Barth rejected the cosiness of Harnack or the rationalism of Troeltsch⁴ and substituted a new and vital sense of the otherness of God and the command of God. He began an intensive study of the Bible and especially the Pauline writings. His great commentary on Romans was beginning to take shape.

In 'Der Romerbrief', while acknowledging the validity of the modern historical-critical method Barth is ever trying to see through and beyond the historical (des Historische) into the Spirit of the Bible - the Word of God. Throughout the commentary Barth demonstrates his thesis that God is first and foremost the subject of theology and only secondarily its object. Man cannot know God himself but only through God's revelation of Himself in the person and work of His Son Jesus Christ. The message of Paul for Barth was that God is God and he has wrought salvation. This was the tolling bell Barth sounded:-

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"As I look back upon my course, I seem to myself as one who, ascending the dark staircases of a church tower and trying to steady himself, reached for the bannister, but got hold of the bell rope instead. To his horror, he had then to listen to what the great bell had sounded over him and not over him alone." 5

In his second edition of 'Der Romerbrief' he pointed out in the preface that if he had a system:-

"it was limited to a recognition of what Kierkegaard called the infinite qualitative distinction between time and eternity - God is in heaven, and thou art on earth. The relation between such a God and such a man and the relation between such a man and such a God, is for me the theme of the Bible and the essence of philosophy."

Barth's other great work 'Die Christliche Dogmatik' was first attempted in 1927. This proved a failure for in it he tried to reconcile his doctrine of the Word of God with the concepts and ideas of existential philosophy. In the new attempt in 1932 he firmly declared:-

"I have cut out everything that in the first issue (1927) might give the slightest appearance of giving to theology a basis, support, or even a mere justification in the way of existentialist philosophy."

Instead his epistemological basis became that discerned in his book on Anselm 'Fides quaerens intellectum' (1931); namely that of 'faith knowledge' i.e. the knowledge that springs from faith in God's revelation in Jesus Christ. The writing of 'Church Dogmatics' covers a vast span of Barth's life (1927-59). It has been held to be the most comprehensive dogmatics since St. Thomas' 'Summa Theologica'. Throughout we see Barth's emphasis on the Word of God as revealed in Jesus Christ, written in Holy Scripture and proclaimed by the Church. Hartwell⁶ lists some consistent features which show Barth's methodology. Throughout the Dogmatics are exegetical discourses vitally linked to his theological arguments. His theology is strongly Christological - each proposition has as its point of departure Jesus Christ. The work has an ecumenical

breadth. It is concerned with the exposition and interpretation of a story - that of God's gracious dealings with mankind in Christ from eternity. This Barth does in myriad forms - each different angle has a correspondingly different theological proposition. This many sided approach to the truth does not make for easy reading or exposition. Finally Hartwell points to Barth's exhaustive structure - covering the whole of Christian doctrine from his own unique perspective. This is not in the sense of a system - for such would be determined by the man in the theologian. Rather the theologian must attempt to follow the Word of God which determines the method and the theology. Barth is not so arrogant as to claim anything like perfection in this but he cannot ground his work on anything less than such a high ideal.

The Nazi phenomenon was the direct stimulus for Barth to work out his theology of Justice and the relation of the Church to the State. It reinforced Barth in his determination to expound the Word of God in theology and confirmed his distrust of theological liberalism. His work 'Church and State' was written just before the second world war. (1938). Barth's famous 'NO' to Natural Right and the development of his concept of Justice according to the Word of God will be considered fully in the next section.

Barth's dogmatism on the otherness of God mellowed considerably in his post war writings. Here Barth laid far more emphasis on the humanity of God - that is his relationship with man. The culmination of this can be seen in his book 'The Humanity of God' (1956). Barth here makes it clear that his earlier emphasis on the otherness of God had been forced on him by the situation of his early ministry. Through Jesus Christ we must also stress God's humanity - this was not the negation but rather the fulfillment of the wholly other God of whom he speaks in Romans.

B. Barth's Concept of Justice

a) The Relationship to Dogmatics

Barth specifically warns against any attempt to separate ethics from dogmatics. This is true from the standpoint of both dogmatics and ethics. Hence:-

"As dogmatics enquires concerning the action of God and his goodness, it must necessarily make thorough enquiries concerning the active man and the goodness of his action. It has the problem of ethics in view from the very first and it cannot legitimately lose sight of it."

"Conversely, the ethical question cannot rightly be asked and answered except with the framework, or at any rate the material context, of dogmatics. True man and his good action can be viewed only from the standpoint of the true and active God and his goodness." 7

So we see from the outset that justice and its practical response in ethics is inseparable from dogmatics and hence in Bartian terms, from the Word of God and his commands.

These commands are not, however, found through a prescribed text - either from moral rules in the Bible, or from natural right, or from Church tradition. Such rules would need casuistry. In it the moralist usurps God's function. He makes the untenable assumption that the command of God is a universal rule and sees his function as filling out and applying that rule. Rather the commands of God are always definite in their context:-

"It rests on a misconception of the command of God as it emerges in Holy Scripture if casuistry thinks it can and must abstract from the Bible a collection of general moral rules which it is then the task of ethics to expound and apply in particular.... The commands of God in the Bible are not general moral doctrines and instructions but absolutely specific directions which concern each time the behaviour, deeds and omissions of one or more or many definite men in this historical context." 8

We can therefore learn from history in specific encounters, for God is true to Himself but the Word of God in each particular situation is in the event itself:-

"If we have heard the Word of God, it must be clear to us that the reality in which the ethical event takes place as revealed in the Word of God is none other than its own, so that we do not have to seek and find it but simply to see it as it is given to us in and by the event itself." 9

Even so we must take care not to claim too much:-

"More than guidance will not be expected from even the most particular ethics, just as more than guidance to a knowledge of Christian truth will not be expected from even the most precise and detailed dogmatics." 10

Hence Barth in his ethics is offering us guidance - but guidance on what he hopes is a faithful perception of the command of God. Such guidance enables us in this study to search out that which is useful to formulate or evaluate legislation. Before we do this we must return to Barth's dogmatics to search for his first principles of law and to discern with more precision how he conceives of the concept of Justice from which his ethics are directly or indirectly derived. In particular we must ask why Barth rejected so fiercely the neo-Thomist position of the importance of natural right as a foundation for justice and from thence to its application in ethics.

b) The rejection of a Natural Right basis

Barth saw a natural right basis for justice and the working out of ethics as clearly contrary to his Word of God theology. For him justice and ethics must derive from the way God communicates to us that justice which is part of his very nature. To Barth moral natural right was a prime example of a false natural theology which placed a dangerous reliance on human reason in place of the revealed

Word of God. Underlying this is the assumption that human reason has been hopelessly corrupted by sin so that God is not discoverable by the reason of fallen man:-

"There is no law and commandment of God inherent in the creatureliness of man as such, or written and revealed in the stars as a law of the cosmos, so that the transgression of it makes man a sinner. It is characteristic of the sin of man - and one of its results - that man should think he can know such a law of nature and direct and measure himself and others in accordance with it." 11

Hence natural right is spiritually blind - Barth illustrates this in 'Against the Stream' in political terms:-

"To base its policy on natural law would mean that the Christian community was adopting the ways of the civil community, which does not take its bearing from the Christian centre and is still living or again living in a state of ignorance." 12

The civil community lacks anything beyond natural right. Barth defines this natural right as:-

"The embodiment of what man is alleged to regard as universally right and wrong, as necessarily permissible and forbidden 'by nature' - that is on any conceivable premiss. It has been connected with a natural revelation of God, that is, with a revelation known to man by natural means." 13

Hence for Barth to ground justice in natural right is to ground it on foundations of sand for there is no consensus of what it consists of:-

"All arguments based on natural law are Janus-headed. They do not lead to the light of clear decisions, but to the misty twilight in which all cats become grey." 14

Moreover where it has a theological basis the theology starts from the wrong point - from man's experience.

Barth's rejection of natural right was stimulated by his extreme reaction to the idealistic liberal Protestant theology of Adolf

Harnack. In the winter term 1899-1900 Harnack delivered a famous lecture series at Berlin university 'Das Wesen des Christentums' (The Essence of Christianity). Believing implicitly in the historical progress of revelation Harnack commented in his seventh lecture:-

"Jesus opens to us the prospect of a union among men, which is held together, not by any legal ordinance, but by the rule of love, and where a man conquers his enemy by gentleness. It is a high and glorious ideal, and we have received it from the very foundation of our religion. It ought to float before our eyes as the goal and guiding star of our historical development. Whether mankind will ever attain to it, who can say? but we can and ought to approximate to it, and in these days - otherwise than two or three hundred years ago - we feel a moral obligation in this direction. Those of us who possess more delicate and therefore more prophetic perceptions no longer regard the kingdom of love and peace as a mere Utopia." 15

However, as Heinz Zahrnt¹⁶ points out, in 1914 it was Harnack who drafted the appeal of the German Kaiser to his people, together with other intellectuals. Barth commented:-

"Among these intellectuals I discovered to my horror almost all of my theological teachers whom I had greatly venerated. In despair over what this indicated about the signs of the time, I suddenly realised that I could no longer follow either their ethics or their dogmatics, or their understanding of the Bible and of history." 17

Barth likewise rejected the position of the Roman Catholic Church, whose formulation and application of natural right was based on Thomism. The authority of the Church, and especially of the Pope was seen as vital arbiter.¹⁸ Barth's reformist tradition did not take kindly to such authority which might attempt to channel the Word of God, but was in effect still tainted with sin and man's fallen nature. Barth recoiled from the traditional language of Thomism in order to bypass the human imperfections of natural revelation.

Barth was confirmed in his stance when both varieties of natural right failed to stand up to Hitler. Indeed many of the pro-Hitler members of the German Church movement based their support of National

Socialism upon a variety of natural right - the Lutheran doctrine of the 'order of creation.' A major reason for the famous split between Barth and Brunner was because Brunner could assert that "What we call laws of nature are God's orders of creation" and "The idea of the 'order of creation' interests us particularly as the principle of social ethics."¹⁹ Barth believed that in essence there was little difference between the 'order of creation' doctrine advocated by Brunner and that advocated by the theological supporters of Hitler like Althusser, Gogarten and Elert. Hitler's supporters could see the new Germanism as the revelation of God's will in creation:-

"God's hidden will is manifest in the great historical events of our time. There are God's masks behind which our conscience may, if it will, recognise His eternal, creative power." 20

In a less dramatic setting in the post war period there is some evidence that Barth's approach to natural right was not so condemnatory. Indeed a recent analyst²¹ has argued that throughout Barth's stance on natural right he:-

"wishes to reject the usual formulations of moral natural law doctrine, but he does not reject the conceptual foundations upon which it is typically made to rest; his position therefore may actually contain, as Brunner and others have implied, some Kantian shavings."

Midgley points out that the essential difference between Barth and his critics is twofold. First in the manner and degree to which essential human nature is known. Second in the degree and significance of the alienation between the existing human being and his essence. Barth's post-war stress on the humanity of God has led him to claim:-

"It would not do even to partially cast suspicion upon, undervalue or speak ill of man's humanity, the gift of God, which characterises him as a being."

Midgley comments that:-

"By adopting the vocabulary of metaphysical realism in his doctrine of man, Barth has backed himself into a corner from which he cannot consistently deny that there is a natural moral law arising from man's essential nature."

Hence Barth can accept natural right ontology but not its traditional epistemology. It is possible to argue, however, that he has elaborated a new form of 'revealed natural right' which is essentially Christological, although avoiding traditional natural right terminology.

Evidence can be found for this in Barth's writings. In a striking passage in Church Dogmatics Barth directly equates his Christological approach with the true natural right:-

"Again we read in 1 Peter 1/20 that the 'Lamb without blemish and without spot' was not only 'foreordained before the foundation of the world, but was manifest in these last times for you.' As the context shows this means that in human history and beyond all history human or otherwise, there is no other higher law than that of divine mercy, now revealed, established and applied in the oblation of the Lamb of God. There is no positive law to be restricted or repealed by another of the same kind. There is no place from which it can be relativised. It is the true "natural law" which necessarily limits and relativises all positive law. For the Lamb of God foreordained before the foundation of the world is the person and work in which this law had been revealed." 22

Barth can also cautiously accept Bonhoeffer's mandates of creation for they turn out to be:-

"the command of God revealed in Jesus Christ it is from the Holy Scriptures that we learn of the existence of these mandates which give concrete form to the command."

Nevertheless two points should be born in mind when considering such a revealed natural right in Christ. The first is Barth's own warning that "the commands of God in the Bible are not general moral doctrines and instructions." This would of necessity leave much room for the Holy Spirit in the revealed natural right. The second is the extent to which a revealed natural right can be called natural right at all in the conventional meaning of the term.

c) The Basis in the Word of God

For Barth Justice can only be securely grounded in the language and concept of the Word of God and his revelation in Christ. Hence Justice must be seen as emanating from the very personality of God as revealed in Christ. Justice must be an absolute - an ontological standard.

Barth demonstrates this in his book 'Church and State' (1939). Here he asks two pertinent questions -

"Is there a connection between justification of the sinner through faith alone and the problem of justice and the human law?"

This in turn leads to the question

"Is there an inward and vital connection by means of which human justice, as well as divine justification, becomes the concern of the Christian faith?"

In answering Barth emphasised his abhorrence of the Lutheran 'two world' doctrine which stressed that the Christian's duty was to God and to his immediate neighbours and that the State was another world which, short of the most clear apostasy demanded unqualified obedience. This arose out of the assumption - seen for example in Zwingli - that there is a clear distinction between 'Divine' and 'human' justice. Barth points out that if divine and human justice are separated the disastrous consequences are that justice would have no relevance to the Kingdom of God and that it would be perfectly satisfactory to construct a secular gospel of human law. That was the plain result of those who advocated the 'two worlds' doctrine in Nazi Germany. It was that which enabled them to tolerate Auschwitz. The effort to discern the Word of God in the form of Divine justice must be made.

In the realm of Church and State it is obvious from 'Against the Stream' that Barth can recognise a vast distinction between the

Christian community and the civil community but the positive point to grasp is that because of their common origin and centre there is a divine ordinance in the civil community:-

"Since the State forms the outer circle, within which the Church, with the mystery of its faith and gospel, is the inner circle, since it shares a common centre with the Church, it is inevitable that, although its presuppositions and its tasks are its own and different, it is nevertheless capable of reflection indirectly the truth and reality which constitute the Christian community." 23

Justice should determine the standard of behaviour and justice should be the criterion of the laws. Christians are the vital link for putting this justice into practice:-

"Christians must not only endure this earthly State, but they must will it, and they cannot will it as a 'Pilate' State, but as a Just State; when it is seen that there is no outward escape from the political sphere; when it is seen that Christians, while they remain within the Church and are wholly committed to the future city and equally committed to responsibility for the earthly city.... in short when each of them is responsible for the character of the State as a just State." 24

The State needs more than anything "the wholesomely disturbing presence", the activity that revolves directly around the common centre, the participation of the Christian community in the execution of political responsibility.²⁵

The Christian community then bears a great responsibility in the discernment of justice to the actions and activities of the State. We have seen that although this justice is absolute as part of God's personality it cannot be discerned in the abstract. The divine justice operates by speaking to each precise situation. This inevitably introduces a dynamic element into Barth's concept. We have already noted his necessary caution in this type of operation:-

"More than guidance will not be expected from even the most particular ethics, just as more than guidance to a knowledge of Christian truth will not be expected from even the most precise and detailed dogmatics."

Nevertheless Barth is able to offer us guidelines for legal systems - these are guidelines for the determination of God's particular will in a particular situation. They are not intended to be laws in the positive legal sense but pointers to God's word and his justice. As such they challenge the law but they do not seek to usurp its function.

C. GUIDELINES FOR LEGAL SYSTEMS

1. Life

a) Respect for Life:

Barth emphasises that all human life is an unmerited loan from God. Hence man should treat this loan with respect:-

"Those who handle life as a divine loan will above all treat it with respect. Respect is man's astonishment, humility and awe at a fact in which he meets something superior - majesty, dignity, holiness, a mystery which compels him to withdraw and keep his distance, to handle it modestly, circumspectly and carefully." 26

In turn such respect means living life in Christian obedience:-

"Respect for life, if it is obedience to God's command, will have regard for the free will of the One who has given life as a loan. It will not consist in an absolute will to live, but in a will to live which by God's decree and command, and by meditation 'futuræ vitæ', may perhaps in many ways be weakened and finally destroyed." 27

So both life and death is under God's sway. Man is not to usurp the Divine authority - a historic expression of this can be seen in the commandment 'Thou shalt not kill'. He is however expected to look after life and encourage health:-

"Man must will to live and not die, to be healthy and not to be sick, and to exercise and not neglect his strength to be as man and the remaining psycho-physical forms which he has for this purpose, and thus to maintain himself." 28

He should use the powers God has given him responsibly and develop his own character according to his gifts from God.

b) The Protection of Life:

The whole of Barth's exposition on the protection of life is, in

effect, a commentary on the commandment 'Thou shalt not kill' in the context of specific ethical situations. This does not however always mean that human life is an end in itself:-

"Since human life is of relative goodness and limited value, its protection may also consist 'ultima ratiōe' in its surrender and sacrifice." 29

Barth examines many of the ethical implications of life and death issues - including suicide and murder. In this study we are, however, to concentrate on his reflections on abortion and euthanasia - both problems of considerable current legislative significance.

i. Abortion:

Barth defines an abortion as the deliberate interruption of a pregnancy in circumstances in which the birth and existence of the child was not desired and perhaps even feared. He has no doubt that this is both medically and theologically the killing of a human life:-

"For the unborn child is from the very first a child. It is still developing and has no independent life. But it is a man and not a thing, nor a mere part of the mother's body." 30

"Moreover this child is a man for whose life the Son of God has died, for whose unavoidable part in the guilt of all humanity and future individual guilt He has already paid the price. The true light of the world shines already in the darkness of the mother's womb. And yet they want to kill him deliberately because certain reasons which have nothing to do with the child himself favour the view that he had better not be born." 31

While accepting that abortion is the killing of a human life Barth does not, however, unlike the Roman Catholic view, issue an unequivocal No. He concedes that there are possible exceptions in which there is the possibility that God may wish the life to be terminated:-

"Human life and therefore the life of the unborn child is not an

absolute, so that, while it can be protected by the commandment, it can be so only within the limits of the will of Him who issues it." 32

Genuine exceptions are, however, rare. Barth suggests only one - where the life of an unborn child directly threatens the life or health of the mother. He does not accept the Roman Catholic view that the life of the child must always be given an absolute preference:-

"On the basis of the command, however, we can learn that when a choice has to be made between the life or health of the mother and that of the child, the destruction of the child in the mother's womb might be permitted and commended, and with the qualification already mentioned a human decision might thus be taken to this effect." 33

Barth attempts to define more precisely the circumstances in which an abortion might be permitted. He refuses to try and frame the circumstances as a law but makes the following observations:- A life against a life must be at stake. There must be scrupulous calculation - this calculation must take place before God (i.e. via prayers) and it must be in the faith that God will forgive the element of human sin. A crucial point is how far the health of the mother can be balanced against the life of the child. Barth seems somewhat equivocal on this point - on the one hand he can declare that 'a life against a life must be at stake' - on the other hand he is prepared to concede that very exceptionally a socio-medical reason may be sufficient:-

"It does not follow, however, that a doctor is generally and radically guilty of transgressing the command of God, though he may expose himself to legal penalty, if he thinks he should urge a socio-medical 'indication' i.e. in terms of a threat presented to the physical or mental life of the mother, or of economic or environmental conditions. For occasionally the command of God may impose a judgement and action which go beyond what is sanctioned by the law." 34

Here not only is the health of the mother a possible justification but interestingly also economic or environmental conditions - both vital issues in our consideration of the present English law on

abortion.

Barth's socio-medical justifications for abortion are an uneasy extension of his previous argument. He gives no indications of the means for assessing such factors, nor does he point out the subjective nature of the judgement and the possible abuses it gives rise to. However, perhaps some of the difficulties are lessened if it is noted that Barth is not here advocating a precept for law, but rather providing a possible justification for going beyond the law and risking incurring a legal penalty. In some socio-medical circumstances he can see this as morally right in the sight of God. He is not, however, advocating changing the law to admit of socio-medical exceptions.

ii. Euthanasia:

35

Barth gives an unequivocal 'No' to euthanasia defined as the killing of the incurably infirm, insane, deformed, immobilised and crippled. This he sees as a wicked usurpation of God's sovereign right over life and death. Even if such people are a burden to society, society has no right to pronounce their life as valueless for "The value of this kind of life is God's secret." Indeed a society that cannot welcome such members is itself weak and infirm:- "No community, whether family, village or state is really strong if it will not carry its weak and even its very weakest members."

Euthanasia is, however, also advocated by people generally in a more specialised sense - namely the treatment of terminal cases by deliberately hastening death in cases of advanced and painful illness. This arises from well-meaning humanitarianism. It is a problem for medical ethics - a problem made more complex by the modern number of artificial means for the prolongation of life. To Barth "Dying no less than living, can be a blessing only to the man to whom it comes, and by whom it is received, from God." Positive human hastening of death may be contrary to God's wish:-

"How can they be sure that as now lived it is not the supreme form of divine blessing?" "How may we know we are really helping a human being by assisting him to die?"

However Barth points out that there is a difference between positively shortening life and fanatically maintaining it. We should not make "the required assisting of human life a forbidden torturing of it. A case is, at least conceivable in which a doctor might have to recoil from this prolongation of life no less than from its arbitrary shortening." As in the case of abortion the right decision can only be reached after careful deliberation and prayer before God.

2. Equality

a) Concern for the Weak:

Barth stresses that the Church is a witness of the fact that the Son of Man came to seek and save the lost and hence Christians in their legislative influence must concentrate on the lower and lowest levels of human society and on the most disadvantaged. So the poor, the economically weak and threatened, the socially rejected will be an object of primary concern:-

"The Church must stand for social justice in the political sphere - it will always choose the movement from which it can expect the greatest measure of social justice." 36

The Church will wish that the whole of society might live as adult human beings with basic rights and freedom to a family, education, art, science, religion and culture. This freedom should be on the basis of equality and exercised responsibly:-

"The Church must and will stand for the equality of the freedom and responsibility of all adult citizens, in spite of its sober insights into the variety of human needs, abilities and tasks. It will stand for their equality before the law that unites and binds them all." 37

b) Racial Equality:

Within his broad concern for the weak and the disadvantaged Barth devotes space to a consideration of racial equality. The background for the Nazi persecution of the Jews was never far away from his thoughts, nor was that Germanism that claimed itself as a super-race ordained by God and pure within itself. Barth points out that barriers of different cultures and languages can only be overcome through conscious effort:-

"He must be at pains to understand them, and above all to make himself understandable to them. He will make oral and verbal concessions for this purpose." 38

This is not merely a duty but results in an enrichment of cultures:-

"The command of God wills that a man should really move out from his beginning and therefore seek a wider field."

and

"In every land there are many native features, traditions and customs which would benefit greatly from superior foreign influences."

That this has gone on through history makes any claim of a super-race absurd:-

"Today, of course, there is no people - not even in Asia and Africa, let alone in Europe or America - which can boast that its present members derive from the same families or clans and therefore constitute a unity of blood and race."

The basic^c theological precept behind this is that there is a common humanity created by God. A man is not firstly and intrinsically in his own people and then perhaps in humanity as well. His first duty is to the common humanity, forgetting all pretensions of exclusivism or superiority for his own language, territory or person. It follows that this should be reflected in the legal structure of a country - to prevent discrimination against one minority or another. The

extent to which this is reflected in present day English law will be considered later in this study.

c) Sexual Equality:

Barth would appear fundamentally to support sexual equality in a passage taken from 'Against the Stream':-

"If, in accordance with a specifically Christian insight, it lies in the very nature of the State that this equality must not be restricted by any differences of religious belief or unbelief, it is all the more important for the Church to urge that the restriction of the political freedom and responsibility not only of certain classes and races but, supremely, of that of women, is an arbitrary convention which does not deserve to be preserved any longer. If Christians are to be consistent there can only be one possible decision in this matter." 39

In his 'Church Dogmatics' Barth examines at considerable length the relationship between the sexes and the nature of their equality.⁴⁰ The equality is a complex one for man and woman are inseparable as well as distinct. Both are human creatures of God and as such the image of God. Any phenomenology or typology according to function or psychological characteristics is dangerous and inadequate for it grossly insults those who do not conform to the rule. However this does not mean that the sexes do not have special vocations - there is a distinction between masculine and non-masculine and feminine and unfeminine for they exist not to deny their sex but to complement the other. So real violations occur:-

"Where the one sex or the other forgets, or for any reason refuses to acknowledge that it has its rights and dignity only in relation to the opposite sex and therefore in distinction from it."

So Barth can support St. Paul's comments in 1Cor. 11 and 14 as based on this principle that women must always be women. It is impossibly dangerous to attempt to aspire beyond the sexes to a purely human being. This would be a being both semi-sexual and bi-sexual:-

"Outside their common relationship to God there is no point in the encounter and fellowship of man and woman at which even as man and woman they can also transcend their sexuality. And precisely in the relationship to God they cannot do this in such a way that they come to be male and female or that their sexuality becomes non-essential."

Hence:

"It is always in relation to their opposite that man and woman are what they are in themselves."

This does not mean that one is superior to the other - 'In Christ there is no male or female' (Gal 13/28). The manner in which they are equal is, however, complex because of their complementary nature. They are not A and a second A like two halves of an hour glass. They are rather A and B and cannot therefore be equated. However in inner dignity and right and therefore in human dignity and right A has not the slightest advantage over B, or the slightest disadvantage. Man and woman are fully equal before God and are equal in regard to the necessity of their mutual relationship and orientation. Barth then boldly faces the problem of order. He comments that every work is dangerous and liable to be misunderstood when we try to characterise this order - yet nevertheless it does exist. For A precedes B and B follows A. This does not mean inner inequality but rather reveals their inequality but then confirms the equality. It confers no privilege or injustice - no duty or right:-

"Thus man has no privilege or advantage simply because in respect of order he is man and therefore A and therefore precedes and is superior to woman."

Conversely

"Woman does not come short of man in any way nor renounce her right, dignity, honour, nor make any surrender, when theoretically and practically she recognises that in order she is a woman and therefore B and therefore behind and subordinate to the man."

Hence Barth sees man as having a leadership role by being first in order:-

"Properly speaking, the business of woman, her task and function,

is to actualise the fellowship in which man can only precede her, stimulating, leading and inspiring. How could she do this alone?"

This is a divine subordination. Equality of order would lead both her and the man in a deplorable situation hanging in the void. If the man is made weak then the woman is weak also through the weakness of the man. The woman will not thereby be compliant but will endorse the strength of the strong man and guide the strength of his sense of responsibility and service thereby negating tyranny. This is no resignation but rather asserting her independence and true equality. She educates the man into becoming a strong man. He fulfils in her the height of womanhood.

In much of this language it is plain that Barth is concerned with personal relationships - especially marital ones. In the sphere of legal and political freedom, rights and responsibilities it is plain from 'Against the Stream' that there should be no arbitrary discrimination:-

"The restriction of the political freedom and responsibility supremely, of that of woman, is an arbitrary convention which does not deserve to be preserved any longer. If Christians are to be consistent there can only be one possible decision in this matter."

Such political freedom and responsibility covers the whole range of political, proprietary and professional rights. These should be identical for men and women. Presumably, however, Barth would suggest to married women that they should weigh whether to exercise some of these rights against the complementary form of equality present in the marriage relationship as outlined by him. That, however, is a personal decision, to be resolved within the marriage relationship and one in which the positive law can have nothing to say. Barth's insights into the nature of equality between men and women will later be directly related to recent English legislation.

CHAPTER 3 - NOTESBarth

1. Karl Barth, How I changed my Mind, (1969), pg.45.
2. cf. Adolf von Harnack, History of Dogma (1894-99);
Harnack, What is Christianity?(1901);
Harnack, The Sayings of Jesus (1908).
3. cf. F.D.E. Schleiermacher, The Christian Faith, (1928).
4. cf. Ernst Troeltsch, The Social Teaching of the Christian Churches (1931); O. Gierke, The idea of Natural law and Humanity - a lecture in Natural Law and the theory of society 1500-1800 (1958). pg.202-222.
5. Foreword to 'Die Lehre vom Worte Gottes: Prolegomena zur christlichen Dogmatik' (Munchen, Christian Kaiser Verlag, 1927) translated by Paul Lehmann in The Changing Course of a Corrective Theology in Theology Today. Vol XIII. No.3 (Oct. 1956) pg.334, and quoted in the introduction to Barth, How I changed my Mind, pg.25.
6. Herbert Hartwell, The theology of Karl Barth (1964) pg.20f.
7. Barth, Church Dogmatics III/4. pg.3.
8. Ibid. pg.12.
9. Ibid. pg.27.
10. Ibid. pg.31.
11. Barth, Church Dogmatics, IV/1. pg.140.
12. Barth, Against the Stream, (1954) pg.27.
13. Ibid. pg.28.
14. Barth, A Letter to Great Britain from Switzerland (1941) and quoted in 'Karl Barth and Moral Natural Law - the anatomy of a debate'. Natural Law Forum (1968). pg.110.
15. Harnack, What is Christianity?, pg.116f.
16. Heinz Zahmt, The Question of God, (1969) pg.16f.
17. Barth 'Evangelical Theology in the Nineteenth Century' in The Humanity of God (1967) pg.14.
18. cf. the Papal encyclicals 'Rerum Novarum' (1891, revised 1931) printed under the title The Workers Charter (1960); 'Quadra gesimo Anno' (1931) printed under the title The Social Order (1960). Recent encyclicals in the same tradition are 'Pacem in Terris' (1963) and 'Mater et Maistra' (1961) - cf. New Light on Social Problems (Catholic Truth Society 1963).

18. contd.

The neo-Thomist tradition can be seen in writers contemporary to Barth such as Maritain (cf. Cp.2 of this Thesis) and Jean Dabin. For Dabin's 'Theorie generale du droit' cf. The legal philosophies of Lask, Radbruch and Dabin (1950). Another example can be seen in Giorgio del Vecchio, The Formal Bases of Law (1921).

19. Emil Brunner, Dogmatics Vol II, pg.25.
20. Adolf Keller, Religion and the European Mind (1934) pg.112.
21. L.C. Midgley, 'Karl Barth and Moral Natural Law' - the anatomy of a debate' Natural Law Forum (1968) pg.108ff.
22. Barth, Church Dogmatics, III/2, pg.484.
23. Barth, Against the Stream, (1954), pg.33.
24. Barth, Church and State (1939). Cp.4.
25. Barth, Against the Stream pg.33.
26. Barth, Church Dogmatics, III/4 pg.338,339.
27. Ibid. pg.342.
28. Ibid. pg.367.
29. Ibid. pg.398.
30. Ibid. pg.415.
31. Ibid. pg.416.
32. Ibid. pg.420.
33. Ibid. pg.421.
34. Ibid. pg.422.
35. Ibid. pg.424ff.
36. Barth, Against the Stream, pg.38.
37. Ibid. pg.38.
38. Barth, Church Dogmatics III/4 pg.290.
39. Barth, Against the Stream, pg.38.
40. Barth, Church Dogmatics, III/4 pg.117ff.

CHAPTER 4

TILLICH

PAUL TILLICH AND HIS THEOLOGY OF JUSTICE

1. TILLICH'S LIFE

Paul Tillich was born on 20th August 1886, the son of a Lutheran clergyman. When he was 14 his father went to Berlin but Tillich never forgot his country origins. His academic talent soon became recognised, his University career culminating in the degrees of Doctor of Philosophy of Breslau and Licentiate of Theology of Halle. In 1912 he was ordained to the ministry of the Evangelical Lutheran Church in Brandenburg. During the First World War Tillich joined the army as a chaplain. At this time he was becoming increasingly interested in art, culture and politics. These were important in the development of his philosophy of religion and can be set against the background of the tragedy of the war.

He began as a university teacher in 1919 at Berlin and was later Professor at Marburg, Dresden and Frankfurt. His lectures from 1919-24 were on the theology of culture. During this period he was also converted to socialism - although this was very much his own brand of religious socialism. Heywood Thomas suggests that in this period Tillich stood on the boundary between idealism and Marxism in philosophy and Lutheranism and Socialism in the world of affairs.¹ He spent one year teaching theology at Marburg (1924-5) where he met with twentieth century existentialism, but the rest of the 1920's were spent teaching philosophy at Dresden, Leipzig and Frankfurt. During this period he was very ^{much} influenced by Barth's 'dialectical' theology. He was, however, too much influenced by nineteenth century liberalism to agree with many of Barth's conclusions. Nevertheless he agreed fully with Barth's opposition to National Socialism and because of this opposition he lost his chair in the University of Frankfurt. He was helped by Niebuhr to emigrate to the U.S.A. where he became Professor of Philosophical Theology at Union Theological Seminary, New York.

Tillich spent the rest of his life in the United States and all his

most creative work was written there. Nevertheless his theological roots lay in Germany. From 1933-55 he taught in New York. In 1955 he moved to Harvard and from there to Chicago. His last major work - his 'Systematic Theology' - was completed in 1963. He died in 1965. Throughout the period following the Second World War he hoped and worked for a United Europe and a closer international unity. His interest in politics and culture never left him and provided the practical challenge to his theological and philosophical enquiries.

2. TILLICH'S GENERAL THEOLOGICAL POSITION

Tillich's theological work is complex and densely packed. This short summary of his position must inevitably be superficial, but is a necessary background to understanding Tillich's theory of justice. We must remember that Tillich is both philosopher and theologian. He is vitally interested in any attempt to deal honestly with the actual condition of human existence. He is concerned with ultimate questions and ultimate meanings. However it is only theology that "tries to correlate the questions implied in the situation with the answers implied in the Christian message."² This is pursued in a rational way. The world embodies structures that find their correspondence in the mind of man. Human reason can pose ultimate questions and answers have historically been given through revelation, itself coming to man through reason. The Bible is a primary source of theologically interpreted facts. Another source is the whole history of reform and culture. Yet man's intellect and his analysis of his situation cannot bring him to God (ultimate Being). For there is no truth without doubt. Man is justified by grace through faith and so ~~is~~^{is} accepted in spite of his doubt.

Tillich's quest for ultimate meaning has the result that, while taking existential thought seriously, he constantly presses beyond this to ontology - to the position where the infinite reveals itself in the finite. This mingled with the Romantic strain in Tillich leads to a search for a lost identity, a quest for the ultimate union of the separated. We will see that his examination of Justice is undertaken in terms of ontology. Commentators have recognised that behind much of Tillich's work is the philosophical German classical tradition - especially Schelling. Man's sin is rooted in the estrangement of his existence from his essence.³

What can conquer this existential estrangement? The salvation event of Christ. Christ is seen as the 'New Being'. He provides a new transparency to the ground of being so that this separation

can be overcome. His salvation is that which liberates and transforms us. It is a gift of Grace. So Tillich can see "that the material norm of systematic theology today is the New Being in Jesus as the Christ as our ultimate concern."⁴

The complexity of much of Tillich's thought comes from the wide variety of much of his source material and his constant dialogue with scientists, artists, psychiatrists and scholars. He was interested in modes of perception of ontology - particularly in symbols, which were not mere signs but which participated in the reality or power of that to which they pointed. The quest for the characteristics of the Kingdom of God led him not only to examine concepts symbolic of the ground of being itself, but also to examine their practical implications in human society. He could write:-

"The meaning of history can only be discovered in meaningful historical activity. The key to history is historical action, not a point of view above history The meaning of history manifests itself in the self understanding of a historical group." 5

Tillich could applaud the ~~progress~~^{movement} of philosophy away from the anti-metaphysical bias of logical positivism and some linguistic philosophy preferring the place of mystery in traditional metaphysics. In some respects Tillich can be compared to Coleridge.⁶ Both were concerned with metaphysics and ontology. Both were romantics and influenced by Schelling and Boehme. Both approached the truth from a wide variety of insights. Both were vitally concerned with their own society and human development and insight. Both contain many flashes of genius, both are highly original yet lack cohesion, because of their multi-dimensional nature.

Tillich's theology of Justice is a vital consequence of his theological method and quest. It has received surprisingly little attention in the standard ~~of~~ commentaries. Yet it is one of the most detailed and intricate examinations of the concept undertaken by a modern theologian. It is to the consideration of Tillich's theory of Justice that we now turn.

3. TILLICH'S THEORY OF JUSTICE

a) The nature of Justice as an Ontological Concept

We have seen that Tillich's basic quest is ontological. He wishes to explore the characteristics of ultimate Being. He is convinced that Justice belongs to this realm. So he writes:-

"Justice is not a social category far removed from ontological enquiries, but it is a category without which no ontology is possible." 7

To treat Justice as ontology is another way of saying that it is a characteristic of God, for God is Being itself:-

"As being itself He is ultimate reality, He is really real, the ground and abyss of everything that is real. As the God, with whom I have a person to person encounter." 8

Being must have a form and Justice is "the form in which the power of Being actualises itself."⁹ This is a symbolic expression of God. Hence:-

"The divine law is beyond the alternative of natural and positive law. It is the structure of reality and of everything in it, including the structure of the human mind. In so far as it is this it is natural law, the law of continuous creation, the justice of Being in everything. At the same time it is the positive law posited by God in his freedom which is not dependent on any given structure outside Him." 10

Because of this in so far as God's law is natural right we can understand it in nature and in mankind and formulate it deductively, and in so far as it is positive law we have to accept it empirically and observe it.

As support for his statement that Justice is the form of Being, Tillich cites both the classical and the Old Testament witness. Plato's ideal was "to become as much as possible similar to God" whereas for Aristotle "Man's highest aim is participation in the

external divine self-intuition."

This leads to an unconditional rather than a conditional moral imperative, and this unconditional character is its religious quality. In the Old Testament model the claim of God was not impersonalistic but implied the principle of Justice. The Covenant demanded Justice and the keeping of the commandments and it threatened the violation of justice with rejection and destruction. The prophetic principle is that God will destroy his nation in the name of justice. We will see the extension of this in the New Testament, with the coming of the 'New Being' when we examine the relation of justice to love. 11

If justice is the form of Being in what sense is it a moral imperative? Tillich writes:-

"A moral act is not an act in obedience to an external law, human or divine. It is the inner law of our true Being, of our essential or created nature, which demands that we actualise what follows from it." 12

The moral imperative therefore puts our essential against our actual Being. Since man is partly estranged from his essential Being he therefore needs laws, yet we must not turn these laws themselves into morality. The end in Christian terms is Grace which overcomes guilt and estrangement through the Salvation process.

However Tillich asks the question whether all ethics are not relative and culturally conditioned. If so no ontology is possible. He states that a positive and constructive criticism of the relativistic theories is embodied in the doctrine of the natural moral right - that men by nature have an awareness of the universally valid moral norms. Many Protestants (notably Barth) have rejected natural right because they claim that man is totally estranged by sin from his essence. He has no knowledge of his true nature in him unless it be given by divine revelation. Tillich cannot agree:-

"For those who deny it must admit that a divinely revealed moral law cannot contradict the divinely created human nature. It can only be

a restatement of the law that is embodied in man's essential nature... Man's essential nature cannot be lost as long as man is man ... Even a weak or misled conscience is still a conscience, namely, the silent voice of man's own essential nature, judging his actual being." 13

Tillich also rejects the claim that natural right is impossible because of cultural conditioning. He claims that in all ethical systems some basic norms appear - their elaboration is the task of natural right:-

"Such a theory underlines not only all ethical systems, but also all systems of 'law' in the sense of jurisprudence." 14

There are, however, important distinctions between Roman Catholic and Protestant views of natural right. According to the Roman Church their principles are discovered through reason. No revelatory event is necessary. Because of human uncertainty the Church must decide. The Protestant distrust of reason has resulted in far less emphasis being placed on natural right. Biblicism has tended to accept ethical demands directly from the Bible. The Church has been viewed as more of a human institution. However where Protestantism is able to accept a doctrine of natural right it can accept some element of relativity in ethics and can develop a more dynamic doctrine. It must relate to person-to-person encounter as the experiential root of morality. For Tillich this leads to the deepest roots of justice:-

"All the implications of the idea of justice, especially the various forms of equality and liberty, are applications of the imperative to acknowledge every potential person as a person. Here too is the point at which every legal system of justice depends on some interpretation, consciously or unconsciously of the moral idea of justice." 15

Personal claims for justice arise from a similar motivation:-

"Justice is first of all a claim raised silently or vocally by a being on the basis of its power of being. It is an intrinsic claim, expressing the form in which a thing or person is actualised." 16

b) The relationship, through ontology, of Love and Power to Justice

Thus far Tillich has only presented justice as ontology in a single dimension. In order faithfully to represent its complexity he must relate it to the ontology of love and power. This he does specifically in his short though profound book 'Love, Power and Justice.' Throughout his writings he pays special attention to the relationship of Justice to Love. This is not only essential through his emphasis on person-to person relationships but also through the very nature of Christ as the 'New Being'.¹⁷ Tillich's emphasis on love presents the Christological dimension to justice.

What does Tillich mean when he refers to love as an ontological characteristic? He acknowledges the wide variety of meanings love has been given. How far is it merely an emotion? Traditionally theologians have separated two broad types of love - eros and agape. Many have seen these in terms of hierarchy. Eros as the lower form of human striving for sensual satisfaction. Agape as the higher form of spiritual love - that commanded by Christ. Tillich is unhappy with such a sharp distinction. To him both are necessary - eros and philia are the motivating powers towards beauty and creativity but remain incomplete without the divine dimension, without 'love cutting into love'. Love is not mere emotion or sentimentality but is ontological - i.e. part of the very nature of Being. To illustrate its role Tillich uses the classical conception that "Love is the drive towards the unity of the separated."¹⁷ It does not distort or destroy in its union.¹⁸ The love of Christ has enabled reunion with God throughout the salvation event.

What then is the relationship between justice and love? It keeps love faithful to itself:-

"A love of any type, and love as a whole if it does not include justice, is chaotic self-surrender, destroying him who loves as well as him who accepts such love." 19

The exercise of justice is the working of his love resisting and breaking what is against love. Therefore there can be no conflict

in God between love and justice." 20

This means that "Justice is that side of love which affirms the ²¹ independent right of object and subject within the love relation."

It both preserves the freedom and unique character of the beloved and preserves the self from chaotic self-surrender. Both love and justice are meaningless ²² without each other. Although love is the ultimate moral principle it could not be love if it did not contain justice. This has been made plain in the salvation event:-

"The final expression of the unity of love and justice in God is the symbol of justification. It points to the unconditional validity of the structures of justice but at the same time to the divine act in which love conquers the immanent consequences of the violation of justice. The ontological unity of love and justice is manifest in final revelation as the justification of the sinner. The divine love in relation to the unjust creature is grace." 23

So also justice without love is injustice. This ²⁴ unity and interdependence of love and justice is a necessary conclusion of ontological analysis. It alone justifies judgement, condemnation and punishment:-

"Condemnation is not the negation of love but the negation of the negation of love."

and

"Judgement is an act of love which surrenders that which resists love to self-destruction." 24

i.e. allowing the self-destructive consequences of existential estrangement to go their way.

When Tillich examines the ontological nature of power he again discovers that it is at the heart of Being. Being is the power of Being. Non-Being is that quality of Being by which everything that participates in Being is negated. Yet:-

Power is the possibility of self-affirmation in spite of internal and

external negation. It is the possibility of overcoming non-Being."²⁵

This is the goal of history:-

"History, in terms of the self-integration of life, drives towards a centredness of all history - bearing groups and their individual members in an unambiguous harmony of power and justice." ²⁶

Justice in democracy means progress only in its quantitative and not necessarily in its qualitative character. Justice is the form in which the power of Being actualizes itself and hence must be adequate to the dynamics²⁷ of power. It gives form to the encounters of Being within Being. Power by its nature needs to be actualised in force and compulsion. How can this be reconciled with love and justice? Tillich recognises that nothing can be forced into something which contradicts its essential nature without being destroyed. But power in justice and love is Being actualizing itself over against the threat of non-Being - so the more reuniting love there is, the more conquered non-Being there is, the more power of Being there is. Hence love is the foundation and negation of power.

Hence in Tillich's ontology love, power and justice are a unity. Love is the aim of justice and power, yet without justice and power love cannot be love. Justice by its nature leads to a concrete expression of itself. We will now examine what principles of justice Tillich can deduce from its nature - together with the ambiguities which arise from them.

c) Philosophical Principles in the Application of Justice

We have seen that love is the aim of justice and that the justice of Being is the form which is adequate to this movement. Yet more detailed principles must be derived from this basic principle in order to mediate between it and the concrete situation where justice is demanded. In the course of his writings Tillich elaborates several principles and points out the ambiguities within them. We now come to

the heart of the practical lawyer's dilemma in trying to apply justice to concrete situations. However, Tillich does not deal with the application of Justice to specific moral issues but rather deals with its application in terms of general principles.

The first principle is that of adequacy - the adequacy of the form to the content.²⁸ The form^s may be inadequate in various ways. They might have outlived their usefulness and failed to keep pace with society - laws governing the family structure of another period may destroy families and disrupt the class unity of this period. The form might be the expression only of a particular individual or social power of being. The form might be abstract and inadequate to any unique situation. There is a fundamental divergence between the abstract character of the law and the uniqueness of every concrete situation.

This is a problem that the common law, with its emphasis on precedent and its ability to distinguish when a new situation has arisen, has coped with quite successfully. The common law can be seen as mediating between general principles and concrete facts. This, perhaps, explains something of the reluctance of many trained in the common law to take note of general and abstract jurisprudence, for this is seen as neglecting the needs of Judges for practicable guidelines or principles. Tillich himself, with his intricate philosophy, may well so be cens^ured.

Finally there is the problem of the inclusiveness and exclusiveness of both form and content. How far can justice accommodate minority groups, dissenters or newcomers? Tillich comments:-

"In all these cases justice does not demand unambiguous acceptance of those who would possibly disturb or destroy group cohesion, but it certainly does not permit their unambiguous rejection." 29

The second principle is that of equality. Put on an external level, most would agree that there is ultimate equality between all men in the view of God and His justice is equally offered to all of them.

Tillich develops this more concretely in his 'Systematic Theology':-

"Every person is equal to every other, in so far as he is a person. In this respect there is no difference between an actually developed personality and a mentally diseased one who is merely a potential personality." 30

Yet he readily acknowledges that every concrete application of this principle is ambiguous. For differences in society may entail different claims for distributive justice. A rigid equality may deny the right embodied in a particular power of Being and give it to individuals or groups whose power of being does not warrant it. The principle of equality has on occasions to be restricted to equals, although this could be used to justify, say, apartheid. Tillich attempts to get over this by basing the principle of equality on that of personality, the content of which is the demand to treat every person as a person. Justice is always violated if men are treated as if they were things.

This brings us to the next principle of justice - that of freedom. Freedom can be seen on two levels. It can be spiritual freedom

"the inner superiority of the person over enslaving conditions in the external world." 31

Hence the Stoic can participate in the justice of the universe and its rational structure and the Christian can expect the justice of the Kingdom of God. In contrast to this Liberalism tries to remove the conditions of oppression:-

"Liberty is considered to be an essential principle of justice because the freedom of political and cultural self-destruction is seen as an essential element of personal existence." 32

The final principle of justice that Tillich examines is that of fraternity:-

"If justice is the form of the reunion of the separated, it must include both the separation without which there is no love and the

reunion in which love is actualised. This is the reason why frequently the principle of fraternity or solidarity or comradeship or, more adequately, community has been added to the principles of equality and liberty." 33

Tillich is, however, unhappy about the principle of fraternity. Community can be seen as an emotional principle adding nothing essential to the rational concept of justice, but on the contrary endangering its strictness. We see from Tillich's 'Systematic Theology' that leadership within a community brings its own ambiguities.

"Leadership is the social analogy to centredness" 34

yet

"The leader represents not only the power and justice of the group but also himself, his power of being and the justice implied in it." 35

In leadership we also have the ambiguity of rationalisation and ideology and the ambiguity of an authority over persons which is always open to rejection in the name of justice.

d) Levels of Justice

Significantly in his book 'Love, Power and Justice' Tillich follows his discussion of principles of justice with an analysis of levels of justice. Ambiguities were an unavoidable accompaniment to his principles of justice. He cannot avoid asking himself the question what effect this has on his scheme of ontology. He tries to answer this by enumerating different qualities of justice.

He begins with the basis of justice - i.e. intrinsic justice. This we have already examined:-

"Justice is first of all a claim raised silently or vocally by a being on the basis of its power of being. It is an intrinsic claim, expressing the form in which a thing or a person is actualised." 36

This can be either a just or an unjust claim. It may suppress the dynamic element in the actualisation of being or it may deny the static structure within which the dynamic element can be effective.

The second level of justice Tillich refers to as tributive or proportional:-

"It appears as distributive, attributive, retributive justice, giving to everything proportionally to what it deserves, positively or negatively." 37

Tillich defines his terms:-

"Attributive justice attributes to beings what they are and can claim to be. Distributive justice gives to any being the proportion of goods which is due to him; retributive justice does the same but in negative terms, in terms of deprivation of goods or active punishment." 38

In the realm of law and law-enforcement Tillich sees the tributive form of justice as the norm. Yet there are exceptions and they point to a third and higher form of justice which is in accord with intrinsic justice.

This third form Tillich refers to as transforming or creative justice. Because intrinsic justice is dynamic, tributive justice is never adequate to it because it calculates in fixed proportions. This would include the breach of a positive law in the name of a superior law which is not yet formulated and valid. A judgement may be unjust although legally right. Tillich defines the criterion of creative justice as the fulfilment within the unity of universal fulfilment. The religious symbol for this is the Kingdom of God. The classical expression of this is given in the Bible, where the main emphasis is not on proportional justice but on those who subject themselves to the divine orders according to which everything in nature and history is created and moves - i.e. loving obedience to the source of the law. God's justice is expressed in the grace which forgives in order to unite. It may appear as plain injustice. Justification by faith through grace justifies him who is unjust. For creative justice is the form of reuniting love. 39

I have summarised at some length Tillich's levels of justice because they mark a fundamental difficulty in the ontological approach. Justice is by its nature a concrete form of being, yet as soon as we attempt to put it into concrete form we are faced with ambiguities and a betrayal of its original purity. This is inevitable given human nature and society and leads Tillich to declare

"A state of unambiguous justice is a figment of the utopian imagination." 40

This difficulty can clearly be seen in Tillich's early book "Die sozialistische Entscheidung".⁴¹ Here Tillich justifies socialism as a prophetic movement leading towards a new order of things - towards justice. However:-

"In the power struggle Justice decides the issue in the final analysis - not an absolute, abstract justice, but a concrete justice that is perceived at a given time by a society and its particular groups as justice for them. In this sense all Power is based on justice." 42

In addition Tillich comments:-

"Justice is not an absolute ideal standing over existence; it is the fulfilment of primal being ... Therefore justice presses beyond every social situation for every reality reflects the ambiguity of origin. It is the function of the prophetic movements of a particular period to explore this ambiguity and to fight for a more adequate justice. But this struggle can only be led by a group that can represent and realise the new justice. This is precisely the situation of the proletariat." 43

It should, of course, be noted that Tillich was here writing in the 1930's in a particular social situation. However, it is because Tillich believes "Justice presses beyond every social situation" that ambiguity is inevitable.

This ambiguity is also evident wherever Tillich attempts to work out justice in personal and group encounters. In personal encounters:-

"The cultural process gives the contents; they are provided by human experience, embodied in laws, traditions, authorities as well as by

the individual conscience. This provides a solid foundation for justice in personal encounters." 44

Hence law is externalised conscience and conscience is internalised law. The rules of justice are created by the interplay between law and conscience within the context of the acknowledgement of the other person as a person. Yet can this situation be transcended? Tillich sees the only possibility left as the classical theory of natural right, but that itself leads us back to the ambiguities of its basic principles like equality and freedom. He concludes:-

"The natural law theory cannot answer the questions of the contents of justice. And it is possible to show that this question cannot be answered at all in terms of justice alone. The question of the content of justice drives to the principle of love and power." 45

This is all very well, yet when we are driven thus far back we are again driven to abstracts. Tillich mentions functions of creative justice (i.e. that which relates love to justice) in personal encounters as listening, giving and forgiving yet surely these are just as ambiguous in working out the content of justice.

An example of the practical difficulty of achieving justice in the sphere of personal and group encounters can be seen in Tillich's own example of the emancipation of women and the movement towards their equality before the law. Tillich, while supporting much of the progress made and opposing any attempt to restore a male patriarchalism, comments on the dangers of providing a male-orientated equality model:- 46

a

"The powers of origin possessed by women by virtue of her resonance with eros and motherhood cannot easily be incorporated into the extremely one-sided, male-orientated rationalistic system." 47

Further analysis of this problem can be seen in the writings of the other theologians examined, in particular Maritain.⁴⁸ Part III of this study further discusses the problems of equality models when examining legislation designed to outlaw certain broad areas of sexual discrimination. 49'

In group relations such as those between nations we are led to similar ambiguities. We have already mentioned the ambiguities of leadership and form to content. In dealing with the problem of the desire for a united mankind Tillich mentions three possibilities.

First the return to independent power centres, perhaps not national but continental. The second a kind of federal union of the present main powers and their subjection to a central authority in which all groups participate. The third that one of the great powers should develop into a world centre, ruling the other nations through liberal methods and in democratic forms. The first leads to a conflict between centralisation and nationalism. The second contradicts the analysis of power as we have given it and presupposes the presence of a spiritual unity which does not exist. Tillich believes the third is the most probable but acknowledges the dangers of disintegration and revolution - the development of new vocational consciousness. Again we are faced with ambiguities and Tillich has to recognise that ultimate justice is only attainable in the ultimate relation - i.e. in God and the Kingdom of Heaven. 50

So we have come full circle. Tillich's ontological analysis is impressive and illuminating as ontology. As such it is the goal and teleology of mankind. Yet the very nature of justice as a concrete form brings with it the eternal dilemma of the lawyer and student of jurisprudence. How can such an ontology be put into practice in an imperfect world? Human justice must to a certain extent be ambiguous. We have but the problem of the immanence and transcendence of God writ large. Yet the difficulty of putting ontology into practice does not negative the necessity of the attempt. Tillich's value is in his attempt to clarify the ontology of justice by exploring its relationship with love and power and thereby examining the strengths and weaknesses of the traditional ontology of natural right. His multi-dimensional approach brings new insights to this. In the last resort he claims to have done neither more nor less than an ontological study. There is the awesome responsibility of attempting to put such an ontology into practice. The significance of the principles enumerated to the problems of present day English law examined in this

study will be further examined in Part III.

CHAPTER 4 - NOTESTillich

1. John Heywood Thomas, Paul Tillich (1963), pg.6.
2. Paul Tillich, Systematic Theology (1953-64), Vol I pg.8.
3. J. H. Thomas, Paul Tillich, pg.112f.
4. Tillich, Systematic Theology, Vol I pg.56.
5. Tillich, Propositions Part V. pg.6, quoted in Thomas (supra) pg.155.
6. For a recent assessment of Coleridge's thought cf. Basil Willey Samuel Taylor Coleridge (1972).
7. Tillich, Love, Power and Justice (1954), pg.55.
8. Ibid. pg.109.
9. Ibid. pg.56.
10. Ibid. pg.111.
11. Tillich, Morality and Beyond (1969), pg.21.
12. Ibid. pg.12. cf. Tillich, Theology of Culture (1959), pg.136.
13. Tillich, Morality and Beyond, pg.28.
14. Ibid. pg.29.
15. Ibid. pg.33.
16. Tillich, Love, Power and Justice, pg.63.
17. Ibid. pg.33.
18. Tillich, Systematic Theology Vol I pg.313.
19. Tillich, Love, Power and Justice pg.68.
20. Tillich, Systematic Theology Vol II pg.201.
21. Ibid. Vol I pg.313.
22. cf. 1 Cor.13; Luke 10 v.26-28.
23. Tillich, Systematic Theology Vol I pg.316.
24. Ibid. pg.314.
25. Tillich, Love, Power and Justice pg.40.

26. Tillich, Systematic Theology Vol III pg.354.
27. Tillich, Love, Power and Justice pg.56.
28. Ibid. pg.57 - cf. pg.243 of this thesis in relation to inherent ambiguities in the Sex Discrimination Act 1975.
29. Tillich, Systematic Theology Vol III pg.85.
30. Ibid. pg.66 - cf. pg.232 of this thesis in relation to abortion.
31. Tillich, Love, Power and Justice pg.60.
32. Ibid. pg.61.
33. Ibid. pg.62.
34. Tillich, Systematic Theology Vol III pg.87.
35. Ibid. pg.87.
36. Tillich, Love, Power and Justice pg.63.
37. Ibid. pg.63. In this Tillich is greatly influence by Aristotle's theory of natural right - cf. Nicomachaen Ethics Book V Cp.VII. However, Tillich himself has invented the term 'tributive justice':- "I have called this form of justice tributive because it decides about the tribute a thing or person ought to receive according to his special powers of being." (Love, Power and Justice pg.63f.)
38. Tillich, Love, Power and Justice pg.64.
39. Ibid. pg.66.
40. Tillich, Systematic Theology, Vol III pg.86.
41. Tillich, 'Die sozialistische Entscheidung' (1933), reissued under the title The Socialist Decision (1977).
42. Ibid. pg.140.
43. Ibid. pg.141.
44. Tillich, Love, Power and Justice, pg.80.
45. Ibid. pg.82. cf. also Tillich, The Socialist Decision pg.143.
46. Tillich's comments on the ambiguities inherent in the concept of equality is discussed on pg. of this thesis.
47. Tillich, The Socialist Decision pg.152.
48. cf. Chapter 2 of this thesis.
49. cf. pg.24⁹ of this thesis.

50. For an examination of the role of antimony within a legal system cf. Radbruch in The Legal Philosophies of Lask, Radbruch and Dabin (1950).

CHAPTER 5

MOLTMANN

MOLTMANN'S LIFE

Jurgen Moltmann was born in Hamburg on April 8th, 1926. He started studying theology as a prisoner of war in England and, after he had returned home in 1948, continued his studies in Gottingen under H.-J. Iwand, E. Wolf, and C. Weber. In 1952 he took the degree of Doctor of Theology with a thesis in the field of historical theology, entitled 'Amyraut and the School of Saumur'. Also in 1952 he married Dr. Elizabeth Wendel.

Having entered the Lutheran Church as a curate in Berlin and Westphalia from 1953 to 1958, Moltmann became parson of a parish and the student chaplain in Bremen. In 1957 he qualified for inauguration as academic lecturer, submitting to the University of Gottingen a dissertation on 'Chr. Pezel and the Conversion of Bremen (from Lutheranism) to Calvinism'. He taught as a professor at the Theological College in Wuppertal from 1958 to 1963. In 1963 he was appointed to the chair of Systematic Theology and Social Ethics in the University of Bonn.

Since 1967 Moltmann has been Professor of Systematic Theology in the University of Tubingen. For the academic year 1967-68 he was guest-professor at Duke University, North Carolina, U.S.A. In 1971 he was awarded the literary prize 'premio d'Isola d'Elba' for the Italian edition of his 'Theology of Hope'. 1973 saw the publication of his other major work 'The Crucified God.'

Moltmann has travelled widely on lecture tours. He is co-editor of several periodicals as well as a member of the Synod of EKD ('Evangelical Church in Germany' the federation of Protestant churches), Faith and Order, the council of the Ecumenical College of Bossey, and the Paulus society.

A. Moltmann's General Theological Position

The development of Moltmann's theology can be compared to the growth of a symphony, each new movement throws the old into relief and further illuminates and develops it. His thinking in the 1960's was centred round the theology of hope. In the 1970's his theology dramatically changed to that of the cross. He does, however, deny any reversal of ideas. On his own admission the two phases are two sides of the same coin. To understand this we will briefly examine both phases.

Moltmann's theology of hope and newness as seen in his books 'Theology of Hope' and 'Religion, Revolution and the Future' start from his fascination with the future and with eschatology. Eschatology is, for him, the starting point for theology, not the end of it. Hence

"From first to last and not merely in the epilogue Christianity is eschatology, is hope, forward looking and forward moving, and therefore also revolutionising and transforming the present." 1

The classic sign in salvation history of this is seen in the resurrection of Christ. The resurrection is seen as the culmination of a God of promise who is witnessed to in both Old and New Testaments. It should not, however, be thought of in terms of classic promise and fulfilment, for the time scale is, as it were, fluid, with the future breaking into the present and the present into the future. This is true for the whole of the Gospel event but the resurrection is the key point:-

"The resurrection has set in motion an eschatologically determined process of history, whose goal is the annihilation of death in the victory of the life of the resurrection, and which ends in that righteousness in which God receives in all things due and the creature thereby finds salvation." 2

On a human level this means that the future attains predominance over the past and hope over anxiety. There is clearly an important difference between this eschatologically determined process of history and that which is historically new merely by virtue of event - although

the one is partially embodied in the other. Hence:-

"The anticipation of that which is ultimately new lies within the historically new." 3

From this hope for the new creation develops Moltmann's vision of the new man and the new community which we will see so intimately connected to his concept of Justice.

In this emphasis on newness and realisable eschatology Moltmann claims to be re-emphasising the insight of St. Paul:-

"If anyone is in Christ he is a new creation." 4

This is in marked contrast to religious tradition:-

"In religious tradition men turn into recipients of an old message. In the modern world they become pioneers of progress, trail-blazers of the future, and discoverers of new possibilities. The Church seems to live on memories, the world on hope." 5

A development of Pauline theology should, however, mean that everything past is either future begun or future aborted. This should be the true context of Christian faith, instead of the present situation where

"A Christian faith in God without hope for the future of the world has called forth a secular hope for the future of the world without faith in God." 6

True faith motivated by hope means that the Church is vitally concerned with the ordering of social and political life for it is striving towards an ideal.

It is not, therefore, surprising that in his 'Theology of Hope' Moltmann rejects a purely ontological foundation for the understanding of history in Christian social ethics. He stresses that God's action is not seen in that which is repeatable or remains the same. Thus he discounts Greek philosophy as standing in the epiphany of the eternal present - contrasting it rather with the Israelite/Christian man who

stands in the 'apocalypse of that which is coming.' This does not deny the present but illuminates it. However the future is ever in danger of being obscured by the forces of evil. Here we see the jumping off point for the next development of Moltmann's theology - the theology of the Cross.

Hence in his 'The Crucified God' Moltmann explains the shift in emphasis:-

"The dominant theme then was that of anticipations of the future of God in the form of promises and hopes; here it is the understanding of the incarnation of that future by way of the sufferings of Christ, in the world's sufferings." 7

In this new emphasis there is the feeling that Moltmann is seeking to balance his earlier idealism and counsels of perfection with the blood, sweat and tears of existence - with that human nature that crucified the Son of God. His theological reasons for his theme bear this general feeling out. He sees the crucified Christ in the light and context of his resurrection and therefore of freedom and hope. Yet to emphasise the crucifixion means we must deepen our concept of God. We must ask fundamental questions about man and his liberation and relationship to the reality of the demonic crisis in his society. Out of such a critical analysis Moltmann wishes to move beyond a criticism of the Church to a criticism of society. The study of the cross marks a radical orientation of theology and the Church of Christ. So the cross illuminates the nature of God and man and enables a more sober reappraisal of hope:-

"Unless it apprehends the pain of the negative, Christian hope cannot be realistic and liberating." 8

More specifically in 'The Crucified God' the cross has three effects on the state of man. Firstly it is of importance when we think about our identity. The cross shows that identity and involvement cannot be separated:-

"Christian identity can be understood only as an act of identification with the crucified Christ."

What does this identification mean?

"By his sufferings and death, Jesus identified himself with those who were enslaved, and took their pains upon himself. And if he was not alone in his suffering, nor were they abandoned in the pains of their slavery ... Jesus was their identity with God in a world which had taken all hope from them and destroyed their human identity." 9

Hence the identity and involvement required from the Church of the crucified is to be the Church of the oppressed and insulted, the poor and wretched. It must liberate the poor from poverty and the rich from riches. It must take sides in political and social conflicts.

Secondly the cross relates to eschatology. The command to take up your cross and follow Christ (Mk.8/35) is eschatological and not moral:-

"It is a call into the future of God which is now beginning in Jesus." 10

The cross can only be understood in the context of his resurrection. It is the resurrection that can demonstrate realised eschatology:-

"Jesus' resurrection makes possible the impossible, namely reconciliation in the midst of strife, the law of grace in the midst of judgment, and the creative love in the midst of legalism." 11

Moltmann later elaborates on this point:-

"Jesus broke through legalistic apocalyptic because he proclaimed 'justitia justificans' rather than 'justitia distributiva' as the righteousness of the Kingdom of God, and anticipated it in the law of grace among the unrighteous and those outside the law." 12

This is an eschatological position because the future was anticipated in Christ's death on the cross. The risen Christ and the crucified Christ are one and the same. This wisdom of God is folly in human eyes. (1 Cor1/25-31; 2Cor 4/10,12).

Thirdly we can see in Moltmann's examination of the theology of the

cross a heightened awareness of the political ramifications of the trial and crucifixion of Jesus and from there to the politics of mankind. Politics cannot be separated from religion for it is the means whereby collective involvement can be made effective and relevant to the present human condition:-

"Faith gains substance in its political incarnations and overcomes its un-Christian abstractions which keep it far from the present situation of the crucified God." 13

A theology of the cross keeps the Church faithful to its mission so that it does not identify wholly with society as constituted, neither does it reject the world but is critical of society in the insight and knowledge of the cross.

For a more detailed examination of the human condition and Moltmann's concept of Justice we must turn to his book 'Man'. Again the cross is a constant theme making the intersection of true God and true men. The exact opposite of the Greek ideal of the good and beautiful for man is seen in Jesus:-

"He did not preach and live out a new ideal of the good and just man but brought the Gospel to the poor." 14

Here, presumably, Moltmann is using the word 'just' in the sense of the Greek ideal and is contrasting it with God's justice of the cross. Man's lack of humanness is revealed in the cross, as is the remedy:-

"The basis of Christian hope lies in the faith of the crucified Son of Man. It is therefore 'hidden under the cross' (Luther) and become present only during temptation and in struggle. Following the crucified Jesus creates the distance of Christians from this 'passing world' ... the strength for the incarnation of love." 15

Moltmann's latest major work is 'The Church in the Power of the Spirit' (published 1977). Doctrinally the book breaks little new ground unlike his 'Theology of Hope' and 'The Crucified God.' In the words of a perceptive review by Kenneth Mason:-

"Those earlier books were fascinating explorations in the doctrine of God, Christ and the Holy Trinity. This book in spite of its title, does nothing similar for the doctrine of the Spirit. It is not really the third book of a major trilogy. That has still to come, and we must very much hope that it will." 16

The book is, however, important for our purposes in so far as it contains a further application of the principles worked out in his earlier books to the life of Christians under the guidance of the Holy Spirit. As such it brings Moltmann one step closer to an applied theology. Its conclusions will be examined in Section C of this Chapter.

B. Moltmann's Concept of Justice

Moltmann's concept of Justice has naturally developed as his theological emphasis has changed. Indeed, it is suggested that his thoughts on Justice may be a major factor in the balancing of his earlier theology of hope with his later theology of the cross. His theology of hope plainly required an expression in terms of Justice. This belonged to the eschatological domain which is seeking to react on the present:-

"Those who hope in Christ can no longer put up with reality as it is, but begin to suffer under it, to contradict it." 17

However Moltmann realised that in this process human striving is essential - this in turn leads to the dangers of human inadequacy and sin. We can see how his thoughts are turning to the cross.

In expressing human inadequacy Moltmann's Lutheran background is in evidence. Thus he comments in true Lutheran fashion on the law, meaning by that the moral and religious law revealed by God:-

"Man being human depends on what he does. But what he does is subject to the law. The law demands of him a justice he can no longer produce once he has become unjust. So he becomes the slave of a law which holds up to him a humanity it refuses to grant and demands of him freedom without setting him free." 18

The way out of this dilemma is to start not from man but from God - thus

"When justification happens to a sinner, unjust living is made just." 19

In the words of Luther arguing against Aristotle

"We do not become just by doing justice, but because we have been justified, we do what is just." 20

In this emphasis on starting from God and on justification by faith the towering influence of Barth's concept of justice can be seen.

Moltmann is surely echoing Barth when he proclaims:-

"Without God's justice and faithfulness nothing can exist." 21

This is equivalent to saying that Justice is an ontological characteristic of God.

Moltmann's theology of hope and eschatology do, however, provide a new and vital element to justice and rule out any simple ontology. Justice as righteousness is made possible by Christ's resurrection in which hope is always kindled anew. Thus this confidence and hope which requires human justice

"Seeks for that which is really objectively possible in this world, in order to grasp it and realise it in the direction of the promised future of the righteousness, the life and the Kingdom of God ... Thus it will continually strive to understand world reality in terms of history on the basis of the future that is in prospect. It will not therefore search, like the Greeks, for the nature of history and for the enduring in the midst of change, but on the contrary for the history of nature and for the possibilities of changing the enduring."

22

Hence, to summarise, we already have in Moltmann's early theology a realistic concept of justice in terms of righteousness. This is seen as both ontology and eschatology challenging the present. Ideally Justice is one with righteousness but in fact our attempts at Justice are clouded by our unwillingness to contemplate the demands of righteousness on human strivings. We can see this conclusion in Moltmann's early work as being influential in the formulation of his later theology of the cross.

Moltmann's concept of Justice is greatly refined in his book 'Man' in 1974. Here he relates it directly to human society through a detailed examination of natural right and human law. Moltmann recognises that man being a social animal must form himself in a society. Societies must have laws, a legal system and concepts of Justice operative in formulating and administering these laws. However "Our ideas of justice depend on the images of man current at any particular time", and "the legal system shows us the actual image of man of an age and of a society as it is put into practice." 23

This leads to the basic question of a coherent and moral theory of justice, namely

Is there a higher court of appeal before which the law in force must be justified, or can anything count as law which has been established by agreement?" 24

Natural right provides a clear answer to this question. However, Moltmann, like Barth, does not see the traditional formulations of natural right as a solution.²⁵ He begins his criticism of natural right with a quotation from Radbruch:-

"Man in the eyes of the law is no longer Robinson Crusoe or Adam, the isolated individual, but man in society." 26

Hence although the idea of natural and human rights is fascinating the difficulties in carrying through this ideal lie in its lack of connection with the real historical situation of man. Universal principles can be used both to support and oppose situations and ideologies. What is natural and what is unnatural may well be culturally conditioned - this can be seen, for example, in sexual ethics. However, although Moltmann believes that natural right is itself historically conditioned he is reluctant to jettison the concept entirely:-

In spite of these historically conditioned and changing contents, the idea itself and the search for a natural law are actual facts and, once they have entered into history, are unforgettable ... Behind the assertions that 'the true nature of man' or an absolute moral law is known stand claims to authority which seen historically are always immense. And yet, on the other hand without a public agreement about what life that is worthy of man is, no legal system is possible." 27

Moltmann develops this statement to expound his own use of natural right and his own foundation for justice. To continue with the above quotation:-

"If this agreement arises in the historical process of human socialisation, it is meaningful to understand the idea of the moral law and the question of natural law in the context of man's future hope for mankind and for humanity. The contents may be historically conditioned and changeable, but the intention which is contained in it is

unconditioned and invariable."

The influence of the 'Theology of Hope' can clearly be seen. Laws and reforms of laws should always anticipate the future of meaningful communal life - justice must have eschatology as well as ontology:-

"It is not the invocation of a supposedly objective moral law, but the unavoidable task of altering the world, of healing it, of bettering it, of making it more worthy of men and more worth living in, that can be regarded as the norm of justice." 28

He quotes Maihofer with approval:-

"Natural Law is for us the concept of the continuously required evolutions and revolution of human relationships in everyday life forward to the form of a truly human society among men." 29

Moltmann claims that such a redefinition of natural law is not only more faithful to our human experience, it is also more faithful to God. For God is a God who acts through history. He is not like Zeus "the right reason which pervades all things" but is God of the Exodus and the Covenant. He is the God of freedom and deliverance from sin and death.

The actual working out of justice is therefore both dynamic and realistic. The realism can be seen in 'The Crucified God' - for God spoke to men not by 'right reason' but by the 'folly of the cross' (1Cor.1/18). So we can elaborate in terms of justice on the three points noted earlier from 'The Crucified God'. The first was that of identity and involvement. The crucified Lord emphasised the radical nature of the content of Justice. There must be justice for the oppressed, insulted, poor and rejected. The second point was that the cross and resurrection were themselves eschatological events. So justice is in the nature of 'justitia justificans' rather than 'justitia distributiva'. The third point stressed the importance of Christian politics. Politics is the way to implement in practical terms a Christian concept of justice. For Moltmann, it is, however, also more than this for it is also the means whereby collective involvement can be made effective and relevant to the present human

condition. It is not merely a mechanical agency but rather shares in the discernment process.

Hence we can see in Moltmann's concept of justice a balance between the two sides of the coin - his theology of hope and his theology of the cross. This reflects the complex nature of God's being - for justice is part of God's personality. So on the one hand justice is dynamic working for change according to the discernment of God's risen power and purposes. Yet on the other hand man's sinfulness and the crucified Lord must be realistically faced. The task of justice is to discern the intention of God which is unconditioned and invariable but in so doing it has to translate it into a concrete historical setting which is by its nature culturally conditioned and changeable. Moltmann's essay 'A Christian Declaration on Human Rights'³⁰ makes the point that since the beginning of time God has had a claim upon human beings. They must respond by establishing and upholding those rights and duties which belong essentially to what it means to be truly human -

"Without their being fully acknowledged and exercised, human beings cannot fulfil their original destiny of having been created in the image of God." 31

Justice is both ontology and eschatology challenging the present, but in our attempts to ground it in present situations and laws we need both the vision to discern the intention of God and also the realisation that God's plan is ever liable to be clouded by human sinfulness.

C. Practical Applications by Moltmann

It is not surprising that such a recent theological concept of Justice has not, as yet, achieved its full flowering in detailed practical applications. Moltmann has not yet achieved any detailed ethics to compare, for example, with volume III part 4 of Barth's 'Church Dogmatics.' The beginning of this process can, however, be seen in a recent collection of Moltmann's essays 'The Experiment Hope', (1975), in his essay 'A Christian Declaration on Human Rights' (1976), and in Moltmann's latest book 'The Church in the Power of the Spirit' (1977).

In 'The Church in the Power of the Spirit' Moltmann discusses ethical applications in three broad categories - viz Christianity in the Processes of Economic Life; Symbiosis; Christianity in the Processes of Political Life; Human Rights; Christianity in the Processes of Cultural Life; Open Identity.³² These broad categories cover many contemporary problems and provide us with a general framework. More specific contributions on individual issues from 'The Experiment Hope' and 'A Christian Declaration on Human Rights' will be added where appropriate.

In his essay 'A Christian Declaration on Human Rights' Moltmann makes the point that because we are persons before God and as such capable of acting on God's behalf and responsible to him, a person's rights and duties as a human being are inalienable and indivisible. This is true whether they be economic, social, political or personal rights and duties. Without human duties, rights and freedom cannot exist.

1) Economic Applications:

In discussing the economic applications of his theology, Moltmann stresses the need to start from the Christian doctrine of creation. He points out that according to the Biblical and Christian tradition it is only the fact that man is made in the image of God that justifies

and upholds his commission to rule over the earth. However he claims that since Francis Bacon and Rene Descartes this idea has been reversed in the popular conception. So it becomes man's expanding rule over nature which makes him the image of God and leads him to be like God. This perversion results in the conviction that man must do everything he can with the world he dominates - using and exploiting it. This results in processes of growth that escape our control. Rather the Christian position should be:-

"... because man is made in the image of God, his rule over the earth has its bounds and responsibilities... away from the will to supremacy to solidarity with others and with nature."

Hence

"The most important element for the development of a society that deserves the name 'human' is social justice, not economic growth... The hunger for justice and the longing for fellowship with one another can be much stronger." 33

This leads to a basic and universal economic right:-

"If the right to the earth is given to human beings, it follows that each and every human being has the basic economic right to a just share in life, nourishment, work, shelter and personal possessions. The concentration of the basic necessities of life and the means of production in the hands of a few should be seen as a distortion and perversion of the image of God in human beings." 34

The "rights" of the earth must also be recognised to safeguard future human life:-

"Economic justice in the provision and distribution of food, natural resources, and the industrial means of production will have to be directed towards the survival and the common life of human beings and nature... Today economic and ecological justice mutually condition each other and thus can only be realised together." 35

2) Political Applications:

Moltmann defines politics as those public affairs which a community

has to order. A primary concern within this sphere is human rights:-

"In their present form human rights had their genesis in the Mediterranean world - Greece, Israel, Rome, Christendom - and they took form in the course of the Christianisation of Europe. Human rights are by definition rights which man as man has towards the state - man meaning every human being without regard to his birth, race, religion, health or nationality. They are rights that are integral to man's being man. They are therefore also termed pre-political or supra-political rights. They are not at the State's disposal and the State is bound to respect them. They must consequently be introduced into national constitutions as fundamental and civil rights." 36

Here we see Moltmann far closer to the traditional formulations of natural justice than in 'The Experiment Hope' where he discussed them in the more general terms of liberation from oppression. He does, however, still assign this as a prerequisite to obtaining such fundamental rights. Hence if they are to claim their human rights people must be freed from poverty, hunger, contempt and persecution:-

"The Biblical traditions have proclaimed liberation from all inequalities of class and caste, as well as from the privileges of race, sex and health and have looked forward to the time when the 'glory of the Lord shall be revealed and all flesh shall see it together.'"

Hence "the traditions of hope in the Son of Man.....demand that we first of all establish human rights among and for those who are oppressed and robbed of these rights. Human justice becomes concrete when it is specifically viewed as 'the rights of my neighbour'." 37

Here Moltmann shows that the emphasis in his Christian theory of human rights is on the rights of neighbours rather than of selves.

In addition Moltmann's consideration of human rights in 'The Church in the Power of the Spirit' and his essay 'A Christian Declaration on Human Rights' have become far more profound than that in 'The Experiment Hope' by stressing that human duties must be formulated as well as human rights - i.e. the fundamental obligations which man as a human being has towards other men when he claims his human rights. He does not, however, go on to enumerate the precise nature of many of these duties. As far as individual human rights are concerned he quotes with approval the formulation in the United Nations Declaration

of Human Rights 1948 but comments that these are only concerned with individual human rights. Arising from his economic applications he stresses that further development of human rights will involve the formulation of the rights of humanity as a whole. We can see ^{this} reflected in his essay 'A Christian Declaration on Human Rights' where he comments that human rights point to a universal community in which alone they can be realised.

Moltmann does not see human rights as a final possession or an ideal but rather as legal and political aids on the road to man's becoming man in the context of the unification of mankind. They are a process - unfinished and historically speaking unfinishable. Thus new human rights can arise as society develops. Here we see a clear teleological emphasis not catered for by traditional formulations of natural justice. All of this is seen as within the context of the Kingdom of God:-

"Human rights and the rights of humanity are to be viewed as answering to and anticipating the Kingdom of the Son of Man in the power struggles of history." 38

However human sin is ever likely to pervert this process:-

"Today, fear and aggression dominate a divided and hostile humanity which is on the way totally to destroy itself and the earth. Human rights can only be realised when and in so far as the justification of unjust human beings and the renewal of their humanness take place." 39

It is through the incarnation of Christ that God restores to human beings their true humanity.

3) Cultural Applications:

Moltmann defines culture as the 'self-representation of persons, groups and peoples in relation to one another and as a whole before the ground of their existence.' Under this heading he examines conflicts caused by race, sex and those who are handicapped.

1. Conflicts of Race:-

In 'The Church in the Power of the Spirit' Moltmann uses the same definition for racism as that which he used in 'The Experiment Hope' viz:-

"By racism we mean ethnocentric pride in one's own racial group and preference for the distinctive characteristics of that group; belief that those characteristics are fundamentally biological in nature and are thus transmitted to succeeding generations; strong negative feelings towards other groups who do not share these characteristics coupled with the thrust to discriminate against and exclude the outgroup from full participation in the life of the community." 40

The mobility of modern society means that more than ever before people of different races have to live together in societies. The solution to racialism ultimately can only be within the heart of the people. It involves a correct understanding of what it means to be human:-

"It can be overcome when people win through to a liberated, non-aggressive identity as people - when they cease to identify 'being human' with the membership of a particular race, and then they arrive at a redistribution of social, economic, political and cultural power from the powerful to the powerless." 41

Moltmann therefore can see the need for legislation to combat racialism and even for special privileges to be accorded to the minority. However to be truly effective such measures should proceed from the inner conviction of the true nature of what it is to be human. Such measures must also be comprehensive - social, economic, political and cultural.

2. Conflicts of Sex:-

Moltmann defines the major problem of sexual discrimination as that of masculine supremacy on the basis of imagined privileges and the subordination of woman to man. He comments that the Christian tradition has often been used to support this - pointing back to the fall. Man has been seen as the 'head' of the woman in creation and redemption. ~~Sociologically~~ ^{Socially} he has claimed dominance in public life. His world has been separated from that of the woman in such a way that masculine

privileges are preserved. This has led to the codification of rights which hinder the woman's free development and hence the man's as well. Behind much of this process has been a psychological typography assigning different characteristics to men and women (for example man stands for activity, intellect and responsibility, woman for passivity, feeling and obedience). These Moltmann denounces as bogus:-

Social privileges are built up on mutual sexual differences and claims to rule are derived from biological distinctions which are not inherent in those things themselves." 42

Moltmann uses an identical solution to sexual discrimination as that he proposed for racialism - viz the concept of the full human being. Until this is brought about neither partner is fulfilling their potential. Hence "as long as being human is primarily identified with being a man the man does not arrive at human identity." Rather there is a "need for a human sense of identity which then no longer needs to justify itself on the basis of special sexual characteristics." This requires positive laws to redress the balance in favour of the woman:-

On the other hand the woman must at the same time be put on an equal footing before the law and her free human development must be made economically possible. There must be a new distribution of power." 43

3. Conflicts of Health and the Handicapped:-

The third major application of Moltmann's concept of full personhood from man's creation by God can be seen in his discussion of the healthy and the handicapped. If being human is identified with being healthy, then the sight of a handicapped person brings insecurity. We do not see the person but only the handicap, because we do not want to see ourselves simply as a person but only as a healthy person.

Moltmann then introduces an important philosophical discussion which is of relevance to the whole of his discussion on human rights. Ironically it can also be used as a critique against some of his earlier conclusions. Starting from Gal.3/28 he examines the notion

of equality in Christ. He comments that the old idea is that like ~~cleaves to~~ ~~strives with~~ like - i.e. we love people like ourselves and in the same condition as ourselves. This is not, however, the Christian stance:-

"If the Christian faith breaks with the compulsion towards self-collaboration, the Christian fellowship will also have to break with the 'natural' principle of 'like cleaves to like'. For Christianity the basic principle of liberated humanity can only be the principle of the recognition of the other in his otherness, the recognition of the person who is different as a person. It is only this recognition which makes it possible for people who are different to live together - one in fellowship - sharing and fulfilling man's common being in hope for the Kingdom." 44

Recognising the other in their differences as a person is to anticipate the Kingdom of God and its righteousness. While such reasoning justifies many of Moltmann's conclusions on human rights it can be argued that, especially in discussing the relation between men and women he has been reluctant to recognise otherness because of its historical use in bolstering privilege.

45

In 'The Experiment Hope' Moltmann goes further into ethical applications of the healthy and handicapped and examines more deeply the nature of life and death. His analysis does, however, consist largely of asking questions. He puts the ethical problems of abortion within the context of two questions - "When does life begin?" and 'When is the origin of the humanity of life?' In order to answer the first question the further question must be asked 'For what purpose is the beginning point to be ascertained?' The gynaecological, scientific and legal answers may differ. The 'nascent life' is accorded a different value depending on whether one is considering the present condition of the ~~foetus~~ ^{foetus} or the potential future of the person. It follows that the question of the origin of the humanness of life cannot be answered by a dating of the beginning of life in its proto-forms. Hence Moltmann makes a distinction between protection against the destruction of vitality and destruction of humanity. The origin of humanity comes when it is accepted and affirmed, recognised and loved. It follows:-

"that an abortion is to be viewed not as the first or the exclusive culpable denial of humanity. Rather the rejection of a person's becoming and beyond that, the rejection of each person, is already such a denial of humanity." 46

However Moltmann points out that the acceptance of another presupposes inner identity and strength on the side of the accepting one and

"without such requirements for acceptance of a nascent life, and thus a pregnancy, self-dissolution and self-destruction is set in to a point where one can no longer speak of acceptance and love." 47

Exclusively personal argumentation is, however, inadequate, since the human non-recognition and refusal of nascent life can be revoked but an abortion is irreversible.

When discussing the end of the body and the death of man Moltmann turns from the human acceptance of life to the human surrendering of it. He points out the lack of consciousness in our society of both death and mourning.

"Medical work turns its efforts against the premature un'natural' death and towards the prolongation of life. This is as it should be for the professional practice of medicine. A similar repression of dying and all conscious human attitudes towards this should not, however, be an unconscious result of this. When in the presence of the dying the medical art has come to an end, the human being in the physician is still "on call." 48

Unless this is the case dying is de-humanised. Whereas physical death can be determined by the dying away of vital organs - eg. the irreversible death of the brain - the death of the person has human dimensions. It is concerned with the human act of surrendering life - or the acceptance of death. For a Christian this involves giving oneself finally out of one's own hands and to trust the one who takes the life which he gave. Christ's love, his death and resurrection showed us the mystery of life and death and the power of accepting and surrendering life. Hence:-

"the mere prolongation of life does not yet contain this human meaning, just as the mere conception and birth of human life do not bring forth human life as human." 49

Hence in discussing the humanity of living and dying Moltmann stresses throughout the need for a comprehensive conception of the human person in his bodily, spiritual, social and transcendental dimensions. Health can only be in the context of a meaningful humanity. He ends by stressing the need for co-operation of the various therapies in the medical, social and human sphere with a view to salvation - the salvation we know through faith and hope.

4) Priorities and Balance in Human Rights

In an important section in 'A Christian Declaration on Human Rights' 50 Moltmann comments that all human rights are bound up with and related to one another. They cannot be curtailed, separated or differentiated and are all bound up with specific human duties. However in history there are always priorities and the balance must continually be redressed. This can be achieved by promoting the opposite rights to those a community is already strong on. For example where a priority has been given to rights and duties connected with personal freedom a counterbalancing stress should be promoted to strengthen collective rights and duties. Moltmann sees the Christian Church as having a major duty to promote such a balance, thus witnessing to the inalienable and indivisible nature of different rights and duties.

Part III of this study will seek to apply some of Moltmann's insights directly to the problems of English law examined in Part II.

CHAPTER 5 - NOTESMoltmann

1. Jurgen Moltmann, Theology of Hope (1967). pg.16.
2. Ibid. pg.163.
3. Moltmann, Religion, Revolution and the Future (1969) pg.37.
4. 2 Cor. 5/17.
5. Moltmann, Religion, Revolution and the Future (1969) pg.6.
6. Ibid. pg.200.
7. Moltmann, The Crucified God (1974) pg.5.
8. Ibid. pg.5.
9. Ibid. pg.19.
10. Ibid. pg.55.
11. Ibid. pg.171.
12. Ibid. pg.177.
13. Ibid. pg.318.
14. Moltmann, Man (1974) pg.18.
15. Ibid. pg.44.
16. 'New Fire' Vol. IV No.32. pg.428.
17. Moltmann, Theology of Hope (1967) pg.21.
18. Moltmann, Theology of Joy (1973) pg.65.
19. Ibid. pg.66.
20. Ibid. pg.66.
21. Moltmann, Theology of Hope (1967) pg.204.
22. Ibid. pg.289.
23. Moltmann, Man (1974) pg.68.
24. Ibid. pg.69.
25. cf. Chapter 3 of this thesis.
26. Moltmann, Man (1974) pg.71.
27. Ibid. pg.74.

28. Ibid. pg.75.
29. W. Maihoffer, Naturrecht als Existenzrecht (Frankfurt 1963) quoted in Moltmann, Man (1974) pg.75.
30. This article is contained in the pamphlet 'Theological Basis of Human Rights' published by the World Alliance of Reformed Churches at Geneva 1976 - pg.7f. It is reprinted in A.O.Miller, A Christian Declaration on Human Rights (1977) New Jersey, Eerdmanns. Subsequent page references to it in these notes refer to the pamphlet 'Theological Basis of Human Rights'.
31. Ibid. pg.9.
32. Moltmann, The Church in the Power of the Spirit (1977) pg.168f.
33. Ibid. pg.174.
34. Moltmann, 'Theological Basis of Human Rights' (see note 30) pg.14.
35. Ibid. pg.13.
36. Moltmann, The Church in the Power of the Spirit (1977) pg.179.
37. Ibid. pg.180.
38. Ibid. pg.182.
39. Moltmann 'Theological Basis of Human Rights' (see note 30) pg.16f.
40. Moltmann, The Church in the Power of the Spirit (1977) Also, Moltmann, The Experiment Hope (1975) pg.132 - cf. Uppsala Spricht (Geneva 1968) pg.68.
41. Moltmann, The Church in the Power of the Spirit (1977) pg.183.
42. Ibid. pg.184.
43. Ibid. pg.185.
44. Ibid. pg.189.
45. Moltmann, The Experiment Hope (1975) pg.158f.
46. Ibid. pg.166.
47. Ibid. pg.167.
48. Ibid. pg.168.
49. Ibid. pg.170.
50. Moltmann 'A Christian Declaration on Human Rights' (see Note 30). Pg.16f.

PART II

SOME PROBLEMS OF ENGLISH LAW IN THE 1970'S

CHAPTER 6

RACIAL DISCRIMINATION

THE LAW ON RACIAL DISCRIMINATION

Background

Racial discrimination is probably as old as civilisation itself. It marks a fear ^{of} ~~against~~ a culture which is alien, or felt to be alien. It has led to countless unnecessary wars and atrocities but possibly none greater than the senseless and de-humanising barbarities such as typified the Nazi reaction to the Jews and other minorities. Despite such a salutary lesson racial arrogance is still much in evidence in modern times. Increased mobility has led to vastly increased racial mingling. Feelings of insecurity have led to an upsurge in nationalism which can easily lead to exclusivism and hatred of those seen to be intruders.

From a historical perspective this is nothing new in Britain. More than most countries it has absorbed many racial strains in its history. Any talk of racial purity is absurd. Present problems of integration are, however, caused by the fact that many of the recent immigrants are recognisable by their colour and come from a greatly different cultural background. Coloured immigrants also tend to be concentrated in a few areas and neighbourhoods. Simple integration by assimilation would often rightly be felt by them to be an insult to their culture. Hence the importance of Roy Jenkins' definition of the right approach to integration:-

"I would define integration not as a flattening process of assimilation, but as equal opportunity accompanied by cultural diversity in an atmosphere of mutual tolerance." 1

It was to further this aim of racial equality that legislative intervention was employed as a concerted policy when it became obvious that widespread discrimination was being practised. The moral issue was not the only spur to legislation. We will see that equally important in the various White Papers were fears of violence, reprisals and counter reprisals such as those seen in the American deep South in the 1960's and 1970's.

Early attempts at legislation

Despite attempts in the 1950's and early 1960's the first legislation in recent times was not achieved until Sir Frank Soskice's 'Race Relations Act 1965'.² This was confined to discrimination on racial grounds in providing services and facilities in specified public places. Contrary to ~~the author's~~ ^{Soskice's} wishes, Parliament proved reluctant to impose criminal proceedings and insisted on a process of conciliation. The Act has been described as largely toothless. The Race Relations Board was set up but their conciliation committees had no self-initiating powers and could issue no subpoena. The only remedy available was an injunction obtained through application to the Courts, unless there was also a common law offence.

The 1965 Act did, however, initiate a far wider debate about the role of legislation in combating racial discrimination. For the first time the actual extent of discrimination was investigated by an independent research organisation. The result was the Political and Economic Planning (PEP) report which was published in April 1967.³ The report indicated discrimination on a wide scale not only with regard to facilities and services but also in employment and housing. Groups who were most physically distinct in colour and racial features from the English experienced the greatest discrimination. The discrimination itself was self-perpetuating for it tended to push or keep immigrants in the poorest housing and lowest status jobs. The report also revealed the complex nature of discrimination. It was by no means always caused by bigotry but also by the fear of the prejudices of others. Of more direct influence to the 1968 Act, which extensively supplemented the provisions of the 1965 Act, was the Street Committee's report in 1967 which examined the legislative choices available to Parliament. This recommended an effective process of persuasion - this meant increasing the powers of the Board, and, where persuasion failed, securing an adequate remedy for the victim.

The 1968 Act in the event was not to be the decisive legislation, being repealed by the 1976 Race Relations Act. Nevertheless its successes and failures were of decisive importance both for the 1976 Race Relations Act and for the not dissimilar 1975 Sex Discrimination Act.

The 1968 Act extended the scope of the law to apply it to a wide range of situations in employment, housing, the provision of goods and services and facilities to the public, including clubs of a public nature, as well as to the publication of discriminatory advertisements or notices. The Race Relations Board was reconstituted and increased in membership and function. It had a duty to investigate all complaints of unlawful discrimination except for employment complaints which had to be dealt with by suitable industrial machinery, and complaints about dismissal on racial grounds which were dealt with by Industrial Tribunals as unfair dismissal. The Board had a duty to seek conciliation. Where that failed they had the exclusive right to bring legal proceedings in specially designated County Courts, two lay assessors sitting with the Judge. In these Courts they could claim an injunction restraining any further unlawful conduct.

The 1968 Act also created the Community Relations Commission to complement the work of the Race Relations Board. Its task was to promote "harmonious community relations", to coordinate national action to this end and to advise the Secretary of State on any relevant measures. It had limited funds to support locally based voluntary community projects.

The Act had an important declaratory effect. Crude forms of discrimination largely disappeared. Yet both the statutory bodies drew the attention of the Legislature to the fact that present legislation was not proving effective to deal with the widespread patterns of discrimination - especially in employment and housing. There was also a lack of confidence on the part of minority groups in the effectiveness of the law. Likewise successive P.E.P. reports showed that the level of racial discrimination remained high. 4

A useful evaluation of the workings of the Act can be gleaned through an examination of the annual reports of the Race Relations Board. The first report after the 1968 Act was that for 1969-70. It was largely optimistic:-

"We consider the Act to be a sound one, with remarkably few ambiguities or weaknesses. We believe that the Act was a necessary piece

of legislation which is oppressive neither in substance nor in operation. That is not to say, however, that the mere enactment of a sound statute is sufficient of itself to achieve the result at which it is aimed." (para 1)

They were also impressed with the role of industrial machinery under sections 3 and 4 of the Act:-

"We have been impressed with the fairness and thoroughness with which the investigations in many industries have been conducted, and so far the Board has not reversed an opinion of an industrial machinery." (para 14)

They were not, however, so optimistic as to believe the Act would be totally effective - they stressed that positive action must be taken by those in positions of authority like the Government, management, Trade Unions, local authorities and insurance companies. They write:-

"The most important consequence of the passage of the Act is to stimulate these and other bodies to fulfil their social responsibilities." (para 95)

Whilst this latter theme is repeated in many subsequent reports, the note of optimism became progressively fainter. The 1970-71 Report commented with regard to the small percentage of complaints upheld in employment cases:-

"The plain fact of the matter is that the extent of discrimination in employment is not and cannot be known with any degree of precision." (para 56)

A major difficulty was the enforcement of the law:-

"The belief that the mere enactment of laws is sufficient to cure the social ills at which they are aimed seems quite unjustifiable." (para 97)

This complaint over inadequate enforcement was returned to with increased force in the 1971-72 Report. Here they requested legislation to enable investigations without the need to suspect that any individual unlawful act had been committed and also to force the respondent and witnesses to disclose relevant information to the

Board directly. The Board also recommended a strengthening of provisions to prevent further unlawful discrimination by offenders. The Report also viewed with concern the widening exceptions deemed possible by the Courts - in particular the case of London Borough of Ealing v R.R.B. [1972] 1 All E.R. 105. The 1972 Report of the Board (they changed over in this year to annual calendar year reports) is, not surprisingly dominated by the loophole revealed by judgements related to the right of entry to private clubs and the definition of what constituted private. These cases will be discussed in detail later on in this Chapter. After the case of Charter v R.R.B. [1973] 1 All E.R. 512 they commented

"In view of the serious social damage we recommend that the Act be amended to cover application for membership of all but those clubs that are genuinely private."

The Reports for 1973 and 1974 mark increasing demands for the amendment of the Act. The 1973 Report included detailed proposals in its Appendix (XII). The 1974 Report commented bitterly on the Dockers' Labour Club case (para 17) which marked a further widening of the Club loophole. A note of frustration and almost despair creeps into the Report:- "We have gone beyond appeals to moral and social obligation" (para 81), "Employers and Trade Unions lack motivation" (para 83) "Swifter progress towards equal opportunities is essential and there is no reason to suppose that the existing powers and methods of enforcement will be any more successful in the future than they have been in the past." (para 84). The role of Government Departments was strongly criticised by the Report of the Commons Select Committee on Race Relations and Immigration (publ. July 1975). It comments:-

"The plain truth is that the Home Office is not at present equipped to give a lead or to deal effectively with race relations matters."

The Department of Education and Science is roundly condemned as being "singularly uninformed."

It was in response to comments such as those found in the annual Reports above that a White Paper 'Racial Discrimination'⁵ was published in September 1975. This aimed to pinpoint the weaknesses of the 1968 Act

and provide suggestions for new legislation. It commented that a major weakness was the narrowness of the definition of unlawful discrimination on which it was based - viz the less favourable treatment of one person than of another on the grounds of race, colour, ethnic or national origins. This definition covered only direct discrimination and we will see had been to some extent eroded by Court decisions. It did not cover practices and procedures which had a discriminatory effect upon members of a racial minority and were not justifiable. This could result in de facto discrimination although all parties were treated equally - for example a stringent language requirement for a job where such a requirement was unnecessary. The definition led to undue emphasis both to motive and identification of individual victims. Many victims did not complain or realise that discrimination was taking place.

The Race Relations Board itself was hampered by this narrow definition and by its obligation to investigate every individual complaint. It had inadequate powers to investigate and deal with suspected discriminatory practices. It was unable to compel attendance of witnesses or demand the production of documents or other information. It had no power to require unlawful discrimination to end. The Court had only limited power to grant injunctions - the Board had to prove not only that the defendant had acted unlawfully and that he was likely, unless restrained to so act again, it also had to prove that he had previously engaged in conduct of the same or a similar kind. The Community Relations Commission suffered from ill defined terms of reference and uncertainty of aim.

Added to these institutional difficulties inherent in the 1968 Act were loopholes and anomalies in the Act itself as interpreted by the Courts. Many will be pointed out in the detailed discussion of the 1976 Act, but two of the most glaring will be commented on now. The words 'national origin' in S.1(1) of the 1968 Act were narrowly defined by the Courts. The case of London Borough of Ealing v Race Relations Board [1972] 1 All E.R. 105 determined that 'national origins' was distinct from 'nationality'. Nationality meant the status of an individual as the subject or citizen of a particular sovereign state and was outside **the** scope of the act. In this case the Council as local housing authority

stipulated that the applicant must be a British subject within the meaning of the British Nationality Act 1948. A Polish national was rejected on these grounds from the housing list. The Court distinguished between 'national origins' as indicating a person's connection by birth within a particular group of people from 'nationality' as meaning citizenship of a particular state - (per Viscount Dilhorne 'Nationality in the sense of citizenship of a certain state must not be confused with nationality in the racial sense ... I think the word 'national' in 'national origins' means national in the sense of race and not citizenship'). Lord Kilbrandon was the lone dissenting voice on the grounds that the Board's claim that the two were identical "leads to a result less capricious and more consistent with reality." The judgement as a whole demonstrates the reluctance of their Lordships to give an extensive interpretation of the Act.

This same 'conservative' policy was followed in the judgements related to the position of membership clubs vis a vis the Act. The case of Charter v Race Relations Board [1973] 1 All E.R. 512 concerned the right of membership to the East Ham South Conservative Club. An Indian was rejected by the casting vote of the chairman on the grounds of his colour. The point at issue was whether the club was providing facilities to "a section of the public" within S.2(1) of the 1968 Act. The House of Lords held that the words "section of the public" were words of limitation. The word 'public' was used in contrast to 'private'. S.2(1) did not apply to situations of a purely private character. A club, being an association of individuals fell outside S.2(1) provided there was a genuine process of selection (per Lord Reid "A clear dividing line does emerge if entry to a club is no more than a formality. This may be because the club rules do not provide for any true selection or because in practice these rules are disregarded.") Lord Morris of Borth-y-Gest dissenting made the point:-

"I see no reason why those who are members of a club are not properly described as being a section of the public. A private group may still be a section of the public ... What parliament has as a matter of policy provided is that, subject to certain defined exceptions, that type of discrimination which is made unlawful is just as unlawful where groups of the public are concerned as it is where members of the public at large are concerned."

The restrictive interpretation of the ratio in Charter's case was again applied in the case of Dockers' Labour Club v Race Relations Board [1974] 3 All E.R. 592. The Dockers' club was affiliated to 4,000 similar clubs in a union - all of which held the right of associate membership to each other, subject to a possible power of exclusion. The Dockers' club operated a colour bar and so refused entry to a coloured associate member from another club. It was held by the House of Lords that the Dockers' club did not move from the private to the public sphere in offering admission to associates and hence S.2(1) did not apply and the doctrine of Charter's case was reaffirmed.

(per Lord Diplock "The Race Relations Act 1968 does not operate in some esoteric field of law. It provides for the enforcement by legal sanctions of a code of conduct to be followed in day-to-day transactions between ordinary citizens." and "Those who were allowed in were not admitted in their roles as members of the public but by reason of their having been chosen because of their character as private individuals.")

The obvious reluctance of their Lordships to extend the scope of the Act by judicial legislation exposed a wide loophole in the case of membership clubs. Such a clear flouting of the spirit of the Act made fresh Parliamentary legislation the only remedy.

Another major spur to legislation was the desire to harmonise laws dealing with discrimination in both the sex and the race areas. The Sex Discrimination Act was framed largely out of the experience of the 1968 Race Relations Act and sought to avoid running into similar difficulties. It enacted an increased range of remedies, institutional powers and basic definitions (see Chapter 7). The Race Relations Act 1976 is clearly analogous in its provisions and procedures to the 1975 Act. This should promote advantages ^{such as} in a common case law and administrative expertise - for example, like powers can be interpreted by analogy. ^{Sex Discrimination}

As a background to all of this could be seen continuing racial disadvantages as shown by several PEP Reports. A major fear was the possibility of vastly increased racial violence. Hence the comment of the 1976 PEP Report:-

"If present injustices are allowed to continue, political organisation by the minorities, when it comes, is likely to be extremist and destructive." 6

A comment echoed in the White Paper 'Racial Discrimination' (1975):-

"To abandon a whole group of people in society without legal redress against unfair discrimination is to leave them with no option but to find their own redress." (para 23)

In the White Paper the Government affirmed their determination and resolve to act boldly in order to achieve fair and equal treatment:-

"The Government's proposals are based on a clear recognition of the proposition that the overwhelming majority of the coloured population is here to stay, that a substantial and increasing porportion of that population belongs to this country, and that the time has come for a determined effort by Government, industry and the unions, and by ordinary men and women to ensure fair and equal treatment for all our people, regardless of their race, colour or national origins." (para 4)

However, while legislation was acknowledged as "the essential precondition for an effective policy" the Paper pointed out that "Legislation is not, and can never be, a sufficient condition for effective progress towards equality of opportunity."

While welcoming the White Paper's vindication of many of the previous statements from the Race Relations Board, the Board itself in its final report (for January 1975-June 1976) was critical as to some of the practical recommendations as to new legislation. This criticism is set out in detail in Appendix VIII of the Report and centred around the proposal to abandon the conciliation system and instead allow individuals direct access to the Courts and also the proposal to join the functions of the Race Relations Board and the Community Relations Commission in the new Commission for Racial Equality. In the event both of these proposals became operative in the 1976 Race Relations Act and the detailed criticism of the Board will be examined in the subsequent analysis of that Act. Despite this criticism the Board in particular welcomed many of the new powers proposed for the new Commission, as well as the new legislation proposed to bring clubs within the scope of the Act. It is to the contribution of the 1976 legislation that we now turn.

RACE RELATIONS ACT 1976

This Act is now the comprehensive statute on race relations and the 1965 and 1968 Race Relation Acts are now repealed.

a) The definition of Discrimination

The Act enumerates three different kinds of discrimination. The first is similar to the definition of the 1968 Act and covers direct discrimination. This involves less favourable treatment on the grounds of colour, race, nationality or ethnic or national origins (S.1(1)(a) and S.3(1)). An unlawful ~~motive~~ ^{intention to discriminate} must be proved. This may be done by statements of the defendant or may be inferred from the surrounding evidence. A direct personal ~~wish to discriminate~~ ^{approval of the} ~~discrimination~~ is not necessary - hence the situation where the discrimination arises because of fear of what the customers would think is covered. Segregation is per se less favourable treatment unless justified by one of the exceptions to the Act (eg. for special training, welfare or ancillary benefits under S.35).

A new provision of the Act deals with indirect discrimination. This occurs when a condition or requirement is applied which is such that the proportion of persons of a particular colour, race, nationality, ethnic or national origins able to comply with it is considerably smaller than the proportion of other persons able to do so, which works to the detriment of the complainant, and which is not shown by the alleged discriminator to be justifiable on non-racial grounds. (S.1(1)(b) and S.3(1)(2) and (4)). Here no intention or discriminatory motive is necessary. Intention is only relevant to the question of compensation and damages - no compensation being necessary where no intention can be proved. ⁷ This provision is in line with the Sex Discrimination Act (SDA). It allows plenty of scope over the judicial interpretation of the meaning of a requirement or condition and the definitions of "considerably" smaller proportion, what constituted justification and what is a racial group. For example in the case of Bohon - Mitchell v Common Professional Examination Board and Council of Legal Education [1978] I.R.L.R. 525, concerning the length of training required, it was held that the proportion of persons not

from the U.K. or Irish Republic who could comply with this requirement was considerably smaller than such citizens and the required justification under S.1(1)(b)(ii) of the Act had not been met by such a far reaching regulation.

The third form of discrimination is that arising through victimisation. This occurs when those who bring proceedings under the Act or who otherwise use powers conferred by the Act are unfairly treated because of this (S2). This again is a new provision. One of the concerns of the Race Relations Board had been the extreme reluctance of victims of racial discrimination to come forward.⁸ Under the old Act there were a number of incidents of reprisals. The victimisation clause is designed to eliminate such fear. Commentators have, however, doubted its effectiveness.⁹ Victimisation has to be proved by the person alleging it and there are many covert ways of victimisation possible. Also unlike Trade Union victimisation cases there is here, and in the SDA a bad faith exception. If an allegation is false and has been made in bad faith the employer is free to victimise. It has been commented that "courage to stick up for and fight for what is your right is less likely to come from the uncertain legal safeguard in the Race Relations Act's victimisation clause than from your own crusading zeal." Section 2 is, however, still actionable although the employee is employed for the purpose of a private household and thereby otherwise exempted from the Act. (S4(3)).

Several factors common to all three kinds of discrimination should be mentioned. As with the 1968 Act discrimination is covered in employment, education, housing and the provision of goods, facilities and services to the public although unlike that Act the provisions operate uniformly for all. The meaning of racial grounds has been extended with the reversal of the case of London Borough of Ealing v RRB (supra). Both national origins and nationality are covered and S.78(1) defines nationality as including citizenship. Discrimination is still, however, narrowly defined on racial grounds. The absence of religion has been criticized as making the position of Jews, Sikhs, Moslems etc. uncertain and providing a possible loophole for the Act. In the case of Ahmad v Inner London Educational Authority [1978] 1 All E.R. 574, a Muslim teacher was not entitled to absent

himself from school to attend religious worship if this was inconsistent with the performance of his contractual duties. So far most cases involving Jews have been found to be genuine discrimination on religious grounds¹⁰ but if with them or other religious groups the discrimination was in fact on racial grounds masquerading as religious they would come within the scope of the Act. A major difficulty arises over the definition of "racial group." S3(1) says a racial group means a group of persons defined by reference to colour, race, etc. without saying who does the defining. One solution would be to define subjectively according to the view of the discriminator but in indirect discrimination the discriminator's intentions or motives are irrelevant to establish discrimination. Objective definitions have in case law been found almost impossible.¹¹ The position of gypsies highlights the problem similarly. In a 1967 case (Mills v Cooper) [1967] 2 All E.R. 100 it was held that the word 'gypsy' in a statute meant a nomadic people rather than people of the Romany race, yet in a past report of the Race Relations Board it was commented

"The Board has been advised that gypsies should, in general, be regarded as being within the terms of the Race Relations Act." 12

b) Unlawful discrimination

i) Employment

The Act protects employees and the self-employed in respect of terms of employment, promotion, transfer, training, conditions of employment, benefits, facilities or services and dismissal (S4). Also covered under S4 are job applicants and contract workers. The subsequent actions of the Company are instructive in assessing whether discrimination has taken place - eg. cf Johnson v Timber Tailors (Midlands) [1978] I.R.L.R. 146. Recruitment covers such details as advertisements, arrangements for interviews, the terms offered and job refusals thus removing the ambiguity in the 1968 Act over recruiting arrangements.¹³ Vicarious liability attaches to an employer for the actions of his agent whether the discrimination was done with his knowledge or approval or not. It is however a defence if he took

such steps as were reasonably practical to prevent discrimination. The case of RRB v Harris (Mail Order)¹⁴ produced the judicial comment "It is sufficient if the employee knew that any sort of discrimination will not be contemplated." Employment agencies and careers advice services are covered as are professional or occupational qualifying bodies, vocational training bodies and the manpower services commission. Partnerships are covered only if the firm contains six or more partners. Trade Unions and Employers Associations are covered in respect of admission to membership and treatment of members. 15

Excluded from the employment conditions are private households. However we have seen that this exception does not apply to victimisation. Nor does it apply where contract services are involved. In addition dismissals on racial grounds from a private household may be unfair dismissal actionable under the Trade Union and Labour Relations Act which has no private household exception.¹⁶ Employers have also a limited right to discriminate in certain jobs for which being of a particular racial group is held to be a genuine occupational qualification. Examples are actors, artists and photographic models, waiters in Chinese restaurants and community social workers. However this exemption does not allow discrimination in terms of employment or access to any other benefits, facilities or services. There is also an exemption for seamen recruited overseas. Immigration controls are exempted. Exemptions under the 'racial balance' clause to preserve a reasonable balance of persons of different racial groups, permitted under the 1968 Act¹⁷ no longer obtains, as does that Act's exemptions for seamen. We have seen that positive discrimination is permitted to give persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefit. (S35).

ii) Education

The 1976 Act has separate provisions within it for discrimination in education and its enforcement. This is unlike the 1968 Act in which education was merely an example of facilities and services. Under

S.19(6) of the 1976 Act a distinction is made between the public and the private sector. In higher education the Universities are classed as the private sector and polytechnics and Colleges of Further Education as public. The range of discrimination actionable is the same in each - viz terms of admission, refusal of admission and discrimination in the provision of benefits and facilities to students or expelling and subjecting students to detriment. Thus in the case of Commission for Racial Equality v Ealing London Borough Council [1978] 1 W.L.R. 112, brought under the 1968 Act, the Commission alleged that the Local Authority discriminated against Asian children by dispersing them to schools outside the area. The Council claimed they were in an impossible position unless the claim was particularised. However the Court of Appeal held that this was not necessary and ordered the Council to deliver a defence to the pleadings as they stood.

However there are differences of procedure in enforcement dependent on public or private status. Complaints in relation to the public sector must go first to the Education Minister. His or her sanctions under the Education Acts entirely replace the Commission's non-discriminatory notice procedure (see post) but the individual can still take the case to a County Court after a brief delay to secure individual reparation.

Exceptions to the provisions on education include the provision of special education to cover the needs of racial groups as well as training courses (S.35,36). Likewise existing immigration controls and restrictions on overseas students are exempted. 18

iii) Goods, Facilities and Services

According to S.20, subject to the exceptions, the general rule is that any person who is concerned with the provision of ^{goods, facilities and services} ~~these~~ to the public or any section of it must not discriminate against any person who seeks to obtain or use them, whether they are provided free or for payment. This provision is very similar to that under S2 of the 1968 Act with the omission of the old exception allowing discrimination in the provision of sleeping berths on ships. The situation with regard to

clubs is clarified. A new provision makes it unlawful for any non-profit making organisation with over 25 members to discriminate in the admission of people to membership or in the treatment of members or associate members on racial grounds. (S25). There is an exception for clubs whose main object is to give benefits to members of a particular race, ethnic or national origin, but not colour. Hence some clubs are covered by S20, some by the new provision and some are exempt. The old cases apply to S20 alone. The ethnic and national club exception is an addition and designed to facilitate such clubs as the London Welsh Club or the Caledonian Club.¹⁹ In deciding what is the main object of such a club regard shall be had to i) its essential character ii) the extent to which it tries to see that its benefits are primarily enjoyed by the racial group in question and iii) all other relevant circumstances. Hence clubs whose primary object is to keep blacks out (or whites) will not qualify. Thus the Act in effect reverses the Charter and Dockers' Club rulings of the House of Lords.

Other exceptions, outside the general ones of the Act, are few. However, surprisingly the Government has decided to remove fostering from the scope of the act. In Applin v RRB [1975] A.C. 259 under the 1968 Act the House of Lords upheld the decision that fostering, other than by private arrangement was within the scope of S2 of that act. The Government's omission has the effect of making lawful the ~~treatment~~ ^{discrimination} in Applin's case and making the judgement of no effect with regard to the specific issue of fostering. However, in the case of Zarczynska v Levy [1978] The Times October.21st. The Applin case applied to entitle the bringing of a case of racial discrimination under the 1976 Act by a person not herself discriminated against. The plaintiff was a barmaid who was dismissed for refusing to obey her employer's order not to serve coloured customers.

iv) Property Transactions

The provisions of the 1968 Act are largely intact in S21,22 of the new Act but the format of the provisions have been changed to bring them into line with those under the Sex Discrimination Act 1975. This has been done to avoid possible future differences of judicial interpret-

ation. Discrimination is actionable where practised in relation to disposal, terms of disposal, management of property and waiting lists. The 1968 Act referred to "the disposal of housing accommodation, business premises, or other land." The new Act refers only to premises which is defined as including land of any description, unless the context otherwise requires (S78(2)). Hence the sale of house plots as well as houses is included. Two provisions established under the 1968 Act apply - viz that the housing accommodation need not be immediately available and an incomplete house is still classified as housing accommodation (RRB v Geo. H. Haigh & Co)²⁰. Terms of disposal which include more onerous conditions of sale are dealt with by S21(1). Discrimination with regard to waiting lists is actionable under the main provisions of the act, including the reversal of the Ealing case. Under S71 local authorities have a general duty to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations. Discrimination is also illegal in the management of property - eg. refusal of access to any benefits or facilities, eviction or other detriment.

There is a limited exception for owner-occupiers in disposal, provided that they do not use an estate agent, advertisement or notice. There is also an exception covering discrimination in the provision of accommodation in premises for landlords of small premises. This is operative if the landlord or near relative resides and intends to continue to reside there and he shares accommodation other than storage space or means of access with other people in the house who are not members of his or her household and the premises are small as defined by the act.

v) Miscellaneous Liability

The Act makes discriminatory advertisements unlawful (S29). Both their author and their publisher are liable. This is subject to the exceptions of advertisements for a job where discrimination is permitted because of a genuine occupational qualification (closely defined as we have seen), to advertisements for employment outside Britain and advertisements in regard to ethnic clubs. In the case under the 1968

Act of Commission for Racial Equality v Associated Newspapers Group [1978] I.W.L.R. 905 an advertisement recruiting nurses for South Africa made the comment 'all white patients only!'. It was published in the 'Daily Mail' and the 'Irish Independent'. The Court of Appeal upheld the finding that publication in the 'Irish Independent' was not covered by the Act. The crucial test was where the newspaper was published and offered for sale, not where it passes into the hands of its readers. It also upheld the decision that in any event the wording in itself did not convey any intention to discriminate under S6(1) of the 1968 Act. However, although landlords of small premises can still discriminate when they take on tenants, advertisements indicating this are unlawful. Although the publisher has a liability for advertisements he publishes it is a defence for him to claim that he relied on a statement by the person placing the advertisement that it was outside the scope of the act and that it was reasonable for him so to do.

Potential discrimination is unlawful where direct or indirect provisions exist but have not become operable. Likewise instructions to discriminate are unlawful even if not carried out. Pressure to discriminate and unlawfully aiding discrimination are also covered. With regard to discriminatory terms in contract under the 1968 Act the Race Relations Board could apply to the Court to have them revised. Under the new act they are unenforceable per se, although the courts still maintain provision for their revision. Exemptions from liability apply to charitable instruments with the proviso that future provisions are void if discriminatory. Exempt also are acts done under statutory authority or to safeguard national security.

Another category of liability in the act is incitement to racial hatred. This originated from S6 of the Race Relations Act 1965 when a party was guilty if he circulated written matter or used words in public intended to be a) threatening, abusive or insulting and b) likely to stir up racial hatred. This is replaced by S69 of the new act. The main difference is that now this section is made as an amendment to the Public Order Act 1936 (the insertion of a new S5A to that act) and is therefore taken out of race relations legislation. In addition it will no longer be necessary for the prosecution to prove any deliberate

intention to stir up hatred. As before no prosecution is possible without the consent of the Attorney-General. There are exemptions for parliamentary proceedings and fair and accurate reports of court proceedings. Nevertheless doubts have been expressed whether the²¹ provisions will be any more successful than those of the 1968 Act.

c) Institutional Provisions, Enforcements and Remedies

Institutionally the Commission for Racial Equality (C.R.E.) replaces the Commission for Community Relations and Race Relations Board established by the 1968 Act. Its duties are specified²² as working towards the elimination of discrimination, promoting equality of opportunity and good race relations as well as keeping the working of the Act under review and proposing amendments. It is able to give grants to organisations or to finance research and education. We will see that in many ways it has far more power than the old Race Relations Board but its role has changed in a fundamental respect. It no longer has the responsibility of investigating and acting on each individual case. The old Race Relations Board in its final Report strongly objected to this merger. It claimed that to do so was to confuse the function of each and to threaten the impartiality of the new Commission in its quasi-judicial function on the one hand, and to threaten the previous independence enjoyed by the Community Relations Commission on the other hand.

Individual enforcement and remedies

Individuals can enforce remedies, where permitted by the Act, in either Industrial Tribunals or County Courts - depending on the subject matter of their complaint. The burden of proof is always on the person alleging the discrimination except under S1(1)(b) when the respondent will have the burden of showing that the practice is justifiable on non-racial grounds.

Employment cases are only actionable before Industrial Tribunals. All the Race Relations procedures have stressed the importance of avoiding litigation wherever possible. Hence in the new Act all complaints go first to ~~an~~ an ACAS conciliation officer. He attempts to

settle but can only act if the parties agree or if he considers there to be a reasonable prospect of success. If the case is judged by the tribunal the remedies available are:-

- i) an order declaring the parties' rights in respect of the act complained of
- ii) compensation, including compensation for injured feelings up to a maximum of £5,200
- iii) a recommendation that action be taken by the discriminator within a specified period to right the wrong done to the complainant.

An appeal is possible against judgement on a point of law. This goes to the Employment Appeal Tribunal which consists of a High Court Judge and two lay members.

All non-employment cases are actionable in certain designated County Courts. These are presided over by a single Judge with two assessors, unless the parties consent to trial without ~~them~~ ^{the assessors}. Actions are treated as if they are claims in tort. Remedies possible are a declaration, damages (including damages for injured feelings) and an injunction.

23

The final report of the Race Relations Board criticized this new emphasis on individuals looking after themselves. They preferred a strengthening of the procedure under the 1968 Act:-

"On this issue our view remains that the balance of advantage for individuals seeking redress rests strongly with the retention and strengthening of the present conciliation system, combined with the right of complainants to have access to the Courts when they are dissatisfied with the Board's handling of their case." 24

The Board took this view because of the difficulties the complainant might meet in formulating his case, in representation and in the difficulties of proof. In addition they commented:-

"Our strongest reservation, however, relates to the use of County Courts. We know from experience how reluctant complainants are to face publicity, how reluctant Judges are to make a finding of discrimination."

25

It remains to be seen whether this pessimistic view or the optimistic view of the White Paper will be proved to be the correct one. The CRE

is not totally unconcerned with individual actions - it may give practical assistance where a question of principle exists, where there are special difficulties for the employee or other exceptional circumstances. It may advise, seek conciliation, arrange for legal advice or take other appropriate measures of assistance including representation. S65 enables a standard question procedure for the eliciting of information. Evasion leads to an inference of discrimination (cf Virdee v E.C.C. Quarries [1978] I.R.L.R. 296).

Enforcement by the CRE and Remedies

The CRE is the sole body able to bring proceedings in respect of the following circumstances indirect discriminatory practices in which there is no actual victim of discrimination, discriminatory advertisement cases where a person gives instructions to someone under their authority to discriminate and cases where pressure is applied directly or indirectly to discriminate.

Normally a necessary preliminary before proceedings is a formal investigation. The CRE can act as of right to instigate a formal investigation in cases where this is confined to specific allegations both in respect of its unique enforcement areas and any other discrimination within the ambit of the act. This is part of its strategic role of identifying and dealing with discriminatory practices at large. In order to assist its investigations the CRE has subpoena powers for written information, documents and witnesses. After an investigation the CRE has the power to issue a non-discrimination notice and to take legal proceedings to enforce it where such investigation has disclosed an unlawful act of discrimination, a potentially discriminatory practice, an unlawful advertisement or instructions or pressure to discriminate. The non-discrimination notice requires the recipient to cease doing such acts and to comply with the law. It may be appealed against within six weeks, after which time it becomes final.

When a notice has become final the CRE can require recipients to inform it of those necessary changes they have made as well as providing additional information and material for up to five years. If within five years of a non-discrimination notice or a judgement it appears

that the person is likely again to act unlawfully the CRE is able to apply to the County Court for an injunction restraining him (S62). There are, however, separate enforcement procedures for discriminatory advertisements, instructions to discriminate and pressure to discriminate.

These areas can be dealt with by formal investigation and non-discriminatory notice. However, under the special arrangements of S62 the CRE can first apply for an injunction to stop the discrimination without the necessity for a formal investigation. No damages or compensation are obtained and these are the only provisions when the CRE is able to seek an injunction without a non-discriminatory notice or judgement. An injunction is only available when there is a clear likelihood that the respondent will commit a second or further contravention of one of the three sections. In addition to an injunction, provision is made for the CRE to obtain a ruling from the Industrial Tribunal or Court that there has been a contravention of the Act. It is hoped this will deter future breaches and facilitate decisions on difficult matters.

The powers of the CRE are therefore considerable. It is to be hoped that they will be used effectively and serve not only as a deterrent but also as a guideline of what is acceptable practice and what is not. In employment cases the CRE have been charged directly with drawing up such a Code of Practice. The Government have high hopes that this Act will be far more effective than its predecessors.

In its first annual report ²⁶ (that for June - December 1977) the Commission for Racial Equality comment realistically about the progress that still has to be made. Thus:-

"Equal opportunity in employment is obviously of crucial importance, and there is ample evidence, particularly from the research carried out by Political and Economic Planning that discrimination in this field is still widespread. Our work in employment will be one of our main priorities." 27

"In the fields of both public and private housing research evidence has shown that the condition of racial minorities is one of persistent disadvantage."

No doubt, partly as a response to the criticisms made by the old Race Relations Board, the Commission for Racial Equality devote space to stress their willingness to help individual complainants:-

"The Commission is aware of the fact that the majority of complainants alleging racial discrimination would not be in a position to take advantage of their rights under the Act without expert guidance. Our policy is to encourage other organisations to share in the responsibility of providing a comprehensive advisory service which is essential if the 1976 Act's provisions are to offer any real benefit to individual complainants. We accept that until these organisations are ready to offer such assistance, the main source of help to individuals would be the Commission's complaints staff."

28

However, on the whole the Commission seems well satisfied with its early beginnings:-

"We have now established a sound basis for more rapid progress. We shall continue to use the law against discrimination with courage and fairness. During the coming year we hope to be starting at least ten strategic investigations as well as undertaking similar investigations where information about the possible occurrence of racial discrimination is brought to our notice. The individual complainants will also continue to receive maximum attention from us and assistance will be given wherever the merits of the case and the circumstances make it reasonable to do so." 29

In Part III of this study theological justifications for intervention in the field of race relations will be examined. Attention will be paid to the philosophical notion of equality employed. It will be argued that, from the theological positions examined, endorsement can be given to the arithmetical notion of equality employed in the Act, as well as justification for the element of positive discrimination in favour of disadvantaged groups in certain defined circumstances. Comments will also be made on the effectiveness of the 1976 Act and the need to go beyond the strict letter of the Act to wider Christian principles and practice.

CHAPTER 6 - NOTESThe Law on Racial Discrimination

1. Roy Jenkins, Essays and Speeches (1967) pg.267.
2. For a comprehensive survey of attempts to legislate against racial discrimination cf. Lester & Bindmann, Race and Law (1972) Cp.3. pg.107f.
3. 'Report on Racial Discrimination', Political and Economic Planning (P.E.P.) H.M.S.O. (1967).
4. cf. 'Racial Disadvantage in Employment' P.E.P. (1974); 'The Extent of Racial Discrimination' P.E.P. (1974); 'Racial Minorities and Public Housing' P.E.P. (1975).
5. 'Racial Discrimination' H.M.S.O. Cmnd. 6234.
6. D.J. Smith, 'The facts of Racial Disadvantage' P.E.P. (1976).
7. Sex Discrimination Act 1975 S.1(1)(b).
8. 'Report of the Race Relations Board for 1975' H.M.S.O. Appendix VII para.15.
9. I.A. MacDonald, Race Relations Act 1976 (1977) Cp.2.
10. cf. 'Report of the Race Relations Board for 1970-71' H.M.S.O. para.19.
11. cf. MacDonald (supra) for examples.
12. 'Report of the Race Relations Board 1967-68' H.M.S.O. para.22.
13. Interestingly the case of MacDonald v Applied Art Glass Co. Ltd. 1976 I.R.L.R. 130 brought under the Sex Discrimination, permitted a complaint from a woman deterred from applying by discriminatory terms.
14. Reported in the 'Report of the Race Relations Board for 1973' H.M.S.O. pg.38.
15. For a discussion on the liability of Shop Stewards as agents cf. MacDonald (supra) paras. 215-217 (pg.58f).
16. However, under this Act the employee must have completed at least 26 weeks service and work for at least 16 hours per week.
17. S.8(2) of the Race Relations Act 1968.
18. For a criticism of this cf. MacDonald (supra) para 250 (pg.71f). In addition the Education Minister has confirmed that the Government is to continue discriminatory rates of fees for overseas students relying on S.41 which enables arrangements approved by Ministers to be exempted from the Act.

18. Such action considerably weakens the Government's moral credibility - cf. Daily Telegraph, Friday August 19th 1977. cf. also the criticism of the immigration debate contained in the Commission for Racial Equality First Report (1977) H.M.S.O. pg.35f.
19. MacDonald hints that previous judicial attitudes on the exemption of clubs from the 1968 Act may have been partly influenced by membership of some of their number in clubs of an ethnic or national character now covered by the exemption to the Act (MacDonald, para.286 pg.83).
20. Leeds County Court reported in The Times, 11 Sept.1969. cf. also Lester & Bindmann (supra) pg.234ff.
21. MacDonald pg.139, para 481, especially his comment:- "Since the underlying assumptions of most racials are firmly expressed in the Immigration Act 1971, all kinds of racist propaganda can be dressed up as proposals for amendment of that Act or for further restrictions to be made under it."
22. Race Relations Act 1976, Schedule I.
23. Report of the Race Relations Board for 1975, H.M.S.O. Appendix VII.
24. Ibid. para.14.
25. Ibid. para.15.
26. Commission for Racial Equality - First Annual Report (June-December 1977).
27. Ibid. pg.11.
28. Ibid. pg.16.
29. Ibid. pg.33.

CHAPTER 7

SEXUAL DISCRIMINATION

The Background to Modern Legislation on Sexual Equality

It belongs to the social historian to chart and assess the immense changes that have taken place in the role and status of women in recent centuries. Any study of present day legislation in this field would however, be incomplete without some attempt to illustrate their findings. To this end we will trace in outline form some of the major factors that have given impetus to this movement. Although these are clearly related, as is all social history, for convenience they will be dealt with under separate headings.

1. Philosophical:-

The French Revolution set Europe ablaze with a new and dramatic philosophy of liberty, equality and fraternity that echoed throughout the succeeding century. In England an early exposition can be seen in Tom Paine's 'The Rights of Man'. Those women who were caught up with its fervour could scarcely help relating this to the position of their sex. Tom Paine's pamphlet inspired one by Mary Wollstencraft entitled 'A Vindication of the Rights of Woman'. This argued that women were individuals whose own powers and capacities were capable of being developed to the full. Although not claiming an identical role this argued that women ought at least to possess the franchise and to be allowed in industry and medicine. Whereas this pamphlet had no immediate effect it heralded increasing attempts to argue the case for a more active social role for women.

Thus in 1833 Mrs. Anna Jameson commented in her 'Characteristics of Women' that:-

"The condition of women in society as at present constituted is false in itself and injurious to them"

and in 1843 Mrs. Reid in her 'Plea for Women' wrote:-

"The greater portion of womankind are, at present, so slavish in their spirits, as to have no thought, no wish for emancipation. This indolence and senility of mind ought not, however, to be considered inherent. It is to be attributed solely to the operation of those social arrangements of which we complain."

Perhaps the major philosophical influence in the 19th. Century to the growth of women's rights came from a man - J.S. Mill, and especially in his book 'The Subjection of Women'. Mill, a great believer in individuality and with a great distrust of any ontological reasoning pleaded for the acceptance of dominant as well as passive women. He wrote:-

9 / "Some women may be soft and delicate and gentle; let them remain so.
 . / Others are more robust and vigourous - why should they be compelled not to be?"

He requested that they be judged "no longer upon an artificial standard invented by men for the whole sex." He commented that women had never, with a few exceptions, had any opportunity of showing themselves equal or superior. A large part of Mill's book consisted of an examination of the condition of married women. He maintained that this was substantially the same as at 1700. He argued that complete equality between the sexes was the only basis of just treatment in law. The great influence of Mill's philosophy on 19th. century and 20th. century thought and action gave his conclusions concerning the equality of women great currency and proved a major impetus towards reform.

2. Educational:-

A demand for the education of women sufficient to admit them to every employment in the State was made as far back as 1739 in a pamphlet 'Women not Inferior to Men' by Sophia, a Person of Quality. Of more significant practical effect was Elizabeth Montagu's proposal in 1775 to found and endow a college for the higher education of women, and the founding of the Sunday School movement by Hannah More (perhaps the original 'blue-stocking') in 1789.

The 19th. century saw an increasing interest in popular education, although the quality of education for girls improved very slowly in its early part. This can be seen by the report of the 1867 Royal Commission into Education. The Commissioners suggested two causes for the poor nature of girls' schools. First inveterate prejudice that girls are

less capable of mental cultivation than boys. Second a belief that solid attainments would impair a girl's prospects of marriage. However, as the century progressed some significant improvements were made. In 1843 Queen's College, Harley Street was founded as a training college in connection with the Governesses' Benevolent Institution. In 1849 the Ladies' College, Bedford Square was founded and in 1858 the Ladies' College at Cheltenham. From 1875-85 there was great progress in higher education with the foundation of Lady Margaret Hall and Somerville Colleges at Oxford and of Newton and Girton at Cambridge. However it was not until 1920 that Oxford would admit women to degrees and 1922 before Oxford would admit women to professorships, readerships and as University teachers. The need to provide opportunities for higher as well as basic education for girls was increasingly recognised in the first part of the 20th. century. The syllabus in many girls' schools did, however, still reflect some of the conventional wisdom about the roles of the sexes.

3. Economic:-

The 19th. century marked the rapid speeding up of the industrial revolution. Women became far more vital in the economic life of the nation as factory hands were increasingly needed. Gone were the cottage industries and the automatic assumption that all women's work was in the home. Sheer economic pressure drove more and more women into towns and factories and the evils of forced competition. Low wages, physical and moral deterioration and the squalor of unbridled capitalism forced the problem of female and child labour onto the attentions of the Government. Although successive Factory Acts curbed the worst excesses, factory women throughout the 19th. century were, on the whole, pawns of cheap labour. To them must be ascribed much of the vast profits which enabled the investment to keep the industrial revolution going at such a pace. Working women, as men, began to value some sort of organisation. They began to take their place besides men in political agitation.

In the middle classes the effect of the Industrial Revolution was also

marked. Much domesticia was now transferred to factories - for example baking, brewing, the making of clothes and linen. This led to a demand for genteel employment. The opportunities were not at first great - the Governess being the commonest - but as the century progressed more and more professions were deemed suitable for women. The first to be opened up was the medical profession. Florence Nightingale was able to establish nursing as a profession for women through the Crimean War. The acceptance of women doctors took far longer. Through the work of women like Elizabeth Blackwell, Elizabeth Garrett-Anderson and Sophia Jex-Blake the London School of Medicine for Women was founded in 1874. In 1877 the Royal Free Hospital in London offered to take women students and was able to extend full medical qualifications to them. By 1894 there were 170 women doctors. Other professions followed the lead of the medical profession. With few exceptions (the Church being one) women were not barred from practising any profession by the end of the first quarter of the 20th. century.

4. Political:-

The fight for the franchise by women gained increasing momentum from the middle of the 19th. century. In 1848 it had an influential supporter in Disraeli who commented:-

"I do not see, when she has so much to do with the State and Church, on what reasons, if you come to right, she has not a right to vote."

In 1866 ^{came} ~~was~~ the first petition for votes for women. In 1867 J.S. Mill brought in a woman's suffrage amendment to the Reform Bill, but was defeated. On the positive side, however, women were allowed to vote at municipal elections in 1869, were eligible for membership of school boards by the 1870 Education Act, in 1875 sat on Boards of Guardians and in 1888 could vote for County Councils.

The organisation of the woman's suffrage movement became steadily more militant. Mrs. Pankhurst founded the Woman's Franchise League in 1889. In 1901 the Woman's Social and Political Union was founded. In 1907 women were admitted to County and Borough Councils but this did nothing

to lessen demands for full suffrage. The suffragette movement became violent and lawless - a development that seemed counter-productive. In 1914 the Women Householder Franchise Bill was narrowly defeated in the House of Lords. Immediately after the war, with the impetus and recognition of their war service, eight million women over 30 gained the vote. By the Sex Disqualification (Removal) Act of 1919 women could stand for parliament, be J.P.'s, jurists and enter all the professions except that of priest of the Church of England. In 1928 they attained their goal with regard to the franchise for by the Representation of the People (Equal Franchise) Act they attained full equality of franchise with men.

5. Legal:-

As J.S. Mill pointed out, the position of the married woman in the early part of the 19th. century was substantially the same as at 1700. If there was no marriage settlement the wife's property was no longer her own. If the marriage failed she had no control over the children as against her husband. She was bound to submit to him for "restitution of conjugal rights". If he deserted her or was guilty of cruelty she could however obtain a legal separation after 1857, but the Divorce Act of 1857 allowed him to divorce her for a single act of infidelity.

The position of married women was improved greatly by the Married Women's Property Acts of 1870 and 1882. The 1870 Act enacted that a married woman's earnings and wages should be regarded as her separate property. She was given a power to recover them in her name (S.1 & 11). The 1882 Act enacted that all property belonging to a woman who married after 1882 should remain her separate property, as should any property acquired by a wife after that date. She was now able to enter into contracts - including contracts in respect of her separate property. By the Guardianship of Infants Act 1886 the common law principle that the father had the absolute right to determine the form of his children's education and ^{that} his wishes had to be respected even after his death, was set aside. The courts could now pay more attention to the welfare of the child. Maintenance for a married woman in the case of desertion was provided for by the Married Women (Maintenance in case

of Desertion) Act, 1886. These powers were made far wider by the Summary Jurisdiction (Married Women) Act, 1895 and have been extended in a series of Acts which became collectively known as the Summary Jurisdiction (Separation and Maintenance) Acts 1895 to 1949. 1

Legislation in the 20th. century reflects the fruition of many of the 19th. century movements towards equality. Thus the 1923 Matrimonial Causes Act equated the rights of spouses to a divorce - a principle followed in subsequent Acts concerned with divorce. The 1925 Guardianship of Infants Act gave equal rights to Husband and Wife over children. The wife was given complete powers to contract by the Law Reform (Married Women and Tortfeasors) Act 1935 and the Married Women (Restraint on Anticipation) Act 1949. The Law Reform (Husband and Wife) Act of 1962 abolished the prohibition of tort actions between spouses. Property rights were established on a basis of equality by the concept of the 'common purse' enumerated in Rimmer v Rimmer [1952] 2 All E.R. 863 and the Married Woman's Property Act 1964. Equality with regard to maintenance means that in some circumstances the wife may be under an obligation to maintain her husband (cf. Matrimonial Proceedings and Property Act 1970). Whereas the common law with regard to the married state frequently assumed a unitary doctrine of personality, much of recent legislation has stressed the separate, though equal, personhood of the spouses. Thus for the purposes of the Theft Act ~~1969~~¹⁹⁶⁸ a husband and wife are to be regarded as separate persons and under the ~~Domicile~~^{and Matrimonial Proceedings} Act of 1973 a married woman can have a separate domicile from her husband.

The last major area to receive the concerted attention of the Legislature in respect of sexual equality was that of equal pay and opportunities. It is to a consideration of this which we now turn, in particular the Equal Pay Act 1970 and Sex Discrimination Act 1975. These can be seen as the culmination of well over a century of legislation about sexual equality. The specific philosophy behind these Acts will also be drawn out, bearing in mind the background painted in this section.

Recent Legislation in the field of Equal Pay and Opportunities

The demand for equal pay for men and women is no new one - the T.U.C. demanded this as long ago as 1888. The contribution of women towards the 1914-18 war resulted in the Atkin Committee examining the subject in 1919. Their contribution towards the Second World War resulted in a Royal Commission on Equal Pay from 1944-46. The entry of women into the professions that resulted from the Sex Disqualification (Removal) Act of 1919 made a substantial level of equality possible within them. However major inequalities continued in manual and semi-skilled jobs. The 1944 Royal Commission highlighted the inequality but was unable to agree as to its cause. In 1955 the Government implemented equal pay for non-manual civil servants. Amid continuing pressure from the T.U.C. and from the international community an Equal Pay Act was introduced in 1970.

International resolutions on equal pay date from the aftermath of the First World War. An I.L.O. resolution in 1919 called for 'equal pay for work of equal value.' Equal treatment has subsequently been proclaimed by the Universal Declaration of Human Rights Act. 23(2), the International Covenant on Economic, Social and Cultural Rights, Article 119 of the Treaty of Rome and the European Social Charter Article 4(3). The European Social Charter was ratified by the U.K. in July 1962. Our membership of the Common Market now gives us ^{an} obligation ^{to conform with} ~~under~~ Article 119 of the Treaty of Rome. The Equal Pay Act 1970 must therefore be seen in relation to this pressure both from at home and abroad.

EQUAL PAY ACT

The Equal Pay Act, although becoming law in 1970, was not intended to be fully operative until December 1975. However, the Secretary of State was empowered to make an order for its partial implementation from December 31st. 1973 to December 1975.

Under Section 1 it provides for equality of treatment regarding terms and conditions of employment between men and women employed on like work or on work rated as equivalent as a result of a job evaluation

exercise.² A requirement of equal treatment is to be implied in individual contracts (S.(2) & (3)). The report on Equal Pay by the Royal Commission (1944-46) doubted whether "utterly disparate" occupations could be compared. This the Act seeks to do by reliance on Job Evaluation (S.1(5)) - a scientific examination into the skills necessary for each different type of job. The case of Green v Broxtowe District Council [1977] 1 All E.R. 694 determined that an evaluation study can only be challenged if there is a fundamental error on the face of the record. Its conclusions cannot be rejected because the tribunal disagrees with them, and it is certainly not proper for the tribunal to embark on an evaluation study of its own.

The 'like work' clause is elaborated by S.1(4) as being the same or identical work or work "of a broadly similar nature." Frequently cases hinge on arguments about this point. The first appeal under the 1970 Act determining the correct approach was the case of Capper Pass Ltd. v Lawton [1977] 2 All E.R. 11. Here a female cook sought equality with two male assistant chefs although there were some differences in their duties and hours of work. The Court sought to determine two questions - viz. 'When is work of a broadly similar nature and what significance should be given to the difference between the man's work and the woman's work at this stage?' and 'If their work is broadly similar is it inevitably 'like work' or can the differences, though insufficient to prevent their work being broadly similar, nevertheless prevent their being employed on 'like work' because the differences are 'of practical importance in relation to the terms and conditions of employment?' The Court determined that in answer to the first question a 'broad judgement' should prevail. Not a minute examination but a consideration of the work involved. In answer to the second question one should disregard trivial differences. Hence "the only differences which will prevent work which is of a broadly similar nature from being 'like work' are differences which in practice will be reflected in the terms and conditions of employment." (per Phillips L.J.).

This liberal interpretation was quickly followed in Dugdale v Kraft Foods Ltd. [1977] 1 All E.R. 454. Here, in comparing day with night work, the E.A.T. determined that the mere time at which the work was performed should be disregarded when considering the differences

between 'the things they do'. If the work is broadly similar the Act cannot be avoided by the use of night work which is illegal for women. Nor can it be avoided by promoting men, titularly at least, in the hope of removing a 'like work' comparison - cf. Sorbie v Trust House Forte [1977] 2 All E.R. 113. The two questions determined in the Capper Pass case were applied directly in Waddington v Leicester Council for Voluntary Services [1977] 1 W.L.R. 544. Here a female community worker in charge of an adventure playground was paid according to a different national scale from that of the male playleader for whom she was responsible. He was paid more than she was. The Industrial Tribunal found that there were differences in their respective work and hence she could not claim under S.1(4) of the Act. On Appeal it was held that the tribunal ought to have considered first whether they were both employed on work of a broadly similar nature and then, if so, whether the differences between them were of practical importance in relation to the terms and conditions of employment. The tribunal had failed to distinguish sufficiently between the nature of the work and the work actually done.

The interpretation given to S.1(4) has given the Act considerable cutting edge. (cf. Redland Roof Tiles Ltd. v Harper [1977] I.C.R. 349; Electrolux Ltd. v Hutchinson [1977] I.C.R. 252; National Coal Board v Sherwin & Spruce [1978] I.R.L.R. 122. In Shields v E. Coomes (Holdings) [1978] 1 W.L.R. 1408 the differences in contractual obligations were irrelevant unless these led to actual (and not infrequent) differences in practice. The employee is entitled to compare her work with her immediate predecessor if the time lapse is a short one (cf. McCarthy v Smith [1978] 1 W.L.R. 849). The differences between men and women must arise from personal factors and not economic factors or bargaining power (cf. Fletcher v Clay Cross (Quarry Services) [1978] 3 C.M.L.R. 1). In Eaton Ltd. v Nutall [1977] I.C.R. 272 the Waddington case was applied to justify a higher salary where the added responsibility was significant (cf. also Boyle v Tennent Caledonian Breweries [1978] I.R.L.R. 321).

However, even if S.1(4) of the Act is satisfied a remedy may still be barred by S.1(3). This applies to minor variations in terms and conditions applying equally to both sexes in different parts of the

country. S.1(3) was considered in the case of NAAFI v Varley [1977] 1 W.L.R. 149. Here it was held that where men and women are employed on like work, and the variation is in the rate of remuneration, and the remuneration is fixed in accordance with nationally, or widely, negotiated wage scales, "it would seem to us that there will usually be a strong case for saying that the case falls within S.1(3). The variation very likely is genuinely due to a material difference other than a difference of sex." This point was also made in the Waddington case appeal. The point was referred back for determination to the industrial tribunal, although the hope was expressed that the different wage rates would be harmonised without this being necessary.

A difficult area is that concerned with 'red circling'. This is the practice of transferring workers to a lesser paid job while protecting their previous rates of pay. The employer can justify this if done for causes neither directly nor indirectly due to a difference of sex (cf. Charles Early v Smith [1977] 3 W.L.R. 189). He cannot, however, use this as an indirect means of discrimination (cf. Snoxell & Davies v Vauxhall Motors Ltd., The Times, March 23, 1977; United Biscuits v Young [1978] I.R.L.R. 15. The burden of proof is strongly on the employer whenever discrimination is evident. In the important case of National Vulcan Engineering Insurance Group Ltd. v Wade [1978] I.R.L.R. 225 the original finding of the Industrial Tribunal was reversed. The Tribunal determined that when a woman had established that she was being paid less than a man engaged on 'like work' in the same employment it was presumed that the variation between her contract and his was due to a difference in sex. On Appeal it was held that this imposed too heavy a burden on employers. They only had to prove their case on a balance of probabilities. In this case the fact that there were both men and women in the highest and lowest grades indicated that the differences were not due to sex.

There is, however, nothing in the Act to prevent an employer from not employing women or men. In this ^{regard} ~~sense~~ it is not comparable to the Race Relations Act (1968) S.1 & 3. Neither does it seek to prevent discrimination in non-contractual matters. However, in contractual matters, by laying stress on the job, it does prevent the employer from justifying unequal treatment through real or imagined differences between

the overall value of the work of each sex based on such grounds as lower output, higher absenteeism, maternity leave and the refusal of overtime.

Section 2 of the Act confers jurisdiction upon industrial tribunals to determine claims arising out of the Act. The tribunal may award arrears of remuneration or damages in respect of a failure to comply with "an equal pay clause" (S.2(1)) The Secretary of State has the right to refer a breach of an equal pay clause to the Tribunal (S.2(2)). According to S.2(6) it is envisaged that it would be for the claimant to establish that he or she is entitled to equal treatment under S.1 (1)(4) & (5) but that the onus of proving a "material difference" would lie on the claimant's employer.

Section 3 provides for the elimination of discrimination on the grounds of sex in collective agreements and in employer's pay structures, both of which may be referred to the Industrial Tribunal for amendment. Subsection 2 provides that whatever the position concerning the enforceability of a collective bargain by the parties the terms of such a bargain may be incorporated expressly or implicitly into individual contracts of employment. Sections 4 & 5 contain similar provisions to Section 3 to enable wage regulation orders and agricultural wage orders to be revised to comply with the new requirements.

Section 6 rejects the argument that the retention of protective laws or special treatment for women in employment would produce inequality for males and enacts that such laws or treatment are to be ignored in applying the Act. Examples of such protective laws can be seen in the Factory Act 1961 and differing retirement ages (60 for women, 65 for men). Section 7 makes provision for equal pay and conditions between men and women in the services. Section 8 provides for equal treatment in certain matters within the Police Force, Section 9 & 10 provide for the commencement of the Act and allows a collective agreement, pay structure or order to be referred to the Industrial Court for advice on the amendments needed.

A ~~comprehensive~~ ^F Report on the workings of the Equal Pay Act was produced in 1972 by the Office of Manpower Economics. ³ While by the end

of March 1972 in only one fifth of the agreements and orders examined had discrimination in rates of pay been removed or been planned to be removed, a majority of agreements and orders had given larger or at least equal increases to women in comparison to men. Women were still largely concentrated in the service sector. The Report found that there was little knowledge of the terms of the Equal Pay Act amongst small companies. However, few firms tried to evade the Act by aggregating male and female jobs although many were seriously worried by the cost considerations and by the implications of a complete overhaul of their wages structure. With the passage of time the provisions of the Act have become widely known and many companies have voluntarily revised their wages structure. The Act gains from a clearly defined and limited aim. Although, as we have seen, the procedures of job-evaluation are not without their difficulties there now exists a considerable wealth of experience and body of case law. 4

THE SEX DISCRIMINATION ACT 1975

a) Underlying Philosophy

The Equal Pay Act 1970 was sponsored by the then Conservative Government and was concerned with sex-discrimination in contractual conditions of employment. The Labour Government in 1974 was concerned to extend the notion of equality to non-contractual areas and areas other than that of employment. In the White Paper 'Equality for Women'⁵ it commented that the Equal Pay Act was inadequate in scope and enforcement.⁶ The government aimed at harmonising the legislation on sex and race discrimination. It wished for a Bill to apply to employment, training, education, housing and the provisions of goods, facilities and services⁷ and wished to combine the right of the individual access to legal redress with the strategic function of a new public body - the Equal Opportunities Commission - to enforce the law in the public interest.⁸ Before examining the detailed provisions of the Sex Discrimination Act, it is helpful to examine the white paper 'Equality for Women' for it contains the underlying philosophy of the legislators.

The White Paper recognises the major social trend that today nearly half of all married women are in paid employment. Work for women is no longer merely an interlude between school and motherhood. This is not all gain for women:-

"Paradoxically, the very improvements in the position of women have, in some ways, made their lives harder than before. To the physical and emotional strain of bearing children and caring for them in their early infancy have been added the demands of work in shops, offices and factories." 9

Most women do low-grade jobs in a narrow range of services and industries for lower rates of pay than unskilled men. They have not the same chances for skilled work or promotion. They lag behind on fringe benefits like pensions. Women are sparsely represented in the professions - there has been little improvement since the removal of sex disqualifications in 1919. Less than one seventh of doctors are women. They are in the majority in teaching but in primary schools although three quarters of all teachers are women only two fifths of the head teachers are women. 10

The White Paper examines discrimination in education facilities and services. In education it comments:-

"Many children are brought up from their earliest years in the belief that the social and economic roles of men and women are radically different." 11

The philosophy of the legislation is plainly opposed to this and hence we can assume that a basic assumption behind the Sex Discrimination Bill is that the social and economic roles of women ought to be the same, or at any rate not radically different. The White Paper comments that girls tend to have a different curriculum, they tend to leave school earlier and fewer in proportion to boys enter higher education. The same number as men qualify in languages and the arts but in science and the social sciences men outnumber women by five to one. Concerning the provision of facilities and services the White Paper claims that women may be denied banking, insurance, mortgages, grants, loans, credit and tenancies.

In discussing discrimination and prejudice the White Paper comments:-

"The unequal status of women has not been perpetuated as the result of the deliberate determination by one half of the population... Its causes are complex and rooted deeply in tradition, custom and prejudice. Beyond the basic physiological differences between men and women lies a whole range of differences between individual men and women in all aspects of human ability. The difference within each sex far outweighs the difference between the sexes... Women are often treated unequally because they are alleged to be inferior to men in certain respects and the consequences of their unequal treatment are then seen as evidence of their inferiority. Their unequal status is caused less by conscious discrimination against women than by the stereotyped attitudes of both sexes about their respective roles." 12

Such is an important statement of the underlying philosophy of the Bill. As such it will have to be examined carefully in Part three of this study. The White Paper continues in Para.17 by expressing a direct economic motivation:-

"The unequal status of woman is wasteful of the potential talents of half of our population in a society which, more than ever before, needs to mobilise the skill and ability of all of its citizens." 13

The rest of the White Paper is a detailed examination of the scope of the legislation. These have now become an actuality in the Sex Discrimination Act 1975.

b) Detailed provisions

Part I of the Act is concerned with defining the discrimination to which the Bill applies. The key formula is found in S.1(1)(a) for direct discrimination. This occurs if a person in any circumstances relevant to the Act:-

"on the ground of her sex treats her less favourably than in those circumstances, or circumstances as nearly as may be resembling those circumstances, he treats or would treat a man."

This definition is extended to cover indirect discrimination by S.1(1)(b). Here discrimination occurs when:-

"he applies to her a requirement or condition which applies or would apply equally to a man but -

- i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
- ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
- iii) which is to her detriment because she cannot comply with it.

S.2(1) ensures that the legislation applies equally for discrimination against men.

The White Paper commenting on the definition of discrimination pointed out that it is not the object of legislation to require a change in activities which arise out of common sense and not out of prejudice - for example an employer whose business involves heavy manual labour is not obliged to provide less physical work, nor men's shops to provide women's wear. It points out that there is an important difference of principle between sex and racial discrimination. Racial separation is inherently degrading, even where both groups are treated equally - but separate provisions for men and women are not always unjustifiable (paras 34-37).

A comparison of S.1(1)(a) and S.1(1)(b) reveals that there is a defence of justification possible for indirect but not direct discrimination. Discrimination is illegal "which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied." The scope of this defence will depend on the interpretation by the courts of what is justifiable and what is not. Beloff and Watson¹⁴ point out that 'justifiable' is not the same as 'justified'. Justifiable means that the action can be justified after the event. There are considerable obstacles to proving indirect discrimination. There is no guideline in the Act as to the size of the groups from which the proportion of men and women are to be drawn for the purpose of comparison. This may depend on the particular case or it may refer to the situation at large. They also point out that the test is whether the woman 'cannot' comply with a condition, not whether they cannot reasonably be expected to comply with it. Thus it was not discriminatory against men to allow free entry to a club to 'persons wearing skirts' since

men could, if they wished, wear skirts - indeed certain Scotsmen did (cf. 'Daily Telegraph' 19th Jan. 1976).

Judith Reid has pointed out that many conditions may be more difficult for women than men - eg. availability for travel, training courses and the like. Whereas logically it could not be said that women 'cannot' comply with such conditions it may be very difficult in practice. However the subsequent judicial interpretation on this point has been a liberal one. The important case of Price v Civil Service Commission [1977] 1 W.L.R. 1417 held that an imposition of an age limit of 28 to job applicants may be discrimination against women, a large proportion of whom are occupied with children at that age. It was commented that the word 'can' in S.1(1)(b)(i) is not to be construed too strictly. Because a woman can in theory comply does not mean that she can in practice. This goes a long way towards meeting Reid's point. Similarly a seniority condition that many women could not meet because they had not previously been allowed to be categorised as permanent full-time status was covered by S.1(1)(b)(iii) - cf. Steel v The Union of Post Office Workers and the G.P.O. [1977] I.R.L.R. 288.¹⁵ Earlier case history also suggested a liberal approach - thus rigid seniority rules which militate against the woman who leaves work for family reasons for a time might be covered (Lading v Headway Shopfitting Ltd. I.T. 2096/76 and Thom v Meggit Engineering Ltd. I.T. 5032/76). Nevertheless Reid, in her article, commented

"It is greatly to be regretted that the Government was not able to implement its original intention of placing the burden of proof on the alleged discriminator."

S.3 of the Act extends the definition of discrimination to cover direct or indirect discrimination against married people on the grounds of their marriage. Illogically there is no similar protection for unmarried people. Under S.3 the ~~motive~~^{intention} to discriminate can be inferred from all relevant circumstances (cf. McLean v Paris Travel Services Ltd I.T. 4767/76/E). The victim must be married, not about to be married (cf. Bick v Royal West of England School for the Deaf I.T. 11664/76). Similar difficulties arise in the case of indirect discrimination against married persons as those outlined above. The proportions compared must be between married and unmarried people of the same sex

(s.1(2)). Another section dealing with comparisons in discrimination cases is S.5(3). Under this the relevant circumstances of a woman who complains that she has been discriminated against must be the same as, or not materially different from, those of the man with whose treatment she is comparing her own. Thus dismissal due to pregnancy could not be sex discrimination since, as a man could not become pregnant, there could be no comparison with men in the same relevant circumstances (Reaney v Kanda Jean Products [1978] I.R.L.R. 427.)

S.4 of the Act protects those who assert rights under the Act or the Equal Pay Act. A late amendment to the Act covers discriminatory practices that are so effective that discriminatory acts never in fact occur. 17

Part II of the Act deals with discrimination in employment. As such it complements the Equal Pay Act by dealing also with the non-contractual aspects of employment. The Act contains within it a new version of the Equal Pay Act 1970. The relationship between the two is at times complex - not least because the concept of the Equal Pay Act is 'equality' rather than 'discrimination'. Problems occur in overlap areas between the two acts. As Judith Reid comments:-

"It is difficult to see... how the woman is going to find her way out of this jungle." 18

The Sex Discrimination Act is far clearer on employment questions when the matter clearly relates to a non-contractual aspect. Thus S.6 makes it unlawful for an employer who has more than five employees to discriminate either between applicants for jobs or between employees for promotion, transfer or training. Applicants for employment bear the burden of proof of discrimination (cf. Oxford v Department of Health & Social Security [1977] I.C.R. 884). The important case of Amies v I.L.E.A. [1977] 2 All E.R. 100 determined that where the appointment of a man to a post involves discrimination on the grounds of sex it is the appointment itself which is within the mischief of the Act and not the continuing state of affairs. In this case a man was appointed the head of an art department two months before the Act came into force in preference to a woman applicant. She claimed that

the fact that he still occupied the post after the 1975 Act constituted a continuing discrimination against her. This argument was rejected, the tribunal having no jurisdiction for the reasons stated above. Neither could she seek a remedy under A.119 of the E.E.C. Treaty, for this created no enforceable community right in respect of discrimination based on sex within the Equal Pay Act other than in relation to equal pay. In addition rights conferred directly by E.E.C. Treaty could only be enforced in the High Court. However, the recruitment provisions have been widely interpreted in so far as a complaint can be made by a person deterred from applying for a job as well as by an applicant (cf. McDonald v Applied Art Glass Co. Ltd. [1976] I.R.L.R. 130.)

S.6(2)(a) also requires equality of treatment with regard to 'Benefits, facilities, or services'. An early case determined that opportunity to earn overtime is a benefit (cf. Baxter v Glostal A.A. Ltd. I.T. 1168/76) unless provision of these benefits is regulated by the person's contract of employment. Similarly, reducing overtime is accounted a detriment (cf. Morris etc. v Scott & Knowles I.T. 7673/76.)

An important recent case determining the scope of the interpretation of a 'benefit' is that of Peake v Automotive Products Ltd. [1977] 3 W.L.R. 853. Here the complainant was a male shop floor worker who claimed he was being discriminated against because the female employees were allowed to leave the factory five minutes earlier than the men on safety grounds. The Court of Appeal overturned the decision of the Employment Appeal Tribunal. The E.A.T. had held that under S.1(1)(a) the fact that the act was less favourable treatment on the grounds of sex was decisive and the motive of the discriminatory act was irrelevant. More significantly it held that 'Benefits, facilities or services' in S.6(2)(a) ought not to be given a restrictive interpretation. Both these findings were overturned in these particular circumstances. The Court of Appeal determined that a working rule which differentiated between men and women in the interests of safety and in accordance with established standards of right conduct between the sexes was not discriminatory within S.1(1)(a). Lord Denning commented:-

"Although the Act applies equally to men as to women, I must say that it would be very wrong to my mind if this statute were thought to

obliterate the differences between men and women or to do away with the chivalry and courtesy which we expect mankind to give womankind."

In these circumstances there was no 'benefit' under S.6(2)(a) to the women, nor 'detriment' under S.6(2)(b) to the men. Even if the Act was to be construed literally the discrimination in issue was one to which the rule 'de minimis non curat lex' should be applied. The Court applied a 'common sense' approach:-

"in applying statutory provisions which touch human conduct and relationships it is vitally important to cling to common sense. Some acts of discrimination are not adverse to either sex and are not designed to be." (per Shaw L.J.)

Interestingly this approach has not been welcomed by the Equal Opportunities Commission. In their 1977 Report they express their concern at the Court of Appeal's argument that reasonable discrimination could not be sex discrimination.

The recent case of Ministry of Defence v Jeremiah [1978] I.R.L.R. 402 was another case in which a man claimed equality with a woman under S.6. Here the women were not required to do certain 'dirty' work in the lead-rate shops. The E.A.T. upheld the finding of the industrial tribunal that there had been discrimination by subjecting the man to a detriment under S.6(2)(b). However, in relation to the definition of a benefit under S.6(2)(a) it was commented obiter:-

"We are disposed to think that the Ministry of Defence may be correct in their submission that a benefit must be something which is positively conferred as opposed to the relief from a particular part of the work which has been done and that what is relied upon here does not constitute a benefit for the purpose of S.6(2)(a); but this is a matter of very wide import and in view of our decision that there has been a detriment under S.6(2)(b) we do not express any concluded view."

Clearly the interpretation of S.6(2)(a) and (b) will exercise the courts in the future. Interpretation is still in a fluid state and future pronouncements from the Court of Appeal will be awaited with interest.

A recent case where a detriment was not proved was that of Schmidt v Austicks Bookshops [1978] I.C.R. 85. Here the stipulation of an employer that the female assistants should wear an overall and not be allowed to wear trousers was not serious enough to be a detriment. An employer is entitled to a large measure of discretion in controlling the image of his establishment.

S.6 is limited both by the general exceptions of the Act and those exceptions relating to employment in particular. It is to these that we now turn.

General exceptions to the Act are charities (S.43), sport where the physical strength, stamina and physique of the average woman would put her to a disadvantage (S.44), insurance based on statistical data (S.45), communal accommodation (S.46), provisions of existing statutes including safety legislation (S.51), pregnancy and childbirth (S.2(2)) where men cannot claim equal treatment, and provision of training facilities (S.47) and where positive discrimination is permitted in favour of women (or men) who have been excluded from the kind of work to which the training relates, or have been involved for some time in domestic duties.

Specific employment exceptions include private households and small employers employing five or fewer employees (an action claiming victimisation under S.6(3) is not, however, ruled out by this exception). Provisions about death or retirement are excluded by S.6(4). However benefits continuing after retirement are not in themselves "in relation to retirement" and so are not exempt from the Act - cf. Garland v British Rail Engineering [1978] I.C.R. 495. Also excluded from the Act are special categories of employees (S.19-21) and recruitment based on 'genuine occupational qualifications' which a man or woman alone possesses. These include physiology (excluding physical strength and stamina), authenticity in drama and entertainments and matters of decency and privacy. Single sex institutions and services for the promotion of the welfare or education of its clients are also excluded where the work can most effectively be done by a man or a woman. Finally there are some geographical exceptions for work wholly or mainly outside Great Britain. (S.10).

In commenting on these exceptions Beloff and Watson point out that the word 'physiology' is inapt. Either physiognomy or physique would be better. They submit that it in fact would not be unlawful to discriminate on grounds of physical strength or stamina as such - for example fire-persons can have a standard imposed - if a woman can satisfy it, she is eligible. What, however, the fire authorities cannot do is refuse to consider any women on the grounds that the job automatically calls for a man. The case of Cartwright v John Collier [1976] (Daily Express, 1st April, 1976) has shown that as long as some of the employees' duties fall within the category of "genuine occupational qualifications" which a man or woman alone possess, the employer is entitled to rely on it. However, the employer cannot so rely where he already has employees of the appropriate sex who are capable of carrying out the necessary duties - cf. Wyllier v Dee & Co (Menswear) [1978] I.R.L.R. 103.

Part III of the Sex Discrimination Act deals with discrimination in other fields. This can be divided into two sub-sections - education and the provision of goods, facilities or services. Sections 22 - 29 deal with education. It is unlawful to discriminate concerning admission and treatment of pupils. Facilities must be provided on a non-discriminatory basis. However there is an exception for single-sex schools which are not thereby required to go coeducational. The White Paper hoped for the gradual introduction of coeducation. The Act seeks to facilitate this by also providing for exceptions during²⁰ the transitional period when an establishment is turning coeducational. Also excepted are physical training courses in the field of further education. Hewitt²¹ suggested that the provision of books in which women are supposedly put at a disadvantage (eg. by showing them only in their domestic roles) may amount to sex discrimination. Beloff however points out that this is not the case provided such books are provided on an equal basis to both sexes.²² The Act covers both the public and the private sector. There is also a general duty in the public sector not to discriminate.

Sections 29 - 36 deal with discrimination in the provision of goods, facilities, services and premises. It is unlawful for any person concerned with provision of goods, facilities or services, whether for

payment or free of charge, to discriminate to the public or a section of the public. This is so in discrimination by refusing or deliberately omitting to provide them, or by varying the quality or terms of provision. The case of Race Relations Board v Charter [1972] 1 Q.B. 545 at 555 held that the opportunity to be considered for membership of a club is not included among the "facilities" provided by the club. Likewise a members' club is not within the scope of the Act if it has rules which provide for a genuine selection of persons to be members on the grounds of their acceptability and the existing rules (cf. Dockers Labour Club v R.R.B. [1974] 3 All E.R. 592). Although the effect of these cases has been negated in the Race Relations Act 1976 this is only in respect of racial discrimination. They still stand in respect of the Sex Discrimination Act. Otherwise excepted from this part of the Act are persons who require special care or supervision, and places used for religious purposes, or the necessities of decency and privacy. It is likewise unlawful with defined exceptions to discriminate in the disposal or management of premises. The general exception is in the case of residential accommodation shared by the landlord provided the premises are "small premises" as defined by the Act. There are specific exceptions for political parties, voluntary bodies, hospitals, reception centres, prisons and religious bodies. 23

Part IV of the Act deals with other unlawful acts. It will be unlawful to publish an advertisement which might reasonably be understood as advocating an unlawful act under the previous sections of the Bill. According to S.38 the use of a job description with a sexual connotation (such as 'waiter', 'salesgirl', 'postman', or stewardess') shall be taken as indication of an intention to discriminate unless the advertisement contains an indication to the contrary.²⁴ A publisher will not be liable if he reasonably relies on a statement by the advertiser that one of the exceptions of the Act applies. The Commission is seeking to discourage advertisers from showing the woman at domestic tasks - for example when trying to sell household items. The periodical Publishers Association has warned its members that if advertisements are submitted showing the woman in old fashioned roles they will ask for an assurance that the balance will be redressed in the course of a future series.²⁵ The Act also contains provisions which make it

illegal to instruct to discriminate and to attempt to induce discrimination. Vicarious liability will apply.

There is provision in the Act (S.74(1)) to assist a person to decide whether to institute proceedings and to help in the formulation and presentation of the case in the most effective manner. This is done by means of a standard question procedure. However, the court has proved somewhat chary about ordering the disclosure of confidential documents at a preliminary stage. This must be done when the judge or chairman decides that the confidence should be overridden in the interests of justice (cf. Science Research Council v Nasse The Times, March 21, 1978; Vyas v Leyland Cars The Times, July 27, 1978; University of Reading v MacCormack ; Busfield v University of Essex [1978] I.R.L.R. 491.)

Enforcement and remedies under the Act are dealt with by Part VII. In all employment matters enforcement proceedings are to be in industrial tribunals as per the Equal Pay Act.

Conciliation offices are to be made available but if these fail remedies are threefold - a declaration, a compensation order, and a recommendation that the discriminator take appropriate rectifying action (S.65 (1)). Compensation can include damages for injury to feelings and is subjected to an upper limit at present of £5,200 or two years pay whichever is the less. Complaints concerning the publication or display of discriminatory advertisements or notices can only be brought by the Equal Opportunities Commission. Industrial Tribunals are not equipped to deal with complaints in non-employment cases. These will be dealt with by specially designated county courts. Remedies are damages, non-discriminatory notices and an injunction. Complaints related to the Education provisions of the Act must go first to the Minister. He is allowed two months to consider whether or not to bring an action himself. This is without prejudice to the individual's right should the minister decide to take no action, except for enforcing the general duty in the public sector. 26

The Equal Opportunities Commission has wide responsibilities and powers. It can help the individual to formulate a complaint and obtain

information as well as helping in getting a settlement. It has also a wide range of review, research and education duties and powers. It must work towards the elimination of discrimination, promote equality and keep under review the working of all the relevant legislation. It may conduct formal investigations under terms of reference to be drawn up by its members or by the Secretary of State and has wide powers to obtain information for this purpose. It may make recommendations based on its investigations and must report on its findings. It has powers of enforcement both to aid the individual and where no individual has suffered loss. It may issue non-discriminatory notices, whether proceedings have been brought or not, and is responsible for proceedings against discriminatory advertisements. An even stronger level of enforcement can be taken against persistent discrimination. Here the Equal Opportunities Commission can apply to a County Court for an injunction. In employment cases the Commission does not need to go through the non-discriminatory notice procedure, but can simply bring the matter before a tribunal which may add a declaration or recommendation.

Such then, in brief, are the main provisions of the Sex Discrimination Act. In ^{a critical}~~this legal~~ analysis, it should be pointed out that although the Act brings vast new powers against sexual discrimination it does so at the cost of considerable complexity and legal technicalities. Beloff comments in his Preface:-

"An Act designed expressly to help John (and in particular Jane) Citizen, has emerged in linguistic clothing of such complexity as to daunt lawyers, let alone the layman. Firstly, the form of the Act was dictated at least in part by its subject matter. Racial differences (at any rate where races cohabit in one territorial unit) may be no more than skin deep; but there are differences of substance between men and women.

The Act has to derogate from its principles by the creation of numerous exceptions and then prevent those exceptions gutting the Act of force by creating in turn provisions for them.

The draftsmen by dotting every 'i' and crossing every 't', have increased errors and ambiguities."

Likewise Phillips J. commented obiter in Peake v Automotive Products Ltd [1977] 2 W.L.R. 751:-

"The Act is a very complicated guide, and certainly no layman who wished to know his rights and duties in this field would obtain a clear answer by reading it."

Such are indeed startling conclusions for an act that is meant to change social policy on such a wide scale in everyday life. The question must be asked whether in this complicated form the act can significantly further its basic principle of equality of opportunity and treatment for men and women. The experience of the Race Relations Acts suggests that greater legislative effectiveness is possible by legislative revision, but as Beloff points out, the basic issue in racial equality is a far simpler one. It may be that some degree of complexity cannot be avoided, but unless the complexity is significantly lessened the effectiveness of the Act is bound to be impaired.

27

It is not surprising that a commentator critical about the lack of effectiveness of the Act has this as one of her major reasons:-

"Legislation can only function effectively if it is understood and used by those it is designed to help. Both the 1970 and 1975 Acts are extremely complex pieces of legislation not readily understandable without professional advice."

However, she also advances other reasons. These include the demoralisation caused by the high failure rate of cases, the lack of legal aid for industrial tribunals, the inactive role played by the Equal Opportunities Commission. Interestingly, however, she lists as the greatest problem the apathy of women themselves. It would appear that many women do not place a high priority on the assertion of their rights but rather place a higher priority on many more traditional female concerns (much to the dismay of the champions of sex discrimination legislation). The possible theological implications of this are of great interest to this study and are commented on in Part III.

28

In their first annual report, that for 1976, the E.O.C. nowhere commented on the complexities of the Act. Rather they were dissatisfied because it had been introduced into an atmosphere of unemployment and economic stringency:-

"We would wish to register our belief that stringency has made those responsible for the allocation of resources and opportunities less responsive to our work than we would have wished, in this, the first year of our existence." (pg. 7)

The E.O.C. clearly saw their role as a pressure group to achieve further equality for women. At the conclusion to their 1976 Report they comment:-

"The setting up of the Commission is only the beginning of a new phase in the century long quest to achieve equality for half of our society... As the aspirations and expectations of women throughout the country rise, more effort and more commitment will be necessary from voluntary organisations as well as the Commission. A thriving Equal Opportunities Commission can only come about in the setting of a thriving movement concerned with equality for women."

29

The 1977 Report of the E.O.C. starts with a belief that progress has been made in this area:-

"We are happy to say that as the work of the Commission developed during the year, the Commission has found a much greater willingness in the country to pay attention to the substantive issues of discrimination than there was a year earlier."

This comment does not necessarily contradict the comment of the commentator above about the apathy of women themselves. Elsewhere in the report dissatisfaction is expressed with the progress towards equality and the need for the Commission to be more visible and accessible to individuals. The 1977 Report, unlike its predecessor, does criticise the Acts dealing with discrimination:-

"The Commission has devoted considerable attention throughout the year to a close scrutiny of the two Acts. By the end of 1978 these two Acts will have been in full operation for a period of three years. It is absolutely clear to the Commission that it will have to return to the Secretary of State at the end of this period substantial comments on how the two Acts have been working in practice, and to propose amendments to clarify and strengthen them."

Other recent legislation bearing on Women's Rights

As well as the Equal Pay Act and the Sex Discrimination Act two other statutes should be commented on briefly in relation to recent attempts to secure women's rights. They are the Employment Protection Act 1975 and the Social Security Pensions Act 1975.

The Employment Protection Act contains provisions concerning maternity rights in relation to employment. Employers now have a duty to provide maternity pay and leave (S.35). A woman employee is entitled to this if she is absent from work wholly or partly because of pregnancy or confinement, if she has been continuously employed for a period of two years or more, if she has continued at work until the beginning of the eleventh week before the expected week of confinement, if she has given three weeks notice and has produced a medical certificate if so required. Her maternity pay entitlement runs for six weeks and is nine tenths of a week's pay, less flat rate maternity allowance. A maternity pay fund is set up by the statute. Maternity "leave" gives the woman the right to return to work within 29 weeks from the actual date of birth. This must be to a job which is the same as the employee's original one, and on "terms and conditions not less favourable than those which would have been applicable to her if she had not been absent." (S.48) Judith Reid comments:-

"... there is not much point in giving mothers the right to return to work at the end of this period if the employer has no duty to provide day nursery facilities or allow some flexibility in working hours, part-time arrangements and holidays for the mothers of school age children."

In addition to the above provisions, the Employment Protection Act also classes as unfair a dismissal on grounds of pregnancy, unless the employer can show that the woman is incapable of doing the job because of her pregnancy, or because it would be unlawful to carry on employing her for the same reason. The dismissal is also unfair in these circumstances if the employer has another job available which is suitable for her but does not offer it (S.34). If the employee is so unfairly dismissed she is entitled to the above maternity benefits even though she is not employed up to the eleventh week before

confinement and even though without these intervening weeks she would not have the requisite two years continuous service.

The Social Security Pensions Act 1975 regulates discrimination both in all private and occupational pension schemes and in those of them which are contracted out of the State scheme. Equal access must be afforded to "both men and women on terms which are the same as to the age and length of service needed for becoming a member and as to whether membership is voluntary or not." (S.52(3) SSPA). In relation to social security itself S.3 of the Act deals with the contribution side. The married woman employee's right to opt out of full contributions is to be phased out - thus facilitating women's claims to equal social security rights. S.19(3) helps the non-working woman by crediting her with contributions for some purposes while she is kept out of work by responsibilities at home. In benefits, the lower rate for sickness and unemployment benefit to a married woman who has not opted out but is living with or supported by her husband has been abolished. Here therefore the notion of dependence has been abandoned. Judith Reid points out that the position is different in the provisions for the new pension scheme under SSPA.³⁰ Perhaps the most glaring inequality not dealt with by the Act is the fact that women still reach retiring age five years earlier than men - this notwithstanding the average longer life-span of a woman compared with a man. 31

In Part III of this study, the Acts dealing with sex discrimination and equal treatment will be subjected to a theological critique. In particular the fundamental philosophical basis of the Sex Discrimination Act, 1975 will be so examined, together with a consideration of whether its complexities and ambiguities arise from this. Alternative, theological foundations for sex equality will be examined and suggestions made for future legislative amendment. Far from just proposing, like the Equal Opportunities Commission, "amendments to clarify and strengthen" present legislation, this more radical analysis may suggest that if the foundations are wrong no amount of tampering with the brickwork above ground will be satisfactory.

CHAPTER 7 - NOTESRecent Legislation on Sexual Equality

1. These were Summary Jurisdiction (Married Women) Act, 1895; Licensing Act, 1902, S.5; Married Women (Maintenance) Act, 1925; Married Women (Maintenance) Act, 1949.
2. For an examination of how this section has been interpreted in practice cf. J.M. Thomson 'Sex Discrimination and Employment' 8 Fam. Law.26; J.A. Wall 'Sex Discrimination and Employment' 128 New L.J. 968; G Woodroffe 'Equal Pay for Women - dream or reality?' 74 L.S. Gaz. 1027.
3. 'Equal Pay - First Report on the workings of the Equal Pay Act 1970' Office of Manpower Economics. There have been no subsequent annual Reports.
4. In their 1976 Annual Report, the Equal Opportunities Commission comment on the high rate of failure of equal pay claims.
5. Published Sept. 1974.
6. Para. 23.
7. Paras. 24 and 25.
8. Para. 29.
9. Para. 7.
10. Paras. 8-11.
11. Para. 12.
12. Para. 16.
13. Para. 17.
14. Beloff & Watson, Sex Discrimination Act 1975.
15. Judith Reid 'Women in Employment : The New Legislation' 39 M.L.R. 432-51.
16. For a discussion on the cases of Price v Civil Service Commission 1977 1 W.L.R. 1417 and Steel v The Union of Post Office Workers & the G.P.O. 1977 I.R.L.R. 288. cf. S. Cooke 'Sex Discrimination : two recent cases' 75 L.S. Gaz 341.
17. S.37.
18. Both Reid and Beloff & Watson give examples of the relationship between the two Acts.
19. This includes organised religions (see note 23). Hence it is not illegal for the Church of England to refuse to ordain women.

20. For the differing interpretations of what such a transitional period involves cf. Times Educational Supplement 28 Oct. 1977.
21. P. Hewitt, Rights for Women (1975) pg.26.
22. I.L.E.A. sent a booklet to 13,000 heads, principals, managers and governors stating that "myths and taboos" in 'sexist' reading books which impress on small children the dominant role of boys must be attacked. cf. The Times 30 Dec. 1975.
23. Organised religion is nowhere defined in S.D.A. However Scientology is not a religion (cf. R v Registrar General ex p. Segerdel 1970 2 Q.B. 697.)
24. For a criticism of the impact these provision will have on the English language cf. Howard 'One area in which sexism is welcome', The Times 31 Jan. 1976.
25. However, the Institute of Practitioners in advertising have emphasised that the Commission can recommend but not enforce such practice.
26. Relations between the education section of the E.O.C. and the D.E.S. have been somewhat stormy over their relative powers in monitoring the Act - cf. Times Educational Supplement Nov. 4th 1977 Jan 20th 1978. A report by Ruth Miller on 'Women and Equal Opportunities' in The Daily Telegraph Feb. 6th 1978 produces statistical evidence to suggest the E.O.C. has had little effect in the Education field.
27. Jane Fortin 'Sex Discrimination Laws - Success or Failure?' 128 New L.J. 700.
28. Equal Opportunities Commission 'First Annual Report, 1976' H.M.S.O.
29. Equal Opportunities Commission 'Second Annual Report, 1977' H.M.S.O.
30. cf. Reid (supra note 15):- "The woman whose entitlement to pension rights rests on her husband's contribution record (category B pension) must still wait until her husband reaches pensionable age before she can collect it and is paid at a lower rate so long as he is alive. One of the more absurd applications of the dependence assumption also arises from the S.S.P.A.; S.20 allows a wife (or a husband) to carry her husband's contribution record with her through a divorce. This means that even though a person is expressly prohibited from collecting on the contribution record of more than one ex-spouse, there is nothing to prevent more than one ex-spouse from claiming on the single contribution record of a much-divorced contributor."
31. The E.O.C. seems to attach only a low priority to equality of pensions. In their 1976 Report they comment:- "It did not seem one of the more pressing issues" (pg.11). In order of priorities they accorded it No.14.

CHAPTER 8

ABORTION

ABORTION - LEGISLATIVE BACKGROUND

Discussion and controversy about the legal consequences and justification of the act of abortion had a long pedigree. In Victorian England the codifying statute the "Offences against the Person Act" 1861, S.58 made it an indictable offence a) if a pregnant woman herself administers unlawfully a poison or uses any instrument or other means with intent to procure her own miscarriage, or b) if any other person with the intent to procure the miscarriage of any woman unlawfully administers a poison or uses any instrument or other means.

This statute was given an extensive interpretation in order to minimise the offence in the case of R v Bourne [1939] 1K.B. 687. The law being unclear, on the direction of the Judge to the Jury it appeared as if abortion was lawful where performed by a doctor with the express purpose of preserving the life of the mother. Included in this was not merely the mother's physical health but also her mental health. The danger must be clear and definite - the mother must be in danger of becoming a physical or mental wreck. Nevertheless pressure increased to reform the law on abortion by statute.¹ For some time this was ~~done~~ ^{done} ~~undertaken~~ to bring more certainty to the law. For ~~others~~ ^{some people, however} the reasons were more social - to reduce the amount of 'back-street' abortions, to reduce the pressure on deprived or feckless families or more radically to enable the woman to choose whether she had the child or not. For ~~others~~ ^{people} there were additional medical grounds to those specified in R v Bourne - notably ~~those~~ ^{mothers} who have reason to fear their child will be born deformed.

While the Roman Catholic Church remained implacably opposed to abortion the reforming movement was given considerable philosophical and moral ~~influence~~ ^{impetus} by the report entitled "Abortion, An Ethical Discussion" 1965² set up by the Church of England Board for Social Responsibility and under the chairmanship of the late Bishop Ian Ramsey and including several laymen. Whereas the premiss that human life was sacred was accepted it was not accepted that the foetus was in this category from conception. Rather the commission would describe it as "an embryo having within itself the potentiality of a full flowering of human personality." In certain early stages of its development it

could therefore be argued that termination of pregnancy does not involve taking human life. In addition any decision must also involve the mother and family who may have counter-balancing rights to those of the foetus. However, the Committee concluded that there would only be two possible occasions in which according to Christian ethics it could be right to end the life of the foetus - viz. 1) where the mother's own life is in danger as a result of the pregnancy 2) "we would extend this justification of necessity to cover a real threat to the physical or mental health of the mother, that is, to her psycho-physical well-being."³ There must be a 'grave' risk of 'serious' injury to health or physical or mental well-being taking account of the patient's total environment, actual or reasonably foreseeable.

ABORTION ACT 1967

The culmination of this reformist zeal can be seen in the 1967 Abortion Act. The Act, however, proved far more radical than many of its supporters (including its sponsor) intended. Sponsored by Mr. David Steel it originally followed the recommendation of the Ramsey Committee and specified that the continuance of the pregnancy must involve 'serious' risk to the life or 'grave' injury to the health, whether physical or mental, of the pregnant woman. The adjectives 'serious' and 'grave' were, however, deleted in committee, as unquantifiable and meaningless. By this simple stroke the Act was capable of being interpreted as providing abortion on demand. Some doctors have pointed out that since any unwanted pregnancy creates some risk to the mental health of a pregnant woman, a demand for abortion can never be refused.

The linguistic^{bic} absurdity of the Act in its present permissive form has been pointed out by J.M.B. Crawford in an article.⁴ He concludes:-

"When a piece of legislation, which aims at controlling and licensing abortions, can be shown to permit any abortion under it, then its licensing and control is trivial because it is ineffective. As it stands the Abortion Act 1967 both permits and encourages abortion on demand, a state of affairs which parliament did not intend when it had passed the Act."

Hence when the final Act is examined Section 1(1) reads in defining the exceptional circumstances when abortion is to be lawful:-

"when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith -

- a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or
- b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped"

According to Section 1(2)

"In determining whether the continuance of a pregnancy would involve such risk of injury to health ... account may be taken of the woman's actual or reasonably foreseeable environment."

It is the woman who is entitled to apply for an abortion and her welfare and that of the existing children are the only factors to be taken into account. A recent judgement in Paton v Trustees of B.P.A.S. and others [1978] 2 All E.R. 957 has determined that under the Abortion Act 1967 the husband has no legal rights over the life and death of his unborn child. Mr. William Paton applied to the Court for an injunction to restrain his wife from having an abortion. Sir George Baker, president of the Family Division, said in his judgement:-

"The Abortion Act 1967 gave no right to a father to be consulted. The husband therefore has no legal right whatever and certainly no right enforceable in law or in equity, to stop his wife having this operation or to stop doctors carrying it out."

In addition he commented:-

"Not only would it be a bold and brave judge ... who would seek to interfere with the discretion of doctors acting under the 1967 Act, but I think he would be a foolish judge who would try to do any such thing, unless possibly, there is clear bad faith and an obvious attempt to perpetrate a criminal offence."

A case where the Court did determine clear bad faith was that of R v Smith (John) [1974] 1 All E.R. 376. The question of good faith is

to be determined ~~in~~^{through} the totality of the evidence by the jury. This plainly did not arise in Paton's case. An article considering any possible legal action by the husband in the case of an abortion or threatened abortion without his approval has been written by D.C. Bradley.⁵ In particular this examines the legal consequences in terms of a divorce petition and the possibility of proceedings for the custody of an unborn child.

GOVERNMENT SCRUTINY OF THE 1967 ABORTION ACT

The operation of the 1967 Abortion Act confirmed some of the worst fears of its critics. The number of abortions performed lawfully increased dramatically year after year. In the last year before the Act 6,380 lawful abortions were notified. In the first year of the Act this figure jumped to 54,819. By the early 1970's this figure increased to over 100,000 and then to well over 150,000. By 1976 a total of 1,000,000 foetus^{es} had been aborted^{legally} since the passing of the Act. Since that time the annual number of abortions has decreased slightly - although expressed as a percentage of live births the trend until 1978 was still upward.⁶ In recent years between 70 and 80% of abortions were performed on mental health grounds and rather more on unmarried women than married women.

Government scrutiny became essential when public disquiet was voiced over many abuses of the Act. Private nursing homes and pregnancy advice agencies extorted large amounts of money for providing a service of abortion on demand and attracted some doctors by the lure of easy money. Abortion within the health service was dealt with more responsibly but many gynaecologists complained at the amount of bed space used and those medical staff who refused to co-operate on conscientious grounds complained that their careers were disadvantaged. Large numbers of foreign girls took advantage of this country's liberal abortion facilities. Foetuses and foetal material were used for unscrupulous research. These and other practical abuses can be seen as the motivation for three influential government reports - the Report of the Advisory Group⁷ on the use of Foetuses and Foetal Material for Research (The Peel Report), 1972, the Report of the Committee on the Working of the Abortion Act (the Lane Report)⁸ 1974 and the Report from the Select Committee on Abortion⁹ (the Parliamentary Committee examining Mr. James White's Abortion (Amendment) Bill 1975. This latter report contains a summary of the proposals of the other reports. Before examining the reports in more detail it should be stated that the government has achieved some measure of success in tightening up on the operation of the Act without statutory reform. This is particularly stressed in the Lane report and by the Department of Health which now believes the situation is under control and the Act does not need any major revision.

The Lane Report admitted that a small number of doctors had used the Act to make money and that some women had used the Act and the fact that they could afford private treatment to get an abortion on comparatively trivial grounds of inconvenience or embarrassment to themselves. It admitted that in some parts of the commercial private sector the provisions of the Act had been flouted and abortion on request had been the rule. However in its 'Summary of Conclusions' it held that the vast majority of abortions were fully justified under the act:-

"We are unanimous in supporting the Act and its provisions. We have no doubt that the gains facilitated by the Act have much outweighed the disadvantages for which it has been criticised. The problems which have been identified in its working and they are admittedly considerable, are problems for which solutions should be sought by administrative and professional action, and by better education of the public. They are not, we believe, indications that the grounds set out in the Act should be amended in a restrictive way. To do so when the number of unwanted pregnancies is increasing and before comprehensive services are available to all who need them would be to increase the sum of human suffering and ill-health, and probably drive more women to seek the squalid and dangerous help of the back-street abortionist." 10

The Report claimed to be aware of the moral nature of the decision:-

"As a committee we can only acknowledge its significance for the moral life of the individual and of society and seek to ensure in our recommendation that such decisions are made with deliberation, care and earnestness." 11

With regard to medical staff disadvantaged in appointments by conscientious objection the report comments:-

"We have stated the view that

⁵ Sometimes the needs of the many must take priority and that inevitably some who refuse this work may not obtain a particular appointment; but we come to this conclusion with great reluctance and hope that the occasions for such a decision will be rare." 12

In assessing the general conclusions of the Lane Report it is striking that the philosophical reasoning is almost exclusively based on utilitarianism. Individual happiness and individual suffering are balanced from a humanist standpoint. The influence of Bentham on present day legislation and the evaluation of such legislation can hardly be ^{over} ~~under~~-estimated.

RECENT ATTEMPTS TO AMEND THE ACT

There have been several recent attempts to amend the Abortion Act - The first, Mr. James White's Abortion (Amendment) Bill 1975 although gaining a large majority at second reading lapsed through lack of Parliamentary time. However it is of interest because of the exhaustive nature of the Select Committee's report on it and because of their considerable ^{disagreement} ~~variance~~ with the Lane report - both on detailed evaluation and on matters of philosophy. We see in the Select Committee far more emphasis on the sanctity of life as an over-riding consideration. However, it should perhaps be remembered that the committee had a rather one-sided composition - the pro abortion members refusing to serve shortly after its constitution.

Many examples of the Committee's more restrictive attitude to abortion can be seen in their comments on provisions of Mr White's Bill. Perhaps the most radical change Mr. White proposed was to restore the words 'grave' and 'serious' back into the criteria for an abortion - so no abortion would be lawful unless there were grave risk to the life of the pregnant woman or risk of serious injury to the physical or mental health of the pregnant woman or any existing children of her family. While the Lane Committee disapproved strongly of such a change the Select Committee refused to be committed but rather listed three points in favour and three against. Hence in favour were the points that doctors would be prevented from using the statistical argument to justify abortion on request, the restoration of those criteria in the original Abortion Bill before it was amended in the Lords and the fact that more stringent criteria would give expression to the concern that due weight should be given to the right of life of the foetus - so upholding the value of human life. Points against were that it disregarded the Lane Report, it made the work of the certifying doctors more difficult by bringing greater uncertainty and the fact that it would greatly increase the private sector against the National Health Service - as well as leading to more back-street abortions. Hence we can see considerable hesitation in seeing the matter in as clear cut a way as the Lane Report.

Many of the restrictive provisions of Mr. White's Bill were also agreed

to by the Select Committee - often in contradiction ^{to} of the Lane Report. Examples are restrictive provisions in relation to the certifying medical practitioners (Clause 1(a)(i)), the new criteria proposed for the approval and regulation of premises (Clause 6), the upper time limit for an abortion (Clause 7) and strengthened powers of enforcement (Clause 11,12). The Committee did, however, agree with the Lane Report that no legislation should be introduced to reduce the number of abortions on foreign women as proposed under Clause 2. While numbers had jumped from 4,604 in 1969 to 49,414 in 1972 new regulations to reduce the grosser scandals resulted in a considerable improvement in 1975 to 31,329. Licensing and control of premises and advisory and referral bureaux would substantially further reduce the number. The licensing of referral and advisory bureaux was covered by Clause 5 of Mr. White's Bill and was also common ground between the Lane Committee and Select Committee.

Mr. White's Bill was followed by an Abortion (Amendment) Bill sponsored by Mr. Benyon in 1977. If Mr. Benyon's Bill had been successful it would only have permitted abortions if the pregnancy was under 20 weeks, or under 24 weeks with a substantial risk that the child would suffer from physical or mental abnormalities, or if treatment was necessary to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health (Clause 1). The Bill further provided that one of the two medical practitioners whose consent was required must be of not less than five years standing and had safeguards to ensure he was independent from the other doctor (Clause 2). Stricter licensing provisions were proposed for pregnancy advisory services, together with the severance of all financial links between them and abortion clinics (Clause 6). Mr. Benyon's Bill, although obtaining a majority at its second reading, suffered the same fate as Mr. White's Bill and was not allowed sufficient time by the Government.

The latest attempt at legislation to reform the 1967 Act has been Mr. Braine's Abortion (Amendment) Bill (1978). Clause (1) concerned the time limit for abortions and contained similar provisions to the 1977 Bill, although allowing a little more flexibility. Clause 2 made further provisions for conscientious objectors to the Act and

Clause 3 laid down similar provisions for licensing pregnancy advisory agencies as Clause 6 of the 1977 Bill. Mr Braine's Bill, although being milder than Mr. White's Bill, again failed through lack of time being made available to it. Thus, although Parliament has clearly expressed its wish to amend the Abortion Act 1967 on three occasions, attempts so to do have been thwarted by the deliberate policy of the Executive.

THE RECENT CONTRIBUTION OF THE CHURCHES

We noted earlier the influential nature of the Church of England report "Abortion : An Ethical Enquiry" on the 1967 Act. Mr. White's Abortion (Amendment) Bill provided an opportunity for the Church of England and other Churches to further elaborate their standpoint to the Select Committee. These contributions are reported in the Committee's 'Minutes of Evidence' - an assessment of them shows a significant variation between the Churches and also a significant change in the official stance of the Church of England.

The Church of England evidence had none of the coherence seen in "Abortion : An Ethical Enquiry" chaired by Bishop Ian Ramsey. One member Mrs. Jones, appeared to be entirely happy with the 1967 Act or at any rate not to wish for legal changes. The main contribution was made by Professor Dunstan - he was influential in elaborating the continuum theory of the foetus' growth in the earlier report. In reaffirming this he commented:-

"Scientifically speaking, here we have one unbroken physiological continuum and my task as a moralist is to try and match this continuity with the appropriate moral language, and then to see how this can be reflected in an effective and workable and just law." 13

He then goes further:-

"We do not assert that human life is absolutely inviolable - we say, we place a very high value on it."

"The foetus may be the aggressor (although innocent) against the mother."

However in practical terms his concept of justifiable foeticide is still restrictive. So the restrictive adjective 'grave' is welcomed and the provision which extends the consideration to a threat of serious injury to any existing children of the family is regretted ("I can conceive of no threat that can't be met by less drastic means") So far the practical conclusion is broadly similar to the previous report. However there was a major change in attitude from the earlier report in the case of a prognosis of severe congenital handicap:-

"My own thinking on this has developed since the earlier report of the Board, because of the development of accuracy and precision in pre-natal testing and assay."

Because of such greater precision the Professor stated:-

"It would seem, therefore, to me, logical not to insist, on moral grounds, to continue a pregnancy which would result in the birth of a child which everyone concerned would hope would die."

This is a major change in Church of England standpoint. While Dunstan was unable when asked to define gross handicap he sought to clarify his statement by elaborating:-

"If there were a prognosis of a child for whom nothing medical can be done to serve that child's interest, that would be a description which I would take as a ground for termination in utero." 14

He was criticised by Leo Abse and Kevin McNamara for ~~being based~~ ^{basing his argument} on the expediency of current medical and social attitudes, rather than on principle.

The most liberal Protestant standpoint can be seen in the evidence of the Methodist Church Division of Social Responsibility:-¹⁵

"We have not pressed for a repeal of the Act nor for greatly increased restrictions on its implementation. We would view with great concern steps which might lead to an appreciable increase in the numbers of back-street abortions and unwanted children. We therefore welcome several clauses of the Abortion (Amendment) Bill but regard with unease the total effect of its provisions." 16

In particular the Methodist Church doubted the wisdom of reinstating 'grave' and 'serious' as proposed by Clause 1. Theologically the Church acknowledges that all human life is revered. The foetus is undoubtedly part of the continuum of human existence, but the Christian will wish to study the further extent to which the foetus is a person. The foetus has significance but lacks full personhood. When there is a conflict of interest with the mother the decision must not be taken lightly - but either answer is permissible. The Church allows the possibility that large families might provide a justification for abortion.

The most stalwart Christian opposition to abortion comes, as might be expected, from the Roman Catholic Church. Paul VI's 'Humanae Vitae' in August 1968 stated bluntly that abortion was a crime against God and against nature. A directly willed abortion was condemned even for therapeutic reasons. The foetus was inviolable in the womb. It appeared doubtful whether killing the foetus was justified even to save the life of the mother. In their evidence to the Select Committee¹⁷ the Roman Catholic Church reiterated that God is the ultimate authority of life and that the protection of human life is a fundamental principle. The Church would be opposed to any law which contradicted this principle. Hence:-

"a direct attack on the life of the human foetus is excluded by our moral principles." 18

However the view was expressed by the Rt. Rev. Augustine Harris that in the situation where the foetus was a direct threat to the life of the mother "a medical practitioner would, we hope, try to save a life rather than lose a life."¹⁹ However the shift from life and death justifications for abortion to justifications on social, economic or psychological grounds was deplored. The present Act was unworthy in weighing a human life against the emotional, social and economic situation of the mother. Local authorities should provide alternatives to abortion. The Catholic Church remained opposed to the basic principles of the 1967 Act.

CHAPTER 8 - NOTESAbortion - Legislative Background

1. Bills were proposed by Joseph Reeves in 1952, Kenneth Robinson in 1961, Mrs Short in 1965 and Lewis Silkin in 1965. For a general survey of the movement towards liberalising the law on abortion cf. Hindell and Simms, Abortion Law Reformed (1971).
2. 'Abortion, An Ethical Discussion'. Church Information Office (1965).
3. Ibid at pg.34 of 3rd reprint (1973).
4. J.M.B. Crawford, 'Abortion: A Logical Oddity' 126 New L.J. 252.
5. D.C. Bradley, 'A Woman's Right to Choose' July 1978 M.L.R. 365f. cf. also O'Neill & Watson 'The Father and the Unborn Child' 38 M.L.R. 174, 184. There is a vast literature on abortion in America, especially in A.Jo. J/P.e.g. R.T. Gerber, 'Abortion, Two Opposing Legal Philosophies' A.Jo.J/P. 1970 pp.1-24.
6. The following figures are taken from the Office of Population Census & Surveys:-

ABORTIONS	<u>1973</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
Total	169	163	141	128	133	141
UK residents	111	109	106	101	102	112
LIVE BIRTHS	<u>1966</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
	850	640	603	584	569	596
DEATHS	585	585	583	599	575	586

All figures represent 1,000's.

In the U.S.A. in 1976 for the first time there were more legal abortions than live births.

For the existence of a new tort in the U.S.A., that of liability for wrongfully causing one to be born, cf. 83 A.L.R. 3d. pg.15.

7. 'Report of the Advisory Group on the use of Fetus and Fetal Material for Research'. Department of Health & Social Security. H.M.S.O. (1972).
8. 'Report of the Committee on the Working of the Abortion Act' H.M.S.O. Cmd. 5579. (1974).
9. 'First Report from the Select Committee on Abortion.' Vol.1. Report. H.M.S.O. H.C. 573-I (1975-76).
10. ~~Ibid. para. 605.~~ 'Report of the Committee on the Working of the Abortion Act' H.M.S.O. Cmd. 5579 (1974) para. 605.
11. Ibid. para. 606.
12. Ibid. para. 607.

13. 'First Report from the Select Committee on Abortion' Vol. 2.
'Minutes of evidence.' H.M.S.O. H.C. 573-II (1975-76) Para 184.
Pg. 93f.
14. Ibid. para. 192.
15. Ibid. pg.167f.
16. Memorandum submitted by the Methodist Church Division of Social Responsibility and attached to the Committee's 'Minutes of evidence' (supra) pg.165. para. 1.
17. 'First Report from the Select Committee on Abortion. Vol.2.
'Minutes of evidence'.(supra. note 13) para.223f. pg.118.
18. Ibid. para. 223 pg.119.
19. Ibid. para. 256. pg.129.

CHAPTER 9

VOLUNTARY EUTHANASIA

VOLUNTARY EUTHANASIA - SOME LEGAL, MEDICAL AND THEOLOGICAL
CONSIDERATIONS

VOLUNTARY EUTHANASIA

1. The present legal position

The sanctity of human life has long been an underlying principle of English law - and indeed the law of all civilised nations. The crime of murder, defined as the unlawful killing of a reasonable creature, in being and under the Queen's peace, with malice aforethought, express or implied, the death following within a year and a day, was viewed with such seriousness that until comparatively recently the person found guilty was required to forfeit his own life. The lesser offence of manslaughter covers all unlawful homicides which are not murder. Manslaughter occurs when there is no malice aforethought, express or implied, but in special circumstances it may also occur even when malice aforethought is present. At common law this was the case where the killing was done under provocation. By statute (the Homicide Act 1957) two further categories must be added - namely where there exists diminished responsibility or a suicide pact. It is no defence to a charge of murder or manslaughter to prove that the victim gave his consent to the killing. Hence voluntary euthanasia - defined as the deliberate inducement of a painless death at the request of the patient is at present quite plainly a crime.

In one respect the law relating to the sanctity of life was significantly changed in 1961. Originally suicide was also a crime. The Suicide Act of 1961 made it no longer a crime. The law is, however, still operative in relation to possible factors surrounding a suicide. Thus, by the combined effect of the Homicide Act 1957, and the Suicide Act 1961, the survivor of a suicide pact, who by common law was guilty of murder, is now guilty only of manslaughter. Anyone other than the survivor of a suicide pact who has aided, abetted, counselled or procured the suicide of another is guilty of a new offence carrying a possible penalty of fourteen years. Hence it is also plainly a crime to help someone to kill himself. However the liberalisation of the law means that there is no longer a ^{legal} duty to try and restrain a would-be

suicide. A question of more complexity is whether a person would be guilty of an assault if he did, in fact, restrain a would-be suicide. The general legal consensus seems to be that

"probably there is no more than a mere liberty to commit suicide and not a right, there may just possibly be no offence or tort in restraining a would-be suicide." 1

Whereas a doctor cannot deliberately end the patient's life at his request he can, however, use such treatment as is necessary to alleviate his pain. This is probably the position although it may incidentally shorten life. It has been pointed out that evidence that in any given case that the effect was inimical to life is hard to obtain. In Catholic theology this double causation is known as the principle of double effect. The illness is presumed as the direct cause, the drugs or cessation of extraordinary treatment only the indirect. It would usually be the illness that killed, not the drug. If the drug could be proved to be the immediate cause of death, it would be difficult in law to find a defence:-

"The best that could be done would be to argue that a combination of necessity (to relieve pain) and the de minimis rule (the hastening of death by a few hours) should prevail; but the validity of such an argument is doubtful." 2

It is pointed out that the doctor who administers such a dose is unlikely to be detected or prosecuted. If convicted and death was already imminent he would probably be granted immunity via the Home Secretary's Office from the strict letter of the law. It must be admitted that standard medical practice in such cases does, in fact strain the strict letter of the law, while of course falling far short of administering voluntary euthanasia as defined above. The legal effects of decisions to withdraw life-saving apparatus is similarly somewhat vague. In ~~its~~ ^{the} recent directives on 'brain death' the medical profession ~~has~~ ^{has} ~~have~~ assumed that death according to some definition must have occurred before such apparatus is removed. 3

2. Present medical practices

This brings us to the root of much of the present dilemma. The problem is such a live issue in the twentieth century because of the enormous advances in medical resources and technology. On the one hand respirators and other life-saving equipment can keep a person alive according to physical criteria. On the other hand the vast range of modern drugs can provide extensions of life for seemingly hopeless cases and at the same time are more effective than ever before at combatting and alleviating pain, albeit at the risk of marginally shortening life. We will see much discussion on these points in the debates on the attempts at legislation. From the medical point of view much evidence as to enlightened medical practice in the treatment of terminal cases can be seen in the report 'On Dying Well'. This concentrates in particular on the work of the Hospice movement which concentrates on care for the dying. Few would quibble with the inspired care and concern apparent in such institutions or with the need to encourage more of them. Few would argue that life should be preserved at any cost. There does, however, remain a grey area ^{causing} ~~to~~ the doctor's dilemma. How far should active surgical treatment be pursued with elderly and terminal patients, assuming this is their wish? How active should be the attempts to deal with the cardiac arrest of a man over 65, or 70 or what you will? These are everyday dilemmas for some doctors. Inevitably the individual case will be of great importance but so will be the attitude of the individual doctor and of society. Should utilitarian arguments such as those recently suggested by the Archbishop of Canterbury be entertained? When does the law count a doctor's non-intervention as negligent? Such are the grave medical, legal and ethical problems posed by the complexity of modern medicine. We must bear them in mind throughout the ensuing discussion.

3. Attempts at Legislation

The first attempt at legislation can be seen in the voluntary Euthanasia Bill of 1936. Sponsored by Lord Ponsonby of Shulbrede following the death of its author Lord Moynihan it was restricted to

patients suffering from a disease which was 'incurable, fatal and painful.' In such circumstances the patient could request the administration of euthanasia. Although some of the language of its sponsor points in that direction there was no right to demand euthanasia granted in the Bill but merely a liberty to request it, thus setting the proposed enquiry into motion. Lord Moynihan is quoted ^{as} ~~in~~ saying that the general principle of the Bill is

"to obtain legal recognition for the principle that in cases of advanced and inevitably fatal disease, attended by agony which reaches or oversteps the boundaries of human endurance, the sufferer, after legal enquiry and after due observance of all safeguards, shall have the right to demand and be entitled to receive release. You will observe at once that most anxious scrutiny of all such cases must be made and many questions must be asked." 4

The restriction of the Bill to the terminal stages of illness led to much of the medical debate in the House concentrating on standard medical practice and whether the prescribing of increased doses of pain killing drugs was in fact conceding euthanasia. Lord Dawson of Penn stressed that

"The medical profession is primarily concerned with the causes, diagnosis and treatment of disease, and to the best of our minds, our undeviating purpose is to cure and assuage suffering."

Where the disease is incurable

"our duty and our privilege is to do what we can to make that passage between a painful illness and the inevitable end as gentle as we can... our first thoughts should be to the assuagement of pain even if it does involve the shortening of life." 5

The principle of the Bill was also opposed on moral and religious grounds. According to Viscount Fitzalan of Derwent

"it is not opposed only on Christian and moral grounds, it is opposed because it is contrary to the law of nature." 6

To usurp the right to life is in "the nature of an impertinence." 7

8

The Archbishop of Canterbury stressed the clear moral principle that no man is entitled to take his own life. Although on rare occasions there may be exceptions to this they should not be given the backing of

legislation because of the many practical problems involved. Those commented on in the debate included the responsibility put on the relatives, the difficulty of sound moral judgements when under the influence of drugs, the unforeseen effects on the public in giving definite legal ~~encouragement~~^{authority} and the danger of losing the bond of trust between doctor and patient.

9

The subject next came before the House of Lords in 1950. They did not debate a Bill but merely a motion in favour of the principle of voluntary euthanasia. This was withdrawn without a division. Lord Chorley commented that

"the object of such legislation is to provide a person who is suffering from an illness involving severe pain, the illness being incurable and of a fatal character, with a merciful release from his suffering."

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The Archbishop of York warned of the dangerous nature of such a principle ~~and pointed out~~^{while commenting} that the duty of prolonging life is not the same as prolonging dying.

The next definite attempt at legislation did not come until 19 years later with Lord Raglan's 'Voluntary Euthanasia Bill' 1969.¹² This contained significant extensions to the previous legislative attempt. A patient or prospective patient ~~was~~^{would be} able to sign in advance a declaration requesting the administration of euthanasia to himself if he was believed to be suffering from 'a serious physical illness or impairment reasonably thought in the patient's case to be incurable and expected to cause him severe distress or render him incapable of rational existence.' Hence the condition no longer needed to be fatal - merely incurable, and 'incapacity for rational existence' was added to 'expected to cause severe distress.' This would cover a distressing chronic condition and would also cover senile dementia. This Bill comes closer to advocating a right to die in the sense that it is for the patient, other things being equal, to specify the conditions under which that right is to be exercised. The doctor could only exercise his professional judgement to the extent of certifying that the circumstances are those that the law specified as justifying euthanasia. Such a position can be distinguished from a liberty to request euthanasia (as proposed under the 1936 Bill) where the onus of decision

is upon the doctors, and from a position of immunity from prosecution for the doctors for doing what would otherwise be a criminal act.

The extensive nature of the Bill and its provision of only vague safeguards (the witnesses to the declaration, for example, would only have to testify that no pressure had been put on the person requesting euthanasia 'so far as we are aware.') were strongly criticised from a legal and administrative point of view (cf. the speech of the Earl of Cork and Orrery). The medical contribution to the debate widely rejected any legislative interference with what was seen as a medical prerogative. The argument about the effectiveness of drugs was again presented together with ^{Comments about} a widespread lack of demand for euthanasia from terminal patients. Lord Amulree commented that such demand usually comes from the relatives. He also reiterated the trust necessary between doctor and patient and interestingly also commented on the utilitarian argument about shortage of accommodation:-

"If the patient is a burden we should encourage more accommodation. I know I will be told that we can't afford it - but even less can we afford to drop our moral standards by encouraging the belief that these people should be killed." 13

Lord Brock made the point that no patient can be a proper judge of the desirability or inevitability of his death. Neither are doctors' diagnoses always infallible.

The religious contribution included a comprehensive speech by the Bishop of Durham¹⁴ (Bishop Ian Ramsey). After stressing the Christian principle of the value of life he distinguished between four contexts for which euthanasia could be argued - pain, keeping alive by highly artificial means, severe mental distress and social desirability. He believed pain was no longer an argument because of the effectiveness of modern drugs. However he believed that something like euthanasia may in principle be justified in not keeping alive people by extraordinary means. Under certain conditions there is a moral justification in removing the machine. With regard to mental distress he commented that we do not know enough about the subject and with regard to the fourth situation

"euthanasia is likely to be particularly hazardous in the case of alleged social or (dare I say?) political desirability."

He stressed far more the need for more education and better terminal care. Other religious contributions included that from the Earl of Longford:¹⁵-

"We are the custodians of life - that is all we are - and the life of each person belongs to God."

16

and Lord Soper. Lord Soper declared that he was in favour of euthanasia although he couldn't support this Bill. He did not believe that the whole question of treatment should be left to the doctors and stressed the Christian view that death is the gateway to eternal life.

The latest attempt at legislation can be seen in the Incurable Patients Bill of Baroness Wootton (1976)¹⁷. In her introduction she specifically denied that this was a Bill to legalise euthanasia. Rather 'this is a Bill to relieve the sufferings of incurable patients and not to kill them.' It was however held by the bulk of the House that this unquestionably was a euthanasia Bill. Baroness Wootton listed two objects of the Bill. First declaring the right of incurable patients to receive the drugs necessary to give them full relief from pain, even if this should cause unconsciousness. This would impose a duty on the doctors so to do. Second that we should have a right, while of sound mind, to make a binding declaration that should we become totally incapacitated we do not wish to be kept alive. Only a doctor could make the decision when the point of incurability had arrived. The patient's declaration would reject any contrived prolongation or renewal of 'what has ceased to be life in any meaningful sense.' Hence according to clause 1(1) the patient has a right to refuse life sustaining treatment, but nevertheless to be given drugs even to the point that may produce unconsciousness. According to clause 1(2) the patient is judged to be incurable "if he is judged by his attendant physician to be suffering without any reasonable prospect of cure from a distressing physical illness or disability that he finds intolerable." Here again we may note that the illness need not be terminal. Clause 2 interestingly tried to create the legal fiction

that a successful suicide would be reckoned as death by misadventure and clause 2(2) attempted to clarify the law on suicide by stating that 'a person must not interfere with action taken by a patient likely to cause his own death and any such action would be unlawful.' This would apply only to patients suffering from incurable diseases under the Bill. Clause 3 dealt with the formalities of the declaration.

In moving its rejection the Earl of Cork and Orrery ¹⁸ commented on the grave practical and legal inadequacies of the Bill. Clause 1 was, *he said*, irrelevant because in effect this was the position at present. Clause 2(1) was absurd in claiming that deliberate suicide was an accident. Clause 2(2) was potentially very dangerous. *he commented that* Here not only was a doctor empowered but actually required by Statute to end a patient's life. Clause 3(1) was similarly dangerous. A patient who many years before signed a declaration is now to be regarded as refusing life-sustaining treatment. This not merely allows but requires a patient to die. Lord Wells-Pestell further pointed out the difficulties of interpreting 'intolerable' and 'distressing'. Advisory measures such as those of the Royal Colleges on 'brain death' would be more appropriate and more helpful than legislation.

The medical contribution again stressed their distrust of law:-

"After all, there are times when a doctor does not officiously strive to keep alive, but it is better not to put into legislation what they are." (per Baroness Young). 19

"Teaching, training and experience are better than law and, for goodness sake let us keep the law out of the relationship between doctor and patient." (per Lord Amulree). 20

Similarly the effectiveness of present care in incurable diseases was affirmed. Lord Raglan in supporting the Bill made the point about present medical practice that:-

"If one accepts that good medical practice sometimes entails removing life-sustaining equipment one inevitably accepts that good medical practice sometimes entails killing." 21

The Christian contribution in the debate included the points by Lord Hunt of Fawley that "no Christian teaching urges us to prolong life at all costs²²" yet on the other hand in relation to the elderly:-

"Very few doctors, nurses or relatives want to assume or usurp the role of the Almighty and be personally responsible for the death of these old folk, however incurable, difficult, tiresome, crippled, incontinent, mentally confused, blind or deaf they become... At the end of their life they are dependent on others as they were at the beginning. I feel it is our duty to look after them and keep them as happy and comfortable as possible." 23

Indeed in the debate as a whole many contributions were claimed to be ^{made} on specifically Christian grounds. For example:-

"As a Christian and a Roman Catholic I oppose this Bill"
(Lady Kinloss), 24

"As a Christian, I cannot agree with the principle that it is within²⁵ our prerogative to decide when to die" (Baroness Macleod of Borne),

"As a Christian I firmly hold that life is God given." 26
(Lord Mowbray and Stourton).

Lord Soper however, supported the Bill:-

"Christian death has to be seen sub specie aeternitatis. It is not the end but the beginning. It has always struck me as peculiar how those who believe ardently in the next world take the utmost precautions to stay in this one."²⁷ "I believe that those of sound mind and judgement can, in advance, declare their intention of no longer causing suffering to those who are round about them, the intention being that they should relieve the doctor of the requirement to go on prescribing the kind of drugs which will just keep going the mechanism from which life in any real sense has long since departed." 28

These comments drew the response from Lord Mowbray that:-

"I do not, I must confess, subscribe to the philosophy expressed by the noble Lord, Lord Soper, that because Heaven is round the corner we are entitled to take short cuts to get there." 29

All three attempts at legislation were decisively rejected by the House of Lords.

4. Recent Theological Comment

An Anglican contribution to the debate on euthanasia can be seen in the pamphlet 'On Dying Well.' The chapter on 'Theological Considerations' shows much of the recent Anglican thought on the subject. It first examines the traditional approach of appealing to a body of moral teaching derived from Scriptures or Natural Law. It defines natural law as that aspect of divine eternal law which concerns human beings and which is capable of rational discovery. It points out that even on such a traditional basis such moral teaching has to be interpreted and clarified, and then applied to new problems and situations as they arise. There has been a reaction, it claims, away from such moral rules towards looking more at general principles of Christianity. Thus man's life can be seen as a gift and a calling from God. He holds it in trust and should respond to the demanding love of God. He has a divinely offered future and destiny.

The contribution continues this line of thought by examining the doctrine of God as creator. It then attempts to balance underlying assumptions of the doctrine with the call to exercise responsibly the freedom which the doctrine implies. Hence on the one hand there is the assumption that it is not for us to determine the bounds of our mortal life, yet this may be balanced by, say, responsible parenthood, or the use of drugs to control pain even at the risk of shortening life. How can such moral issues be determined? The authors appear to find an answer in a ^{variety} ~~variety~~ of the utilitarian argument. It is not one which I find consistent or theologically sound. Their argument goes like this. A respect for God's creation will seek to minimise destruction. However in an imperfect world some destruction is inevitable:-

"Destruction will be morally justifiable only if the good sought outweighs the evil done and only if that good cannot be secured in any other less destructive way." 30

Hence although animal life may be taken it is seldom justified to take human life:-

"Where there are other means available of exercising care and compassion towards a person in his dying and of relieving his ultimate distress, respect for God's creation and for the consequent value of human life in general would tell against the practice of euthanasia, or direct killing." 31

The authors themselves admit the extreme relative nature of the argument. More radical utilitarians could argue that such a doctrine of creation was too static, that man has freedom to create new values or that a greater good occurs if a miserable life is ended rather than allowed to linger on.

There is a useful examination of the theology of death -

"the Christian....accepts death as that signal occasion when he is finally to prove the love and power of God in Christ. He sees death as the last and crucial occasion for that testing of his faith when victory is to be won in Christ and his redemption is fulfilled." 32

However the dialectical approach continues:-

"It might be replied that the reality of our ultimate dependence upon God is not impugned by the responsible exercise of our freedom of choice, even when it comes to our dying... If my disintegration as a human being occurs before death, is there still any sense in speaking of my dying as either action or passion, self-determination or waiting on God?" 33

Against this it is pointed out that human life is more than just pleasure and pain, that suffering is part of being human and dying may be integrated into life, and also that euthanasia is incompatible with the caring and trust of human relationships.

As a final approach in the chapter the authors examine the basis of Jesus' moral teaching in the statement

"Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets."

and in the commandment to love your neighbour as yourself. The conclusion is not surprisingly reached that

"It is difficult in the face of these commandments to maintain either the moral position that euthanasia is always and absolutely forbidden, or the moral position that it is always permissible." 34

The chapter ends by admitting there may be extreme and unusual cases in which euthanasia is morally legitimate but there is no case for abandoning the simple moral principle that innocent human life is sacred and no case for altering the law.

"It is often expedient to forbid by law acts which are thought morally blameless. Such acts might include some cases of euthanasia, if, although they were held to be morally permissible, the making of them legal were likely to result in practice in the legalising of other acts as well which the law should be seeking to prevent." 35

The mixture of expediency, utilitarianism and relativism with the doctrines of creation and redemption provide a rather dazzling array of arguments. At the beginning of the chapter the natural right approach was criticised because of 'the variety of conclusions which may be drawn from such data'. The author's arguments have hardly improved on such a situation - although their findings in the end are of a similar nature. The variety of conclusions possible from many of their arguments does not inspire confidence as to a sound theological base. Interestingly their final base - that of 'a good and simple moral principle that innocent life is sacred' has returned full circle to the principle of natural law as revealed. Unless there is such a sound and overriding principle the case against euthanasia may go by default. However even under a utilitarian premiss the criteria employed should not be confined to those immediately affected. The possible wider effects on society should also be assessed - including loss of confidence in the medical profession and possible 'knock on' effects of a diminishing value to human life.

Arising from this a further cause for concern in the Anglican theological discussion can be seen in the recent speech of the Archbishop of Canterbury to the Royal Society of Medicine and widely reported in the press on December 14th 1976. While stressing the generally accepted principles that it is wrong to prolong a life at any cost and recommending a healthier attitude to dying and more specialised

facilities, Dr. Coggan, while stopping short of advocating euthanasia, came close to doing so by his use of the utilitarian argument:-

"The resources of the national exchequer are not limitless, and the prolongation of the life of one aged patient may in fact entail the deprivation of aid to others and even the shortening of their lives. Nor are beds in hospitals limitless, and the extension of the life of a terminal patient may necessarily involve the suffering or even death of those who, if speedily admitted to hospital treatment, may have many years of useful life ahead of them."

Dr. Coggan asserted that

"the doctor has a responsibility to his immediate patient, to other patients, to the Government and his fellow taxpayers who provided the resources to keep the health service going." 36

By adopting such crude utilitarian arguments Dr. Coggan is not only balancing a life against a life but is also balancing a life against social and political considerations. Bishop Ramsey's comment quoted above is pertinent:-

"euthanasia is likely to be particularly hazardous in the case of alleged social or (dare I say?) political desirability."

Even balancing a life against a life can hardly be sound theological reasoning for lowering the standards of treatment. Great dangers can be seen to flow from this argument in the case of respirator dependent non-responsive patients whose organs would be useful for transplant, let alone the impression given to elderly sick patients that they are better rid of so the money used in treating them could be used on younger, more viable patients. Dr. Coggan also laid great stress on leaving patients to doctors' skill and wisdom, and keeping the law out of this area. If doctors did take cognisance of social and political factors and did not thereby treat patients they would, in fact, run a strong risk of ~~prosecution~~^{action} for negligence. The B.M.A. have rightly rejected any social or political criteria:-

"Doctors, in their treatment of patients - whether they are in the terminal phase of disease or otherwise, should be guided by knowledge and conscience. They should not be expected to add to their judgement the words "How much does it cost?" 37

38

The Times in a leader commented:-

"Both medical ethics and clinical practice concerning the dying must be rooted in consideration of how best to care for the patient, to effect his recovery or prolong his useful life if that is possible; to ease his dying if it is not. That consideration should never become overlaid by judgements about the social utility, return on capital resources employed, or cost/benefit, of the alternative courses open to the patient's doctor. The resources at his disposal may be a matter of administrative policy. His use of them is not."

The Roman Catholic theological contribution dates from the allocution of Pius XII to a congress of anaesthetists on the 24th November 1957. This distinguished between 'ordinary' and 'extraordinary' medical or surgical procedures. Here immediately we are involved in casuistry. 'Ordinary' in this context does not mean what a medical man would regard as 'normal' treatment - it means whatever a patient can obtain and undergo without thereby imposing an excessive burden on himself or others. 'Extraordinary' treatment has been defined as

"whatever here and now is very costly or very unusual or very painful, or very difficult or very dangerous, or if the good effects that can be expected from its use are not proportionate to the difficulty and inconvenience that are entailed."

A man, according to this argument has a moral obligation to submit to 'ordinary' means of preserving life and health but is not bound to accept 'extraordinary' means unless he has some special obligation to stay alive. Such reasons have been described elsewhere as first that the patient is not spiritually prepared for death or that the patient's existence is of vital importance for the common good.

The above argument seems to be deficient on several counts. It clearly involves casuistry in distinguishing between 'ordinary' and 'extraordinary' treatments. The casuistry is based on moral not medical grounds - the doctor seems unreasonably excluded from the deliberations. Much of the reasoning is based on yet another variety of the utilitarian argument weighing the good effects against the difficulty and inconvenience entailed. However although the latter can be fairly accurately measured, the former cannot. Who can ^{assess} ~~tell~~ good effects in the future? Finally the papal allocution lays too much emphasis on the family of the patient. It does not say, in

the case of artificial respiration that it may be withdrawn if a doctor comes to the conclusion that permanent resuscitation is impossible. Rather it makes all turn on whether or not the continued use of the apparatus would impose an excessive burden on the family of the patient. Thus medical opinion on either option could be overruled. If the death of the patient is seen as a necessary means of relief to the family this quite plainly seems to be a form of euthanasia. So it can be concluded:-

"On the whole the distinction between 'ordinary' and 'extraordinary' treatment and treatment that is excessively burdensome does not seem to be the most helpful approach to the problem under consideration. It is more in keeping with the realities of the situation to regard artificial respiration, not as a distinct means of 'preserving life', but simply as the basis for a complex attempt at resuscitation. Then if the position is reached where the patient remains incurably unconscious and incapable of respiration and circulation without artificial aid, it may be said that the attempt at resuscitation has decisively failed, with the implication that the apparatus involved in the attempt may licitly be laid aside." 39

5. The role of the law in the debate on voluntary euthanasia

In many ways persistent attempts at legislation to ~~enable~~^{legalise} voluntary euthanasia have seriously weakened the standing and role of the law in the area of medical ethics. The Hippocratic Oath clearly maintains a duty upon the doctor to preserve life. Faced with attempts at permissive and potentially dangerous legislation the medical profession and others have strongly reacted against the law having any part whatsoever. The comment (supra) of Lord Amulree - a distinguished geriatrician - is typical of many throughout the debate:-

"Teaching, training and experience are better than law and, for goodness sake let us keep the law out of the relationship between doctor and patient!"

In part this is entirely understandable and any lawyer would agree with the conclusion of the working party that produced 'On Dying Well' that the law is a rather blunt instrument to be operating in this area. However that report does see a positive role for the law as it now stands.

The comment of Lord Amulree and those with similar views cannot be taken at their face value. The law can no more be kept out of the relationship between doctor and patient than it can out of any other contractual or statutory relationship. Doctors have no divine right to be above the law any more than any other profession, or the trade unions. A comparison with the position of the trades unions vis a vis the law is perhaps instructive. Whilst the trades unions operate within a framework of the law they have considerable freedom to negotiate within this framework. Attempts at strict legal regulation in the Industrial Relations Act¹⁹⁷¹ failed. There are some areas of life where strict legal regulation is either unhelpful or inappropriate. There must be a large area of discretion within the boundaries of a legal framework. The bargaining activities of the trade unions may be one such area, the professional duties of the medical profession another. In the case of the medical profession there must obviously be a wide discretion as to the most appropriate treatment for a particular patient. The relationship between doctor and patient is

founded on mutual trust. Increasing the opportunities of litigation would do much to undermine such trust.

However a framework of law there must be. This is not only to guard against criminal or negligent treatment by doctors or the encouragement of suicide by relatives, it is also in recognition of the important legal consequences that result from a death. Death clearly nullifies some contracts and ^{executes} ~~enacts~~ others. The moment or cause of death may be of relevance to ^{committed} ~~other~~ crimes (as for example in the Wilkinson case). Death is in many ways as important a legal event as it is a medical one. It is unfortunate if harmful attempts at legislation result in the law being seen as the villain of the piece and in a reaction towards the other direction of 'leaving it all to the doctors.'

The crucial area is, of course, what form this framework of law should take. It has been argued with ^{much authority} ~~great persuasion~~ that the existing framework of law is about right. It errs on the side of caution - we have seen that the strict letter of the law is modified in current practice to enable the administration of pain killing drugs which may shorten life, providing this is not the purpose of their administration. It clearly upholds the sanctity of life and the doctor's duty to attempt a cure or relieving treatment. It gives no right or liberty to the patient or his relatives to demand or request voluntary euthanasia either at the time of the distress or prospectively for the future should certain criteria exist. Rather the responsibility is clearly on the doctor to act in the patient's best interests. The common law has always maintained that this does not include deliberately ending the patient's life, while supporting the doctor in decisions in the patient's best interests which may incidentally shorten his life. In relation to the vast majority of situations in which the question of euthanasia might arise it is submitted that the existing common law is sufficient, developing if necessary by case law according to the principles mentioned above. This basic framework of law should be supported and defended both against those who would introduce permissive legislation and those who would abandon legal constraints altogether and leave the vital area of treatment of the dying devoid of legal consequences. An

unholy similarity between the practical effects of both extremes should not be allowed to alter the present legal framework or a reasoned extension of it through precedent. The contributions of the major theologians examined in this study will be seen to support such a position. 41

However, as has already been indicated in this chapter, there are particular difficulties which arise when the issue of euthanasia is related to advanced medical technology. ~~Statutory~~ ^{by statute} legislation to govern some of this technology has proved essential (eg. Human Tissue Act 1961). Old common law assumptions about the moment death occurs have been called into question. Thus the very existence of life in the patient may be in doubt - for example when crucial brain stem functions have ceased. Because of the complexity of the legal and moral problems in this area a separate chapter has been devoted to it.

CHAPTER 9 - NOTESVoluntary Euthanasia - Some legal, medical and theological considerations

1. Chancellor E. Garth Moore's 'Legal Considerations' in the report 'On Dying Well', Church Information Office (1975) pg.57. Other parts of this section are indebted to Chancellor Moore.
2. Ibid. pg.58.
3. The guidelines on 'brain death' produced by the Royal Medical Colleges are quoted in the British Medical Journal Nov. 1976 pg.1157, and the Lancet Vol.III 1976 pg.1064.
4. Parliamentary Debates (House of Lords), Fifth Series Vol. 103. at Col.468.
5. Ibid. Col.481. for both quotations.
6. Ibid. Col.479.
7. Ibid. Col.480.
8. Ibid. Col.486f.
9. This was in the form of a motion on voluntary euthanasia - cf. Parliamentary Debates (House of Lords) Fifth Series Vol.169 Col.552f.
10. Ibid. Col.553.
11. Ibid. Col.562f.
12. For the debate on this Bill cf. Parliamentary Debates (House of Lords), Hansard Fifth Series Vol. 300 Col.1143f.
13. Ibid. Col.1167.
14. Ibid. Col.1179f.
15. Ibid. Col.1187.
16. Ibid. Col.1194.
17. For the debate on this Bill cf. Parliamentary Debates (House of Lords), Hansard Vol.368 Col.196-214, 226-302.
18. Ibid. Col.204f.
19. Ibid. Col.237.
20. Ibid. Col.240.
21. Ibid. Col.242, 243.
22. Ibid. Col.253.

23. Ibid. Col.254, 255.
24. Ibid. Col.258.
25. Ibid. Col.263.
26. Ibid. Col.272.
27. Ibid. Col.262.
28. Ibid. Col.263.
29. Ibid. Col.272.
30. 'On Dying Well', Church Information Office (1975) pg.17f.
31. Ibid. pg.18.
32. Ibid. pg.19, being a quotation from 'Ought Suicide to be a Crime?' London, Church Information Office (1959), pg.28.
33. 'On Dying Well' (supra) pg.20f.
34. Ibid. pg.23.
35. Ibid. pg.24.
36. The Archbishop could gain support in his strictly utilitarian arguments from the statistical evidence of the increasing proportion of the elderly within society caused by better medical care and a declining birth rate - cf. Central Statistical Office Annual Abstracts 1974 onwards, some of which are quoted in the notes to the Chapter on abortion in this thesis.
37. This was a comment of Sir Rodney Smith, president of the Royal College of Surgeons, reported in 'The Daily Mail' Tue. Dec.14th 1976.
38. Dec.14th. 1976.
39. Quoted by G.B. Bentley in 'Decisions about Life and Death', Church Information Office (1965) Appendix 3. This section is also based on the contribution of Clarence Blonquist in Appendix 4 of the same pamphlet.
40. cf. the inquest on Carol Wilkinson (Feb. 22nd 1978). This case is fully discussed on pg.246 of this thesis.
41. cf. pg.246f of this thesis.

CHAPTER 10

LIFE AND DEATH

LIFE AND DEATH - SOME LEGAL PROBLEMS CONNECTED WITH ADVANCED
MEDICAL TECHNOLOGY

The advances in medical technology over the last twenty years are so considerable that they ~~evoked~~^{cause} problems far beyond the domestic sphere of the medical profession. Some of the issues raised necessitate comments or clarification from the lawyer, the theologian and the ethical humanist. Academically these issues are exciting because of their inter-disciplinary nature but they are also of supreme practical relevance dealing as they do with man's greatest gift and his greatest surrender.

Because of the complexity of the issues and of their inter-disciplinary nature there is a constant need for clear and careful definitions. I wish therefore to attempt to distinguish medically between different categories of cases and then to spell out the legal responsibilities ~~owing~~^{towards} to each. At one end of the scale there is the doctor's clear duty to his patient. The patient is entitled to rely on the doctor's professional competence for treatment in his best interests. If the doctor intentionally or negligently falls short of this standard a criminal, civil and disciplinary action may be brought against him. The doctor is criminally liable if he hastens the death of the patient following the patient's own wishes. Voluntary euthanasia is still illegal despite attempts of some humanists to the contrary. The doctor is, however, quite entitled to administer drugs to a patient to reduce pain, although those drugs may incidentally shorten his life. The purpose of the drugs is in the patient's interest in reducing pain - they are not intended to shorten life, although this may be their effect.

So far the relationship between doctor and patient is quite clear. It has assumed that the patient, although sick, is quite clearly alive and possesses the qualities of a human life - thought, feeling, expression etc. There is quite clearly a new situation where the patient cannot automatically be considered as a human person. Let us take a hypothetical example:-

"A man aged about fifty lies in a coma. He has been in this condition for about six months, without sight, hearing, understanding or capacity for voluntary movement or response - without apparent awareness of being at all. The vital functions of the heart, of breathing and of digestion continue. So far as is known, he will never regain consciousness, never recover: there is no known medical remedy for his condition. He is kept as he is by constant and skilled nursing care: he is fed artificially, kept warm and clean, and is moved as often as is necessary for his well-being. Withdrawal of this essential care would result in his death, as surely as if he were given a lethal dose of poison." 1

Such a man is quite clearly alive and independent of any medical technology. His life cannot be said to be human in the normally accepted sense - but it is an obvious life. This being so there is a clear legal duty for everyday care and attention - however demanding this may be. Again doctors and nurses are liable criminally and civilly for intentional or negligent omissions. However, the situation is changed if anything more than nursing care is required. Suppose our example is attacked by pneumonia. This may well end his life. The doctor has a possible remedy in antibiotics. The law has left this decision to the doctor's medical judgement. It is most unlikely that he would be liable in negligence for not administering the antibiotic. Not to administer is undoubtedly the standard medical practice in such cases. The law while recognising the value of life does not impose upon the doctor in such a situation the duty to strive officiously to keep ^{the patient} alive, ~~the patient~~. The patient is entitled to ordinary nursing care and no more.

We now come to the most complex area of doctor/patient relationship. There are patients who in addition to being deeply unconscious are also dependent upon a respirator for breathing. We must at once distinguish these cases from the case, say, of a polio patient who is dependent upon a respirator but otherwise is a fully conscious and functioning human being. The case in question is both deeply unconscious and also incapable of functioning without elaborate machinery and constant skilled vigilance. There seem to be three reasons why a person might be attached to a respirator when in an apparently irreversible position of unconsciousness. The first is when it is known that the position is reversible. The second is when the doctor wishes to give himself time to find out whether the position is reversible or not. The third is when the possibility of organ trans-

plantation is involved. The organ of the donor must naturally still be capable of functioning if the recipient is to benefit from it. The whole area of organ transplantation is of vital significance and we will see that many moral and legal problems are raised by it. However it is plain both in medical ethics and in law (The Human Tissue Act 1961) that the donor must be pronounced dead before an organ can be removed for transplantation. The difficulty arises over the criteria for death. Naturally this is of vital importance not only in possible transplant situations but also where there is no question of a transplant. Again medical ethics demand that the machine is not switched off until the patient is pronounced dead. There is no legal obligation to keep the patient in a state of suspended death for years, possibly decades - nor are there many humanists or theologians who would support such a travesty. The difficulty in both cases is in what constitutes death. Not only are the above medical consequences at stake. Legal consequences may also be at stake. The case of Potter (The Times, 26 July 1963) illustrates this.

A useful summary of this case is given in 'Decisions about Life and Death':-

"Mr. Potter was admitted to hospital after he had received four fractures of the skull and extensive brain damage from a fall in a street fight. On June 16, 1963, fourteen hours after admission he stopped breathing. 'Artificial respiration was then begun by machine so that one of his kidneys could later be taken for transplanting in another man. After twenty hours of artificial respiration a kidney was taken from the body on June 17. The respirator was then turned off and there was no spontaneous breathing or circulation.' At what moment did he die? When the hopeless position was reached on June 16, or when the respirator was switched off on June 17?

At inquest in July, a doctor attached to the hospital gave his opinion that the man had virtually died when he stopped breathing on June 16, though from a legal point of view he might have died when circulation ceased and the heart stopped beating on the 17th - ie. when the respirator was switched off. A pathologist testified that death was due to head injuries, and that the removal of the kidney played no part in it. The consultant neurologist who obtained the wife's consent to the removal of the kidney said that he was told the patient was technically dead. The coroner, who had also given his consent in accordance with the Human Tissue Act 1961, S1(5), had supposed when he did so that the kidney would be taken after the man's death; though he is reported also to have said that he thought the patient was alive when the kidney was removed, although there was no hope for him, but he did not regard the doctors as having committed any offence.

The jury on the evidence, returned a verdict of manslaughter against the man said to have been involved with the patient in the fight; and in the Magistrates Court this man was afterwards convicted on a reduced charge of common assault." 2

This case illustrates well the state of confusion in the early 60's. It also illustrates the legal complexities that may arise unless the moment of death is clearly determined. Similar legal questions that could arise are mentioned in an article^{published} shortly after this case - for example 'Did P. a legatee survive a testator?' 'Did P. a joint tenant survive his co-tenant?' 'Did P. a beneficiary with a contingent interest survive until he attained a vested interest?' 3

Much work has been done since this time on a new definition of death - the old one based on heart and circulation is plainly inadequate. The new concept employed is that of 'brain death'. The first comprehensive attempt at defining this came from America and is known as the Harvard Criteria. In Britain a statement was issued on the 11th October 1976 by the Conference of the Medical Royal Colleges and Faculties on the diagnosis of brain death. This stated:-

"It is agreed that permanent functional death of the brain stem constitutes brain death and that once this has occurred further artificial support is fruitless and should be withdrawn." 4

It then lays down stringent medical criteria to establish that there is irremediable structural brain damage. These include a series of clinical tests, particularly of brain stem function - eg. the pupils are fixed in diameter and do not respond to sharp changes in intensity of incident light, no corneal reflex, no motor responses etc., no respiration when the patient is disconnected from the mechanical ventilator for a sufficient length of time. Experienced clinicians are to make these tests - only when the diagnosis is in doubt is it necessary to consult a neurologist or neurosurgeon. Before artificial support is withdrawn there must be the consent either of a consultant who is in charge of the case and one other doctor or in the absence of a consultant his deputy, who should have been registered^{for} five years or more and who should have had adequate experience in the cure of such cases plus one other doctor.

Reaction to these clear criteria have been varied. The British Medical Journal is strong in their support:-

"It sets out clear guidelines for the diagnosis of death, including a recommendation that the decision to withdraw artificial support should be taken by two doctors. There is a consensus of opinion throughout the western world on the diagnosis of brain death. Perhaps we may now see an end to uninformed comment on this topic." 5

However The Lancet is more equivocal. While recognising the need for criteria it is not happy about some of the safeguards. Because of the importance of the individual doctor's opinion it comments:-

"Doubts will still be raised about the wisdom of nominating as the deputy for an absent consultant a doctor who may have been registered for no more than five years, even with the proviso that he shall have had 'adequate experience.'" .

In an important passage it also raises the question of organ transplantation:-

"As the law of Britain stands a person is dead when a doctor states that he is dead - there is no indication of how a doctor should reach that conclusion. We are now moving towards a diagnosis of death in patients whose hearts are still beating. In contrast to the old criteria of death - persistent absence of respiration and circulation, with fragmentation of blood in retinal veins - the new criteria depend heavily on the opinion of the doctor in charge of the patient with his knowledge of all the circumstances.

Among transplant surgeons the beating-heart donor will be greatly in demand; and at times those who care for brain-damaged patients may find themselves under pressure to diagnose brain death. But, if public confidence is to be sustained the existence, say, of a well matched organ recipient, in the same hospital and in dire need, is not one of the circumstances that should be taken into account. In the diagnosis of brain death the doctor's loyalties must be undivided - and conspicuously so." 6

Supporters of the 'brain death' criteria would, however, no doubt claim that the definition is as objective as possible in the circumstances. In a borderline case where there is some slight reaction to the stimuli, the patient cannot be pronounced brain dead if the guidelines are followed and the patient's life cannot be valued against that of a potential recipient of one of his organs. He is entitled to be kept on the respirator and given ordinary nursing care until such time as brain death occurs.

A more radical challenge to the guidelines can be seen in an article by Adrienne Van Till-d'Aulnis de Bourouill entitled 'How Dead Can You be?'⁷ Although this was written in 1975 before the Royal Colleges' guidelines it criticises strongly the Harvard approach which heavily influenced the British guidelines in methodology and content. The author's thesis is that juridicial acceptance of the doctor's dilemma makes cessation of artificial respiration lawful, provided that the patient had validly refused this treatment or is irreversibly comatose and also respirator-dependent. This, however, makes it unnecessary to redefine death in terms of coma in order to solve legal and practical problems. Such a redefinition is against current usage and is the first step on a slippery road. The author cites the case reported in The Times on 16th March 1974 of a Birmingham 64 year old pedestrian who was fatally injured. After he had been declared dead artificial respiration was continued in order to preserve his organs for transplantation. While his kidneys were being removed he made movements. The anaesthetist turned off the respirator, the patient coughed, swallowed and began to breathe. He was returned to intensive care and died 15 hours later. His kidneys were then removed. The author believes that someone who is nearly dead is morally, legally and medically still considered to be alive. For brain death all brain function, that is to say all function of all neurones in the whole brain, must have ceased completely and irreversibly:-

"To accept an irreversible but less than total loss of brain function as a criterion for death is to accept an arbitrary interpretable criterion for death which can vary with personal opinion and with present day practical requirements. The fact that such a variable criterion provides an easy and inexpensive solution for many practical problems does not make it ethically or juridicially acceptable."

The author believes the empirical method of testing, such as used in the Harvard criteria (and now in the Royal Colleges) is not conclusive:-

"No response does not prove unawareness of the stimulus. As long as intact neurones with synapses exist in the brain, the receipt, passage and reaction of stimuli is not with certainty impossible, even where no response is outwardly detectable."

The author prefers the Austro-German diagnosis of brain death based

on an absence of intracranial blood circulation. In the Royal Colleges' report this was held to be not required. Clearly we are here in the realms of technical medicine. A layman is not entitled to pass judgement. If, however, there are more stringent criteria such as the author seems to suggest, he is entitled to ask for further comment. The author, interestingly, proposes both a rigid definition of death as well as legal immunity for withdrawal of artificial support in clearly specified cases:-

"To accept a differentiation in ethics is a better solution than to allow doctors to redefine death in terms of coma."

This would give legal status to irreversibly comatose individuals who would still be alive under the author's definition until the respirator was turned off. It would also stop the risk of being pronounced dead and used as an organ donor while possibly still having some awareness. The Harvard criteria would be sufficient justification for stopping the respirator lawfully. But only then, when all brain neurones had lost their structure could transplantation take place.

Despite this debate it is now clear that the Royal Colleges' guidelines on 'brain death' are recognised as valid in law. This was established by the verdict of a Bradford inquest on February 22nd. 1978 in the case of Carol Wilkinson. Carol Wilkinson was the victim of a savage sexual assault and found with severe head injuries. Shortly after her arrival in hospital she was put on a ventilator to assist her breathing. The Royal Colleges' guidelines on brain death were applied by consultant physicians. They pronounced her as brain dead and withdrew the ventilator. The inquest had to decide whether Carol's death was directly attributable to her attacker, or whether it was caused by the removal of the ventilator. The jury decided that she was unlawfully killed by a person or persons unknown and died from bruising of the brain and a fracture of the skull. They thereby agreed with the doctors that she was already dead when the ventilator was removed. It seems unlikely that such a ruling would be overturned at a later date by a higher court.

The whole question of the relationship to the law of murder of

withholding or withdrawing life-support measures has been dealt with in a recent article by P.D.G. Skegg.⁸ With regard to withholding such measures he comments:-

"There is now general agreement that a doctor need not provide, or continue to provide, artificial ventilation for a patient whose brain is damaged to an extent which prevents a return to consciousness."⁹

It is unlikely that any statutory duty would apply and:-

"As the doctor will not be in breach of his duty of care under the tort of negligence in omitting to provide artificial ventilation where a patient is irreversibly comatose, there should not be any question of his being in breach of any duty imposed by the law of homicide."¹⁰

The situation with regard to the withdrawal of artificial ventilation is somewhat more complicated according to Skegg. He discusses whether such a withdrawal constitutes an 'act' or an 'omission' - a distinction of fundamental importance within the law of homicide.

However, he makes the point that even if such a withdrawal is regarded as an 'act' within the law of homicide, this does not necessarily mean that liability for murder would descend upon the doctor. It is possible to adopt and develop Lord Devlin's view that "proper medical treatment consequent upon illness and injury play no part in legal causation." It is possible to utilise the doctrine of necessity. However, a more likely course is that indicated in the Wilkinson case discussed above - namely that the patient is already dead when the machine is switched off. Such an approach seems far preferable to another possibility discussed by Skegg - that of fitting a device to life support machines to ensure that the termination of the support would be an 'omission' in law rather than an 'act'.

Interestingly in America, far from considering the criteria for 'brain death' as an accepted norm the case of Re Quinlan 79 A.L.R. 3d 205 in effect dismissed them as too stringent. Here Karen Quinlan, although comatose and described as never able to be restored to cognitive or sapient life, quite clearly did not fulfil the criteria for 'brain death' having shown some clinical response to stimuli. Hence the

doctors refused to remove her from the ventilator. Her father requested that because of her condition he be appointed as guardian and receive authorisation for the termination of the extraordinary medical means used in sustaining her life. In granting such a right to the father it was held that if the attending physicians concluded there was no reasonable possibility of her ever emerging from her comatose condition the life support apparatus should be discontinued after necessary consultations. No civil or criminal liability would ensue. During his judgement Hughes C.J. did not accept that the 'brain death' criteria were standard practice in determining the removal of life support systems. He commented:-

"Humane decisions against resuscitative or maintenance therapy are frequently a recognised de facto response in the medical world to the irreversible, terminal, pain-ridden patient, especially with familial consent. And these cases, of course, fall far short of 'brain death.'"

His decision was supported by the Roman Catholic Church according to the principle of double effect. In this sense it was distinguished from euthanasia.

It is submitted that Re Quinlan goes far beyond the present position in the United Kingdom, the brain-death principles having been accepted in the Wilkinson inquest case. Despite the dramatic judicial order to override medical judgement in Re Quinlan Karen Quinlan is still alive. When her ventilator was removed she began breathing of her own accord.

In the Wilkinson case there was no question of transplants being involved. We have already commented that this is vitally connected with the question of brain death and have enumerated it as one of the possible reasons for being placed on a ventilator. We will now consider in more detail the law as it relates to transplants.

The key statute is the Human Tissue Act 1961. This made it legally possible for the first time for doctors to use every part of the deceased person's body for therapeutic purposes as long as the specified criteria have been met. The most straightforward situation is

where the deceased made a formal request that organs be used from his body. By S.1(1) this must be a request in writing or orally in the presence of two or more witnesses during his last illness. Such consent can subsequently be withdrawn. Relatives have no legal right to veto such a request unless they are in the position of a person lawfully in possession of the body (this will normally be the hospital if the patient dies in hospital). If there has been no such request the provisions of S.1(2) operate. These entitle the person lawfully in possession of the body to transplant material providing a) there is no reason to believe that the deceased expressed an objection and b) the surviving spouse or any surviving relatives have given their consent. The ^A Act specifies a positive duty to make reasonable inquiry. The consent of the coroner is only required where there is reason to believe that an inquest may be required. Inquests are required when there has been a violent or unnatural death or a sudden death of unknown cause (Coroners Act 1887 S.3/1). A post mortem may be ordered (Coroners Amendment Act 1926 S.21). Hence in many motoring accidents the coroner's consent would be required. There is some evidence that attitudes of individual coroners vary.¹¹

The Human Tissue Act has been strongly criticised from various quarters. Section 1(2) dealing with objections has been described as vague. It is not always clear who is in lawful possession, nor what reasonable enquiry is, nor how far any surviving relative extends. It has been held by the MacLennon Committee (1969) and by the British Transplantation Society (1975) that the provisions for contracting-in prejudice the living but sick in favour of the dead. In particular the British Transplantation Society propose an amendment with the words 'in the time available' which would make any real enquiry as to the deceased's wishes and the wishes of the relatives impossible. However criticism from the opposite standpoint is as vocal:-

"There is still a substantial body of public opinion, particularly among those who hold particular religious beliefs, that the law should be written so as to give proper opportunity for the objections of those opposed to the removal of organs for transplant to be sought out and respected. This being so it is all the more important to determine whether the existing law not only provides this opportunity but also provides appropriate legal redress if it is denied." 12

The latter point about lack of legal redress has been made in several articles.¹³ It was first made by the New Zealand barrister P.D.G. Skegg.¹⁴ He questions ~~on what~~ ^{under which} legal basis liability would arise if cadaveric transplant material was not removed in accordance with the Human Tissue Act 1961. After careful analysis he claims that there are no recognised torts which would normally be applicable. Neither does the Act specifically invoke any criminal sanctions. It does not expressly create an offence. The possibility of the common law offence of disobeying a statute seems to be ruled out by S.1(8) which provides that nothing in the section shall be construed as rendering unlawful any dealing with a body which is lawful apart from the Act. Mr. Skegg after analysis cannot ~~extend~~ ^{interpret extensively} any other crime to cover this situation. On the contrary a possible justification for removal of material might be founded on the doctrine of necessity:-

"The safety of human lives belongs to a different scale of values than the safety of property....the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property." Southport Corp v Esso Petroleum [1956] AC 218, 228, per Devlin J.

In a further article¹⁵ Mr. Skegg discusses in more detail S.1 of the Human Tissue Act. He points out that a hospital is lawfully in possession of a corpse which lies in a hospital until such time as the corpse is claimed by the person with the right to immediate possession of it. He again claims that even in the absence of a donor card it is sometimes lawful for parts of a corpse to be removed without the spouse or relatives being consulted.¹⁶ That the hospital is in lawful possession of a body lying within it was made clear in a memorandum on the Act issued by the Ministry of Health. Although in the late 60's the Medical Defence Union took a contrary view the government has reasserted its position in a recent circular. This is in accord with the vast majority of legal opinion. Mr. Skegg also examines how far the definition of 'relatives' should extend. The original memorandum suggested this in its widest sense whereas the recent government circular is more equivocal. He suggests that if resources of time and manpower are scarce no enquiry might be reasonable and practical and hence in accord with the Act.

While acknowledging the significant loopholes Mr. Skegg has exposed in the Human Tissue Act he is taken issue with by another barrister - Ian McColl Kennedy.¹⁷ Mr. Kennedy suggests a possible tort for unauthorised removal of material in the tort of negligently causing nervous shock. If the doctor could have ^{reasonably} foreseen such shock he may well be liable. The doctor would owe a duty to the plaintiff where he knew there were relatives but did not contact them - it would probably be otherwise if the person complaining was not known or could not easily have become known (Bourhill v Young [1943] AC92). The damage suffered must not be too remote. No action would lie for mere grief and sorrow. There must be some 'recognisable psychiatric illness.' (Hinz v Berry [1970] 1A.E.R. 1074) - although of course anxiety and depression can be psychiatric. He suggests another possible tort in the tort of breach of statutory duty. Here the duty is imposed in S.1(2). The person to whom the duty is owed may bring an action. The harm suffered must be of the kind the statute was intended to prevent - it could be held that S.1(2) was designed to prevent nervous shock. If the breach of duty caused the injury an action may well succeed. In respect of criminal liability Mr. Kennedy believes Mr. Skegg has passed over the common law offence of disobeying a statute too lightly. He cites the case of R v Lennox-Wright [1973] C.L.R. 529. Here D. who had failed medical exams abroad gained admission to an ophthalmic department by forged documents. He removed eyes from a cadaver for further use in another hospital. He was charged under S.1(4) of the Human Tissue Act 1961 with not being a registered medical practitioner. It was argued that the Act was regulatory and created no offence. The Court held a) that all acts or omissions against statute are misdemeanours at common law punishable on indictment b) The common law offence of disobeying a statute here applied. Kennedy admits that this case may be criticised on the basis of R v Hall (1891) 1Q.B. On balance, however, Kennedy thinks that the Lennox-Wright case applies also to breaches of S.1(2). However the most telling point that Kennedy makes is as follows:-

"What has emerged, it is hoped, is how extraordinarily difficult it may be actually to guarantee that the fundamental provisions of the Human Tissue Act are observed in practice. Such a conclusion should not any longer be allowed to pass unnoticed by those charged with making and changing the law."

Similar conclusions were reached in a White Paper on the Human Tissue Act.¹⁸ In stressing the need for public confidence it commented:-

"It is axiomatic that the public should be able to feel every confidence that the traditional ethical standards enjoining the medical and nursing professions to treat their patients to the best of their abilities are maintained. The trust required by the doctor-patient relationship must remain a stable element in the situation of change brought about by the development of transplantation." 19

It recognised the uncertainties of the present legal position and recommended clear and definite safeguards - eg. that death should be certified independently of the transplant team. The majority proposed a limited amendment of the Human Tissue Act to clarify that the 'person lawfully in possession' is the hospital authority during the time between death and when the next of kin or executors claim the body, to define the persons who ought to be consulted and to define the minimum procedure of enquiry. Of a more contentious nature was the majority proposal for the system of 'contracting out' whereby surgeons should be able to remove organs unless there were definite indications that the deceased had objected.

Conclusions

The complexities of advanced medical technology are matched by the moral and legal complexities to which they give rise. Here the legal complexities have been discussed - these are frequently a reflection of the ethical difficulties.

The definition of death still provokes disagreement, although there is now a great degree of uniformity amongst the medical profession in this country. It is inextricably bound up with the care owing to the patient, his legal status, and the possibility of organ transplantation. The Human Tissue Act 1961 is plainly inadequate as anything other than regulatory. It is both ambiguous and lacks effective sanctions. If doctor/patient confidence is to be maintained in areas of advanced medical technology there is a need for the law to provide a clear framework within which the doctor is free to exercise his professional skill and judgement. This must reflect a deeply moral view of the value of both life and death. The second part of this study will reveal the great wealth of insight the Christian contribution can make.

CHAPTER 10 - NOTESLife and Death - Some legal problems connected with advanced medical technology

1. This example is quoted in 'Decisions about Life and Death', Church Information Office (1965) pg.14.
2. Ibid. pg.36.
3. An editorial entitled 'When is the moment of Death?' in Medicine, Science & Law Vol.4 pg.77.
4. Quoted and commented upon in British Medical Journal Nov.1976. pg.1157 and the Lancet Vol. II for 1976. pg.1064.
5. British Medical Journal (supra note 4).
6. The Lancet (supra note 4).
7. Adrienne Van Till-d'Aulnis de Bour^oquill 'How Dead can you be?' in Medicine, Science & Law Vol.15 pg.133f.
8. P.D.G. Skegg 'Termination of Life Support Measures and the Law of Murder'. July 1978. M.L.R. 423f.
9. Ibid. at pg.425.
10. Ibid. at pg.427.
11. cf. David Lanham 'Transplants and the Human Tissue Act 1961' in Medicine, Science & Law. Vol.11. pg.16
12. Ian McColl Kennedy, 'Further thoughts on Liability for Non-Observance of the Provisions of the Human Tissue Act 1961'. Medicine, Science & Law. Vol.16. pg.49
13. cf. P.D.G. Skegg, 'Liability for Unauthorised Removal of Cadaveric Transplant Material'. Medicine, Science & Law. Vol.14 pg.53. P.D.G. Skegg, 'The Interpretation of the Human Tissue Act 1961'. Medicine, Science & Law. Vol.16 pg.193f. and Kennedy (note 12).
14. Skegg (supra). Medicine, Science & Law. Vol.14 pg.53.
15. Skegg (supra). Medicine, Science & Law. Vol.16. pg.193.
16. I have been assured by a hospital doctor that it is common practice at post mortems for organs to be removed and retained for future scientific research and study. Relatives are not consulted. When a person has been pronounced 'brain dead' and tissues are taken out, although the heart is still beating, it could perhaps be argued that this is but an extension of present post mortem practice as the person is already technically dead under present definitions.
17. Kennedy (supra). Medicine, Science & Law. Vol.16.

18. 'Advice from the Advisory Group on Transplantation Problems on the Question of Amending the Human Tissue Act 1961'
Cmd.4106. H.C. 1968-69.
19. Ibid. para.2.

PART III

THE APPLICATION OF THE THEOLOGICAL CONCEPTS
TO THE PROBLEMS OF ENGLISH LAW.

CHAPTER 11APPLICATIONS

THE APPLICATION OF THE FOREGOING THEOLOGICAL CONCEPTS TO PRESENT
DAY ENGLISH LAW

Implied throughout the earlier part of this study has been the assumption that theologising on the concept of Justice bears some relevance to the practicalities of English Law, especially where it legislates on ethical or social issues of great moment to our society. Whereas such an implication would be viewed as normal in the Middle Ages, in our present pluralistic society with its apparent dramatic decline in religious belief and certainly its decline in religious observance, such an implication cannot be allowed today without a justification. Certainly most practical lawyers and probably most students of Jurisprudence view theology as a specialist domain for the theologian. It is for the benefit of those who believe in God - an esoteric discipline far removed from their practical concerns.

This is, indeed, one of the major points at issue in the famous debate between Hart and Devlin over the enforcement of morals, many of which have been derived from the precepts of the Christian religion. That debate has been summarized and evaluated by Mitchell in 'Law, Morality and Religion in a Secular Society'. Mitchell is unable to agree with Devlin's premiss that the whole of a country's morality is dependent upon the Christian religion. However, while agreeing with Hart that there are certain moral principles and virtues which have been universally accepted and do not depend for their validity upon religious belief, Mitchell asks the question 'What part ought religion to play in the formation of a critical morality?'. Unlike those who relegate religion into the private sphere, Mitchell maintains that a religious interpretation may illuminate the moral platitudes that are accepted, *leading* to a deeper understanding of human nature. The Christian religion may go beyond the morality of platitudes by providing insights into human nature not available to the 'natural man' and so give rise to moral insights which are not available to him either.

If this conclusion is valid it would, therefore, not be surprising if within this study reformist attempts not based on a Christian concept of Justice were likely to be seen as deficient in some respect from a

Christian standpoint. However, before we can attempt any critical conclusions it is necessary first to point out in what way there is a discernible Christian theology of Justice worked out in twentieth century terms by the theologians examined within this study. Only then can we illustrate its practical application to law.

It is for this reason that the theologians studied in the first part of this study have deliberately been drawn from widely differing strands of the Christian community. If significant common elements can be found from different confessional standpoints, then it is fair to talk about a Christian concept of Justice in a modern setting and it is reasonable to try to apply conclusions derived from such a basis.

The three-fold nature of the theological exercise must, however, be kept in mind. The first and primary level is that of abstract theologising on the nature of Justice. This itself may well demonstrate significant theological developments. The second level concerns itself with precepts for man's guidance in practical living and is derived from the first level. The third level undertaken in this study seeks to apply these precepts to particular legal problems faced by a particular legal system at a defined point in time. Such an attempt would clearly be discredited should a disparity of conclusions be reached in the theology examined. What factors then, can we discern in common?

The first common factor relates to the primary level on the nature of Justice itself. All the theologians studied see Justice as emanating from God and hence ultimately an absolute value which is inseparable from the Deity. For BARTH¹ this is seen in terms of the Word of God. This has been revealed in Christ, is revealed in holy writ, and is being revealed through his Holy Spirit. Justice therefore comes from the very nature, or personality of God and must be discerned in concrete terms. For TILLICH² this is seen in terms of the Divine 'Ground of our Being'. Justice is ontological - part of the creative possibilities of meaningful life. ^{if it is} ~~As~~ ontological it cannot be separated from other ontological characteristics of the 'Ground of our Being' or God - namely love and power. All three ontologies illuminate each other.

For MARITAIN³ the highest form of Justice is that which descends from the Divine reason. This corresponds to the eternal Divine law in the Thomist position. In its purity it cannot be fully understood in human terminology, but all human Justice is a striving towards this ideal. MOLTSMANN⁴ takes his standpoint not so much from ontology as from eschatology - the end of all things. Justice is the eschatological revelation of God by expressing his eternal purposes for mankind. It is both ultimate aim as well as the ground of existence.

The second common factor relates to our strivings for an expression of this Divine Justice in our human affairs. Justice is seen as a dynamic concept to which our strivings, though inadequate, are vital. For BARTH Justice in human terms cannot be reached through traditional formulations of natural right because of the corrupt nature of human reason through sinfulness. Yet neither is Divine Justice totally separated from Human Justice as seen by his opposition to the 'Two-World' doctrine. Rather the Word of God can be discerned in a concrete situation and if discerned correctly enlightens the whole of the natural order and provides a prophetic imperative. This is the task of the Christian community (to be "a wholesome disturbing presence") however difficult it may be. For TILLICH man is partly estranged from his actual being. He needs positive law. Just formulations of this can minimise his estrangement, but human Justice whether related to law or not cannot be without ambiguities. These he lists and examines. MARITAIN follows the Thomist position that man can discover the natural right by ascertaining God's will through reason as well as possessing revealed law. In examining ontological and gnoseological elements he develops a progressive theory on the nature of insight and knowledge. For Maritain natural right presumes human rights which it is the Christian duty to formulate and refine while recognising Divine Justice is transcendent. MOLTSMANN expresses this paradox between human and Divine Justice in terms of the two strands of his theology - that of Hope, and the Cross. The life, death and resurrection of Christ are as a cosmic parable on the nature of the human predicament and the loving purposes of God. Justice can be worked out in concrete terms by relating eschatology to the present - ie. in the light of God's eternal purposes what is the just position now? Human sin evidenced by the Cross is ever likely to cloud this reasoning.

From this striving to express Divine Justice in human affairs positive guidelines or precepts can be formulated in relation to practical ethical and legal issues. All of the theologians studied, to a greater or lesser extent, have applied themselves to this process. Another indication of a fundamentally common methodology can be seen in the extent to which they agree on a specific moral issue. If there is clear disagreement on a moral issue this indicates either a fundamental difference in methodology or a defective application from a fundamentally common methodology.

Whatever the degree of uniformity on precepts or guidelines we still have before us the final stage of this process - the application to a concrete set of legal problems at a specified point in time. On some occasions the practical guidelines worked out by the theologians studied may fit very well into the modern situation. On others they may not be directly apposite - in which case the fundamental principles and methodology must be resorted to. Yet whatever the conclusions reached in human terms the theological method of pursuing Jurisprudence postulates that we have never reached the state of ultimate Justice until we fully know God. Hence our conclusions always allow the possibility of a more perfect expression of Justice - subjecting all human endeavours to scrutiny and criticism, ie. the theological approach is essentially dynamic.

As a necessary preliminary to applying the theological concepts studied to present-day English law, it is of value to ask the questions 'To what extent are theological concepts of Justice still influential in the formulation of English law?' and 'If they are still influential are they compatible with the theological concepts here examined?'

Bearing in mind what has been said about the status of theology in present-day thought it might be thought prima facie that any significant influence on the formulation of law is unlikely. However, while in overt terms this may well be true, neither agnostic nor atheist can ignore the historical fact that Christianity and its teaching has had a profound effect on English culture, institutions and moral values. . It is this Christian heritage that Devlin¹ relies on so heavily in his defence of the enforcement of those morals that have become historical

'norms' in our society. He holds them to be part of the very fabric of society itself, and without which society is at serious risk of disintegration. Such residual Christian concepts are, of course, unlikely in terms of theology to be a profound or up-to-date analysis such as we have been examining in this study from professional theologians. Nevertheless we should not forget the influence of such basic concepts.

More consciously the Christian voice in the legislative process is heard through the institutional Churches - their commissions, boards and deliberative bodies, through independent pressure groups which may have a strong Christian motivation and through individual legislators who may have a passionate desire to apply their faith. In particular the Church of England has a 'built-in' presence in the House of Lords in the form of both Archbishops and a number of Bishops. The influence of professional theologians may be seen through all of these, but perhaps particularly through Christian pressure groups.

The first question above (ie. 'To what extent are theological concepts of Justice still influential in the formulation of English law?')⁵ was asked in a study from an English academic lawyer's point of view. In this study he showed Christian influence in the sphere of marriage and divorce law reform, abortion and race relations. He concluded that

"Christian values still constitute a force to be reckoned with in the formation of laws in modern Britain."

However, he quickly qualified this statement:-

"It would be misleading to stop at this point and leave the reader with the impression that Christian doctrine was the dominant or even one of the most prominent forces in the legislative process in this country in this decade. It must be stressed that Britain is not a predominantly Christian community in this second half of the 20th. century but a pluralistic society... Perennial elements in legislative opinion are the Aristotelian axiom of equal treatment for equals, which underlies much of the above; current morality which is fed from fragments of the above; and the lawyers' especial concern for certainty." ⁶

Dowricks's survey has now been overtaken by the vast legislative changes of the 1970's, some of which have been examined in this study.

How far are his conclusions still valid? Are Christian values still 'a force to be reckoned with?' To answer this question we must briefly examine the Christian contribution to the legislation examined in the two broad areas of the legal part of this survey - the equality legislation and the legislation concerning issues of the right to life.

1. The Equality Legislation

a) Race Relations Legislation:-

We noted in the Chapter dealing with the vast increase in legislation to promote racial equality⁷ that the predominant spurs to such a strengthening of the law were firstly the loopholes in the old law, especially those relating to clubs where Judges gave a restricted interpretation to the meaning of 'public'; secondly the fear that unless racial tensions were remedied there would be vastly increased racial violence and thirdly the current philosophy of equality based more on Aristotelian and Utilitarian models than on Christian ones.

Interestingly in operating a restrictive interpretation of the old Race Relations Act 1968 Lord Diplock made a clear distinction between a citizen's Christian duty and what the law could be expected to enforce:-

"If everyone were rational and humane - or, for that matter, Christian - no legal sanction would be needed to prevent one man being treated by his fellow men less favourably than another simply on the ground of his colour, race or ethnic or national origins. But in the field of domestic or social intercourse differentiation in the treatment of the individual is unavoidable. No-one has room to invite everyone to dinner. The law cannot dictate one's choice of friends. The legal process is not adequate to analyse the multifarious and inscrutable reasons why a Dr. Fell remains unloved." 8

Hence while recognising the brotherhood of man in God's creation and the moral authority this should have on the individual believer, it is possible to claim that the law can only enforce this practically to a limited extent. This position is also broadly taken by Lord Hailsham. Himself a practising Christian he commented in his speech in the House of Lords against the 1976 Race Relations Bill:-

"One of the major fallacies of our time is that once you have identified a problem which requires infinite care, and possible courtesy between individuals in dealing with it, you improve the situation or perhaps solve the problem by passing a law about it or, as in this case changing the structure of the law about it... When you seek to press the law further and seek to intrude into private clubs or small shops employing a few persons, or estates with five or six tenants or a house with a few lodgers, you are setting yourself an impossible task. You are creating rights which it is impossible to protect. You are interfering with intimate relations which it is not possible to regulate." 9

On the other hand Lord Denning's extensive interpretation of the old law in many of the early cases probably arose from his basic Christian ideals. The 1976 Race Relations Bill was broadly supported by the Bishops in the Lords. The Bishop of Worcester concluded that the new legislation would enable the minority community to feel they belonged to the British community. He spoke of the problem of fear, the need for local leadership and the need to acknowledge other cultural values. His speech was largely practical and pastoral rather than containing any profound theological analysis. 10

Undoubtedly the Race Relations Acts were not strengthened through any great Christian pressure but rather through the steady and insistent pressure of the Race Relations Board in their annual reports drawing on the current philosophy of equality, the shortcomings of the interpretation of the old Acts and the dangers, also highlighted by the Community Relations Commission, of increased racial violence. Indeed Mitchell makes the point that it is usually thought that moral conservatives wish to use law to enforce morality, but the legislation about race relations shows that radicals may be in favour of enforcing an 'enlightened' morality. Hence it is of great importance to determine their own philosophical motivation. We have seen that 'enlightened' morality tends to be based more on utilitarian models than Christian ones, although the conclusions from both may at times coincide.

b) Sex discrimination legislation:-

From our examination of the movement of women towards equality it is apparent that the major spurs to the passing of the Sex Discrimination Act 1975 were firstly the current philosophy of equality, meaning

identity as far as practically possible, of rights and opportunities; secondly the triumph of the cultural movement which has abandoned the conventional wisdom that men and women have generally distinctive ~~typologies and~~ characteristics which justify fundamentally different roles in private and public life, thirdly the desire and requirement to conform ^{to} with international standards ^{of legal equality} and fourthly the economic motivation of the need for more productive employment and economic growth.

Practical Christian contributions to the legislative process are not easy to find. Certainly the Church of England was in a somewhat embarrassed position as being one of the exceptions of the Bill - thus enabling the continuance of its present sexual discrimination in ordination to the priesthood. In the House of Lords the Bishop of Leicester did, in fact, support the Bill.¹¹ His speech did, however, have a significantly different philosophy from those mentioned above. He commented that the Creator did not create a unisex world. Hence there are dangers if we ignore basic differences and functions between men and women. Yet he acknowledged that women must start by having identical rights and opportunities. From there the situation must be allowed to be flexible so that many occupations should develop a female aspect as well as a male one. This useful speech throws a specifically Christian insight on sexual equality. While giving qualified support to the Bill it seems to be at variance with the basic philosophy behind it.

2. The Right to Life

a) Abortion:-

The liberalization of the laws prohibiting abortion in the Abortion Act 1967 had as its basic philosophy a desire to minimise human misery and increase human happiness - ie. utilitarianism.¹² Added to this was the support of the women's liberation movement (the so-called 'women's right to choose') and also the support of a liberal Christian justification for abortion in carefully limited cases. In the event, as has been previously indicated in this study, the Act was extensively

interpreted - in some areas allowing abortion on demand.

Christian reaction to the 1967 Abortion Act has varied widely. On the one hand are several vigorous Christian groups actively opposed to the present law and concerned to offer alternatives. Examples of these are the 'Society for the Protection of the Unborn Child', 'Life' and the social responsibility section of the 'Order for Christian Unity'. The first two of these are predominantly Roman Catholic in inspiration and it is from the Catholic conscience that opposition is strongest, and unequivocal 'No' being given to abortion by the Roman Catholic Church. Pressure groups such as the above have significant support in Parliament and have been responsible for the unsuccessful attempts to get the Act amended. These Bills have failed not from lack of support from M.P.'s but from the Government's unwillingness to allow the Bills sufficient time to become law.

13

Dowrick in an article written in the early years of the Act's operation listed three objections common to many who subscribe to the Christian ethic of respect for life. The first is the deletion of the adjectives 'serious' and 'grave' in S.1(1)(a) thus allowing something very close to abortion on demand. Second Dowrick objects to the inclusion of existing children of the family in S.1(1)(a). He points out that it is difficult to imagine cases in which allowing a mother to continue to have her baby would injure the health of the other children - although it may be economically or domestically disadvantageous. Unscrupulous doctors may rely on this clause to justify abortions when the real ground for their decision is economic or domestic. However:-

"If doctors only invoke the defence in exceptional cases in good faith to protect the health of other children, it remains an unjustified extension of the ethical conclusion that the right of the foetus to live should only give way to its mother's rights to live and enjoy health." 14

The last objection is to the provision within the Act to authorise the termination of a pregnancy if the doctors are of the opinion that there is a substantial risk the foetus is so abnormal ~~so~~ that the child may be 'seriously handicapped'. Dorwick comments:-

"Even in the case of the foetus which has in fact abnormal features, physical or mental, the Christian would insist that these features do not disentitle it to live. Many handicapped human beings have led rich spiritual lives and enrich the lives of their families and neighbours." 15

On the other hand the recent contribution of the Church of England 16 and Protestant Churches has been far more equivocal. We noted earlier the influential nature of the Church of England report "Abortion: An Ethical Enquiry" on the 1967 Act. Mr. White's 'Abortion (Amendment) Bill' provided an opportunity for the Church of England and other Churches to further elaborate their standpoint to the Select Committee. These contributions are reported in the Committee's 'Minutes of Evidence'.¹⁷ The assessment of them in that Chapter¹⁸ shows a significant variation between the Churches and also a significant change in the official stance of the Church of England. This related to the case of a prognosis of severe congenital handicap. Professor Dunstan affirmed:-

"If there was a prognosis of a child for whom nothing medical can be done to serve the child's interests, that would be a description which I would take as a ground for termination in utero."

We noted in the earlier Chapter that this attitude was criticised by Leo Abse and Kevin McNamara for being based on the expediency of current medical and social attitudes, rather than on theological principles.

We also noted that an even more liberal Protestant standpoint was seen in the evidence to the Select Committee of the Methodist Church Division of Social Responsibility:-

"We have not pressed for a repeal of the Act nor for greatly increased restrictions on its implementation. We would view with great concern steps which might lead to an appreciable increase in the numbers of backstreet abortions and unwanted children. We therefore welcome several clauses of the Abortion (Amendment) Bill but regard with unease the total effects of its provisions."

In particular the Methodist Church doubted the wisdom of reinstating 'grave' and 'serious' as proposed by Clause 1.(1)(a). Theologically the Church acknowledges that all human life is revered. The foetus is undoubtedly part of the continuum of human existence, but the

Christian will wish to study the further extent to which the foetus is a person. The foetus has significance but lacks full personhood. When there is a conflict of interest with the mother the decision must not be taken lightly - but either answer is permissible. The Church allows the possibility that large families might provide a justification for abortion.

In its diversity some of the Christian stances on the Abortion Act are clearly contradictory. Whereas it would be misleading to suggest that the most liberal Christian positions have been largely instrumental in leaving the Act unamended, this being achieved by the more powerful utilitarian and women's rights lobbies, it cannot be denied that the drive to have the act substantially amended has come from the opposite Christian base, owing its origin largely to Catholic inspiration. In a recent survey¹⁹ over half those who voted Labour in the last election and are practising Catholics said they would not so vote at the next General Election if the Labour Party took a pro-abortion stance in its election manifesto. Here is Christian opinion exercising some force. A further examination of this issue in relation to the theologians studies in depth will be made shortly.

b) Euthanasia:-

All attempts at legislation permitting euthanasia in any shape or form have been decisively²⁰ rejected by the House of Lords. We have seen in the relevant Chapter that the Christian standpoint has been influential in this rejection. However, in that Chapter, attention was also drawn to the rather curious nature of current Anglican theological reasoning as exhibited in the pamphlet 'On Dying Well' (C.I.O. 1975) and the rather startling statements of the Archbishop of Canterbury in his December 1976 speech to the Royal Society of Medicine. Concern was expressed in that Chapter that although Christian opposition to euthanasia had been effective in the past some of the modern theological casuistry was putting the basic case in jeopardy. It is hoped to demonstrate that the theologians examined in this study provide a somewhat firmer ground for Christian moral pronouncements in this area.

c) Advanced Medical Technology:-

Although issues raised by advanced medical technology may relate to the moral problem of euthanasia, they also raise a more fundamental problem. The question is not only "Is this life so fraught with pain or difficulties that the patient should be entitled to terminate it?" but also 'Is there a life in existence at all in these medical circumstances?' 'Is the doctor under an obligation to prolong it indefinitely by means of machines?' The Christian contribution to this debate has not so far been impressive. We noted the difficulties in the Roman Catholic approach to 'ordinary' and 'extraordinary' medical or surgical procedures.²¹ We also noted the possible dangers of an extension of the Archbishop of Canterbury's utilitarian arguments. Recent theological statements lack the clarity of approach of the earlier pamphlet 'Decisions about Life and Death' - an alarming factor considering the rapid and continual growth of medical technology and the increased possibilities and difficulties related to organ transplantation. It is clear that the common Christian stance does not seek officiously to keep alive by use of machines when there is no known possibility of recovery. Such a state of suspended animation is abhorrent. Yet recent official Church comment does not seem to have spotted the moral complexities and dangers, let alone contributed markedly in clarifying the issues.

A somewhat sorry picture has been painted of the influence of present day Christian thought on legislation in the 1970's. Whereas in some areas the Christian voice is not heeded because it is out of tune with the prevailing philosophies, in other areas we have pointed to an apparent decline in theological cogency and quality of application. This presents a potentially dangerous situation of Christian thought largely unheeded, but even when listened to, possibly defective.

It is against this background that we now return to the four theologians examined in depth in this study, in the hope that their conclusions, based on firmer foundations, will illuminate the deficiency in recent theological thought and legislation and provide a critical tool for legislative reform or criticism - a 'wholesomely disturbing presence', as Barth would describe it.

The contribution to the modern debate of Barth, Maritain, Tillich and Moltmann

We have suggested that some of the recent contributions from the Churches in relation to the legislation under review may be ineffective or defective. The purpose of this section, central to the whole study, is to provide a critical analysis of current legislation from the insights of the four theologians examined in Part I. From this it is hoped to endorse current legislation where it is seen to be in accord with the Christian base, as defined by them, and likewise to suggest possible reform where this does not appear to be the case. We therefore return to the basic classification of Part II of this study, namely the Equality legislation and the legislation concerning decisions with regard to life and death.

1. The Equality Legislation:-

It has been suggested throughout this study that the philosophical foundation of the equality legislation is a somewhat crude and simple notion of equality. This is the notion of equality as sameness - as two equals two in arithmetic. The simplicity of this concept is in some respects an advantage. It is easily understood. Legislation deriving from a simple, easily understood principle, is more likely to be straightforward and possess that certainty so highly regarded by practical lawyers. The Christian insights into equality we have examined do, however, present a far more complex picture which requires a more profound analysis than the model basic to the legislation. That a more profound analysis is necessary anyway in practical terms in the provisions present legislation seeks to enact can be seen in the Sex Discrimination Act - perhaps the most complex and ambiguous

of modern legislation. The question therefore remains in relation to that Act 'On what philosophical basis have these complexities been determined?' We will return to this later.

At this stage it is helpful to reiterate basic distinctions as well as basic similarities between the Race Relations Acts and the Sex Discrimination Act. While distinctions between the races are principally those of colour, those between men and women are of a far more fundamental physiology. Whatever the importance attached to this philosophically, the need for practical exceptions and a variety of rights relating to physiology is obvious. Prima facie a more complex notion of equality appears necessary in relation to sex discrimination than in relation to racial discrimination or put more practically, while a simple notion of equality can be effective in racial discrimination legislation, it is likely to lead to immense legislative difficulties in sex discrimination legislation. It will be argued in due course that this has been demonstrated in a comparison between the two Acts.

As a pre-requisite to applying a Christian notion of equality we need to review what such a notion is as outlined by our four theologians. Fortunately they reveal a considerable unanimity. Perhaps the most profound examination of the notion of Christian equality is that undertaken by MARITAIN.²² We see in this analysis that Maritain rejects a mathematical base for the concept of equality and he rejects both that which he calls the 'Pure nominalist or empiricist notion of Equality' (ie. the fact of inequality leading to a deduction of inferiority) and what he calls 'Pseudo-Christian Egalitarianism.' (ie. equality as sameness). Rather the true 'Christian Equality' is based on the tenet that all men are created in the image of God and are called to the same supernatural dignity as adopted sons of God. However this does not mean there should be no differences or distinctions between them. Differences and diversity of talents are part of the created order. However, they should not be used to negate fundamental rights which flow from the primary tenet above. In addition some notion of distributive justice is necessary to enable the individual to receive according to his talents and necessities.

MOLTMANN makes a similar point to that of Maritain in a Biblical analysis of Gal.3/28:²³-

"For Christianity the basic principle of liberated humanity can only be the principle of the recognition of the other in his otherness, the recognition of the person who is different as a person. It is only this recognition which makes it possible for people who are different to live together - one in fellowship - sharing and fulfilling man's common being in hope for the Kingdom."

Likewise TILLICH, while adhering to the basic principle that

"Every person is equal to every other, in so far as he is a person"

nevertheless acknowledges that every concrete application of this principle is ambiguous. Differences in society may entail different claims for distributive justice.²⁴ BARTH likewise recognises a common humanity created by God. In the sphere of race relations this requires positive legislation to prevent discrimination. However he sees a distinction between the nature of racial equality and sexual equality. The nature of sexual equality is more complex for men and women are both inseparable and distinct. While one is not superior to the other the nature of the equality may justify differences in rights and duties in personal as opposed to economic relationships.²⁵

The Christian view of equality here examined, then, recognises diversity - or otherness as Moltmann puts it. It is not embarrassed by it, or ~~try~~^{tries} to pretend it does not exist. Rather it is able to rejoice in it as part of God's created order and part of the necessary means of attaining the fulfilment of that created order. It is, however, conscious that such diversity can be used to justify the denial of basic human rights to a section of humanity. This is the case when the Christian position of diversity leading to unity cannot be grasped or is seen as a threat. Hence it is necessary as well as stressing the positive function of diversity also to stress indivisible rights which belong to each person as a person. Such rights are akin to the full arithmetical notion of equality, but are not in themselves a full expression of the Christian nature of equality. More complex notions of equality are necessary when the diversity cannot be disregarded without impairing the basic integrity of the personality

of mankind. We will now see how this principle is operative in the spheres of racial and sexual discrimination.

a) The Racial Discrimination Legislation:-

The common conclusion of our four theologians was that as a basic Christian tenet all men, of whatever colour, are created in the image of God. They are all children of God and loved by him - so Christ died for all mankind. From this theological principle it follows that all children of God must be treated as persons and given the basic rights and privileges belonging to persons. This Christian tenet would not seek to deny that there may be distinctions in characteristics between the races but would strenuously resist any attempt to use such real characteristics to deny personhood or treat one race or class as inherently inferior to another. While acknowledging there may be distinctions between races, the Christian cannot see this as a fundamentally God-given order of creation. The doctrine of creation is a unitary one, giving rise to unitary rights. Differences between races fundamentally arise from geographical and historical circumstances that have led to a variety of cultural development and insight. So BARTH stresses the positive role of distinctions:-

"In every land there are many native features, traditions and customs which would benefit greatly from superior foreign influences",

while commenting that the basic theological precept behind this is that there is a common humanity created by God. Likewise MOLTSMANN looks forward to the time when

"people win through to a liberated, non-aggressive identity as people - when they cease to identify 'being human' with the membership of a particular race."

Given this basic theological concept an arithmetical notion of equality can be seen as an appropriate starting point in racial discrimination legislation. This concept is not, however, sufficient to cope with the particularly disadvantaged circumstances the racial minority may find itself in with regard to, say, education and training. It is therefore appropriate in addition to introduce an element of positive

discrimination in such areas to enable the basic concept to work satisfactorily. The Race Discrimination Acts as we have examined them earlier in this study can be seen to illustrate both these points. Undoubtedly the basic philosophical notion behind them is one of an arithmetical equality, which coupled with the social dangers of inequality have spurred the government to legislation. So we see in the 1976 Act an extensive enforcement of this principle. Both direct and indirect discrimination is covered, as is victimisation and incitement to racial hatred. Unlawful discrimination may take place in extensive areas of life - employment, education, the provision of goods, facilities and services, property transactions and advertisements. We have seen that the reluctance to enforce the law in semi-private areas, such as clubs, has been swept away by the 1976 Act, although purely private relationships are not included. Positive discrimination is permitted to give persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefit.

While it is not suggested that Christian influence was extensive in the culmination of the race relations legislation in the 1976 Race Relations Act, it seems plain that the Christian concept of racial equality is akin to the concept employed and therefore ~~reaches~~^{deduces} similar principles. There does, however, remain the separate issue, voiced by some Christians, whether what are fundamentally Christian attitudes can be enforced by law in the way the 1976 Race Relations Act tries to. The opposite danger, however, is to relegate Christian influence to private exhortation. Important although this may be all the theologians examined in this study view Christianity as vitally concerned with politics and legislation. This 'wholesomely disturbing presence' is a fundamental means of working towards the Kingdom of Heaven and showing the moral cogency of Christianity in practical terms. The Christian cannot separate the private moral life from the public duty in formulating law and political decisions. There does, however, remain a point at which relationships are not sufficiently public to justify the heavy hand of legislative intervention. It is, however, submitted, that the issue of so called 'private' clubs was not one of these. The evidence showed that these were used largely as a loophole

ⁱⁿ to the Act and that many belonged more to the public than the private sphere.

However it remains true that a law such as the Race Relations Act 1976 is far stronger if the moral principles underlying it have general acceptance. Legislation by itself is insufficient. This was recognised under the 1968 Act with the establishment of both a Commission for Community Relations concerned with education and practical encouragement, and the Race Relations Board concerned with the enforcement of legislation. The Christian may question the wisdom in the 1976 Act of abolishing these and merging them in the new Commission for Racial Equality. Its duties are specified as working towards the elimination of discrimination, promoting equality of opportunity and good race relations as well as keeping the working of the Act under review and proposing amendments. While the view expressed by Lord Hailsham in the House of Lords debate that this is equivalent to merging the Director of Public Prosecutions with the Archbishop of Canterbury is perhaps a little far fetched, nevertheless it seems unlikely that one commission can ^{perform} ~~do~~ all these functions efficiently. Likewise the change to a system of largely individual enforcement in the ordinary courts may be questioned on the lines of the criticism of the old Race Relations Board. Are the races sufficiently equal to make individual enforcement a fair and practical proposition? Only time will tell. Nevertheless the strengthened provisions of the 1976 Act are to be welcomed from the premiss of the theologians examined, as giving practical legislative effect to the basic Christian principles on racial equality.

b) The Sex Discrimination Legislation:-

It will be argued that, whereas a simple arithmetical notion of equality is basically appropriate and justified by theological principles in the field of racial discrimination legislation, a more complex notion of equality is required in any legislation relating to sexual discrimination. That is not to say an arithmetical notion has no part to play in this area, but that it is not sufficient by itself.

Whereas, theologically, the creation of mankind was seen as a unitary act in which the subsequent existence of different races was not a fundamental order of creation, mankind itself is subdivided - 'male and female he created them.' This was no historical accident but part of the Divine purpose for the survival and advancement of the human race. God did not create a unisex world, except in some of the simplest and crudest forms of life, but a bisexual world. In particular BARTH examines the consequences of this.²⁷ Whereas on the one hand both male and female are human creatures of God and the image of God and whereas crude typology is dangerous and possibly insulting, the fact nevertheless remains that:-

"Outside their common relationship to God there is no point in the encounter and fellowship of man and woman at which even as man and woman they can also transcend their sexuality and precisely in the relationship to God they cannot do this in such a way that they become to be male and female or that their sexuality becomes non-essential."

MOLTMANN'S recognition of the other in his otherness points to the strong positive function of the distinction of the sexes - although this is not Moltmann's own conclusion. Man is attracted to woman and woman to man because each make up for what the other lacks.

The Christian moralist can rejoice in a basic sexual distinction in the order of creation, without thereby suggesting that one is superior to the other. Here again we return to MARITAIN'S distinctions in models of equality. BARTH comments that in inner dignity and right one has not the slightest advantage over the other. Man and woman are fully equal before God and are equal in regard to the necessity of their mutual relationship and orientation. He does, however, conclude that in domestic relationships that man has a Divine precedence in order although this should confer no privilege or injustice - no duty or right.

In such analysis BARTH makes us aware of a fundamental distinction between domestic relations of men and women, particularly in the married state and relationships in the sphere of legal and political freedom, rights and responsibilities. Such a distinction can also be seen behind the analyses of MARITAIN and MOLTMANN. In this respect:-

"The restriction of the political freedom and responsibility.... supremely that of woman, is an arbitrary convention which does not deserve to be preserved any longer. If Christians are to be consistent there can only be one possible decision in this matter." 28

It follows that an Act legislating in respect of identical rights and responsibilities in these areas must have Christian support.²⁹

Hence there is no difficulty for the Christian who agrees with this theological analysis to welcome the provisions of the Sex Discrimination Act with regard to equal pay, equal opportunity in education and employment and equality in the provision of goods, facilities and services. However the impossibility of extending such an arithmetical notion of equality on a comprehensive scale can be seen by an examination of the provisions of and exceptions to the Sex Discrimination Act. Thus there are many general exceptions to the Act (S.43 -51) as well as specific employment exceptions including recruitment based on "genuine occupational qualifications." It recognises that there are occasions when work can be done more effectively by a man rather than a woman. All of this involves a necessary discrimination and an admission that the basic philosophical notion of the Act cannot be applied consistently. Even the basic definition of discrimination in S.1(1)(a) and S.1(1)(b) is not without its difficulties as we have noted. The attempt to graft on the Equal Pay Act into this philosophical and legal jungle has proved disastrous in terms of the basic philosophical concept and the unrealistic attempt to treat sexual discrimination in the same way as Race Discrimination has led to a muddled, confused and defective piece of legislation.

The solution would seem to be first to get the philosophy right and then to seek to apply the new philosophy consistently. In the earlier part of this study we have examined theological models of sexual equality. While on the face of it these appear more complex than the philosophy underlying the Act, paradoxically this complexity of concept leads to far simpler legislative conclusions. What are the conclusions possible from a Christian concept of sexual equality? While acknowledging that equality is basically complementary this should not lead to any state of loss of opportunity nor to any enforced stereotyping. However in this view of equality, discrimination is not the prima facie

evil it appears to be in the Sex Discrimination Act. It is submitted that the extent of the exceptions under the Act point also to the fact that discrimination is a fundamentally unsound principle for legislation in this area, deriving as it does from a false concept of arithmetical equality. What then is the right approach to guarantee the admitted political, social and economic rights to men and women? The solution seems to be to stick to that measure of equality where an arithmetical notion can be justified in respect of basic rights and the clue is found in the name of the Commission designed to implement the Act - Equal Opportunities. An Act specifically designed to promote equal opportunities between men and women would suffer none of the tortuous legal complexities and absurdities of the present Act. Many of the exceptions of the present Act would no longer be necessary because the concept would not be discrimination but rather denial of equal opportunities. The Equal Pay Act would be kept as a separate statute dealing with a separate, though related, area of equal pay for equal work .

2. Legislation concerning decisions about Life and Death

Whereas the impetus ^{towards} ~~to~~ legislation like the Abortion Act 1967 and ^{towards} ~~to~~ proposed legislation to legalise euthanasia comes typically from the Utilitarian school seeking to minimise the sum of human misery, the Christian moralist as demonstrated by the theologians in this thesis starts from a completely different premiss - one of theology. The fundamental Christian premiss is that aptly described by Barth - all human life is an unmerited loan from God. Man should treat this loan with respect and not seek to usurp the Divine authority in matters of life and death. The philosophical foundation of this in ontology is traced by Tillich. Maritain enumerates human rights arising out of this, including the right to existence and the right to keep one's body whole. Moltmann treats the Divine gift within the context of its acceptance in human terms and its surrender.

a) Abortion

By far the most ^{detailed} ~~profound~~ analysis of this problem examined in this study is found in the analysis of Barth.³⁰ He has no doubt, from his starting point of the sacredness of life, that this is both medically and theologically the killing of a human life. However, ^{contrary to} ~~unlike~~ the Roman Catholic view, we noted that he was prepared to admit exceptions in which there may be the possibility that God may wish this life to be terminated. He expresses one clear case where this is justified - where the life of the unborn child directly threatens the life or health of the mother.

By including the health of the mother as a possible justification for abortion, Barth has admitted an exception of ^{possible} ~~immense~~ breadth. He devotes little theological ^{analysis in} ~~justification to~~ this exception and likewise gives little guidance on the practical difficulties involved in assessing such damage to health. Such assessment is made more difficult by his willingness to acknowledge that on rare occasions socio-medical reasons may suffice. How far should economic or environmental conditions enable the basic precept of the sacredness of life ^{to} ~~be~~ overruled? We are left with little guidance from Barth, except that any such calculation should arise from scrupulous heart-searching before God. This ^{lack of guidance} ~~seems~~ to be a major weakness in Barth's argument.

The socio-medical provision as a possible justification for an abortion in exceptional circumstances comes close to the original intention of the legislation to permit abortion, although the governing factor of the decision in the legislation was to have been more the philosophy of Utilitarianism than Barth's 'scrupulous heart-searching before God'. The practical difficulties in assessing 'grave injury to health' resulted, however, in the all embracing 'injury to the physical or mental health of the pregnant woman or any existing ^{children of her} family, greater than if the pregnancy were terminated'.³¹ It is this provision under which the vast majority of abortions have been justified. Such 'injury' on many occasions seems to amount to no more than socio-economic inconvenience. Barth, even at his most liberal, could only justify socio-economic reasons in the most extreme circumstances, but

his analysis gives us no practical guidance about how a Christian can limit this justification in order to remain consistent with the basic precept of the sacredness of life.

Moltmann in his analysis deals with the problem in a different way. In seeking the origin and value of the humanness of life he lays stress on the origin of humanity as coming when it is accepted and affirmed; recognised and loved.³² This subjective approach might provide a justification for abortion but for two factors. The one Moltmann mentions is that human non-recognition and refusal of nascent life can be revoked, but an abortion is irreversible. The one he does not mention is the status of life in the sight of God, which may make its revocation a sin. Moltmann, more than Barth, recognises gradations of life - from the potential to the actual. Here we see a possible influence on the official Church of England standpoint as described earlier. Both Barth and Moltmann envisage morally justifiable abortion as a rare event and one which must be justified theologically and not merely in human terms. Neither would Moltmann's concept of personhood justify abortion on the grounds of potential handicap per se, if he is consistent in the extension of his argument.

Despite some successful action taken against various obvious abuses, the present law on Abortion in England is very liberal and in many cases amounts almost to abortion on demand. Over one million abortions have taken place since the Act was first passed - a ^{n important} ~~significant~~ ³³ ~~important~~ factor in the recent ³⁴ significant decline in live births. Mitchell commented in 1967 that to relax the law very considerably on abortion would weaken the moral restraint even further with the result that the number of illegal abortions would continue to rise, because many people would regard abortion as a remedy for inconvenience which even the more liberal law did not regard as a sufficient reason to justify the operation. In the event this has not happened ^{with regard to illegal abortions} ~~happened~~ simply because it has been possible to justify the operation under the Act on the flimsiest of moral grounds. However the point about the weakening of morals when legal restraint is removed seems evident from the continued increase in the numbers of legal abortions.³⁵ There is ample evidence to suggest that the Christian concept of the value

of life has, in this area, been seriously eroded.

It is therefore suggested that the attempts to amend the Abortion Act 1967, analysed earlier in this study,³⁶ and deriving from a fundamentally Christian motivation, are in accord with the theological conclusions we have been examining. Any revision of legislation which seeks to take more care over the decision, and to weigh with more importance the seriousness of the step of denying the flowering of human life, is to be welcomed. In particular attempts should be made to restore the words 'serious' and 'grave' to qualify the risks envisaged in S.1(1)(a) of the Act, or some other means found to ensure that the basic sanctity of unborn life is given more emphasis. Significantly attempts to do this and to introduce more controls to the Act generally have obtained the majority approval of M.P.'s but have been denied time by the government, in deference to their own pressure groups. The conclusion of this study is that continued Christian representation is vital.

b) Euthanasia

Euthanasia has been unequivocally opposed by the theologians concentrated upon in this study. In Maritain's enumeration of rights³⁷ it contradicts 'The right to existence', 'The right to keep one's body whole' and 'The right of every human being to be treated as a person and not a thing.' The proponents of euthanasia may argue that these can be counterbalanced by a right to decide to end one's life. Such an argument would not gain favour with Maritain for in his enumeration of positive rights he quite clearly accords these an absolute value. BARTH likewise gives an unequivocal 'No'³⁸ to euthanasia. His principal reason comes not from the enumeration of inalienable rights but rather from what he sees as a wicked usurpation of God's sovereign right over life and death. If we can see no value to a life, or even if the person concerned can see no value to his life we must still acknowledge³⁹ "The value of this kind of life is God's secret." MOLTSMANN starts from a similar premiss and analyses the problem in terms of the nature of man's personhood as created by God. He comments that if being human is identified with being healthy, or useful, then the

sight of a handicapped person brings insecurity and demands for extinction. However the Christian vocation is to recognise not the material but the spiritual reality - to recognise the other in his otherness as one in fellowship. Thus we all share and fulfil man's common being in hope for the Kingdom. TILLICH while not entering into specific ethical applications of his philosophy, in his emphasis on the ontology of love, power and justice belonging to God alone, would no doubt reject with Barth any attempt to steal this ontology from God and set up man as an arbiter over the life of his fellow man or on his own life on grounds of human disinclination to accept life.

Such an unequivocal stance on the value of life in the sight of God, no matter how wretched it may appear in human terms lays a clear ethical foundation for the Christian to oppose any legislation advocating euthanasia. Added to this are the more practical considerations of the doctor and the lawyer. Modern drugs can, to a large extent alleviate pain. This is morally permissible although the by-product may be an incidental shortening of life, for it is not for the incidental reason the drugs are being administered. The function of medicine is not to keep humans alive at all cost. The Christian theologian does not lay so much stress on the value of life because he is frightened of death, for the Christian faith does not see death as an ultimate end, but merely a stage in the spiritual journey. Hence, while not deliberately inducing death, there are occasions when it is right not to practise meddling medicine but to allow the patient to die and to ease this inevitable and universal process. In the words of BARTH

"We should not make the required assisting of human life a forbidden torturing of it. A case is at least conceivable in which a doctor might have to recoil from this prolongation of life no less than from its arbitrary shortening."

c) Problems connected with advanced medical technology

The ethical issues and conclusions in this area bear a close resemblance to those already discussed under the heading of Euthanasia.

They do, however, mark grey areas of moral complexity caused by ⁴⁰ incredible advances in medical technology. The earlier Chapter in which this area was examined has shown the considerable uncertainty on definitions in both the legal and medical field. These ~~arrive~~ ^{is derives} in no small measure from a discussion of 'What is medical life?' and 'What is medical death?' The medical profession in this country has sought to answer this problem in its definition of 'brain death'.

Although the possibility of such medical technology was not available when the majority of our theologians were writing, it is not difficult to trace the Christian response from their principles. Indeed this has been done by MOLTSMANN.⁴¹ The Christian distinction is that between meddlesomely prolonging life and the required assisting of it. Moltmann comments that physical death can be determined by the dying of vital organs - of which the irreversible death of the brain would be one. If this is the case death should be accepted and the patient entrusted into God's loving care. This reveals the primary use of advanced life-support technology - that of determining whether death should be accepted or whether there is any possibility of recovery. Hence, depending on the medical conclusions it may have to be employed for a considerable length of time in a comatose person, or it may, if medically there is no prospect of recovery, be correct to switch the machine off. That is a medical decision and if undertaken responsibly, has full Christian backing.

However, legal difficulties arise ^{from} ~~at~~ such a subjective notion of death. The proposal of Adrienne Van Till-d'Aulnis de Bourouill examined ⁴² earlier has its attractions. That was to have a rigid definition of death as well as legal immunity for withdrawal of artificial support in clearly specified cases:-

"To accept a differentiation in ethics is a better solution than to allow doctors to redefine death in terms of coma."

This would give legal status to irreversibly comatose individuals who would still be alive under the author's definition until the respirator was turned off. Such a definition would seem both more logical and more in accord with the Christian value of life than the definition

adopted which suggests that the patient is already dead while sustained on the machine if certain criteria are fulfilled. It gives spiritual, ethical and legal rights to the comatose individual and at such a crisis point demands a decision as to whether the individual be allowed to die or not. The law should enshrine the ethical nature of the moral decision, rather than say the patient was already dead.

This might appear an academic point but for the complications introduced from that other area of medical technology - that of organ transplants. It is undoubtedly true that some irreversibly comatose individuals are maintained on a machine with the sole purpose of removing some of their organs at a convenient time. If the patient is legally and ethically dead the humanist may think this can hardly be questioned. However the Christian moralist could not condone such action or see the patient as dead. Rather he would see this ^{within} ~~in~~ the category of a forbidden torturing of human life - a sinful denial of the finality of death, and the right to a Christian burial. If it is wrong in Christian terms artificially to prolong life when only the patient is considered it is doubly wrong to deny a person's right to death by using him as a spare parts' bank at the doctor's whim, no matter how vital such organs may be to others. The definition proposed above would enshrine this. Once the decision has been made in the patient's interest a short and clearly defined period of time should be available if the question of transplants was involved, in order to obtain the necessary consents and fulfil the necessary legal requirements.

We noted in an earlier Chapter ⁴³ that the present statute dealing with the area (the Human Tissue Act 1961) is both out of date and gravely deficient in law. A revised Act is now necessary. It is suggested on the lines argued above that the new Act should face the problem of a legal definition of death, coupled with immunity for withdrawal of artificial support in clearly specified cases, the artificial support in such cases being seen theologically as a temporary cessation of the natural course of death in order to see if any possibility of cure existed. Its switching off is not therefore a moral hastening of death but a moral refusal to impede death. This is therefore in no sense legislation permitting euthanasia. The new Act should further remedy

the legal defects already pointed out in the practical issues of obtaining consent to the removal of organs.

CHAPTER 11 - NOTESThe Application of the foregoing theological concepts to present day English law

1. cf. Chapter 3.
2. cf. Chapter 4.
3. cf. Chapter 2.
4. cf. Chapter 5.
5. F.E. Dowrick, 'Christian Values in the Legislative Process in Britain in the Sixties.' A.Jo.J/P Vol.16. pg.156f.
6. Ibid. pg.182.
7. cf. pg.118f of this thesis.
8. Dockers Labour Club v Race Relations Board 1974 3 All E.R. at pg.598.
9. Parliamentary Debates (House of Lords). Hansard. Fifth Series Vol.373. Col.741.
10. Ibid.
11. Parliamentary Debates (House of Lords). Hansard. Fifth Series. Vol.362. Cols.130-136.
12. For an examination of the various kinds of Utilitarianism cf. F.E. Dowrick, Justice According to the English Common Lawyers (1961) Cp.6 and especially pg.124f.
13. F.E. Dowrick, 'Christian Values in the Legislative Process in Britain in the Sixties'. A.Jo.J/P Vol.16. pg.156f.
14. Ibid. pg.173.
15. Ibid. pg.174.
16. cf. pg.170 of this thesis.
17. First Report from the Select Committee on Abortion.' Vol.II Minutes of Evidence. H.M.S.O. H.C. 573-II (1975-76).
18. cf. pg178f of this thesis.
19. Taken by the 'Sunday' programme on B.B.C. Radio 4 and announced Dec. 11th. 1977.
20. cf. Chapter 9.
21. cf. pg197 of this thesis.
22. cf. pg.24f of this thesis.

23. cf. pg. 106f of this thesis. However Moltmann is here applying this to distinctions between the healthy and the handicapped. It was argued that his conclusions could be logically extended to differences in sex, but Moltmann himself appears to deny this.
24. cf. pg. 79f of this thesis.
25. Ibid. pg. 61f.
26. Parliamentary Debates (House of Lords) Hansard. Fifth Series. Vol.373. Col.741.
27. cf. pg. 61f of this thesis.
28. Karl Barth, Against the Stream (1954) pg.38.
29. It is, however by no means certain, that even when provided with an Act of Parliament that women as a whole attach a high priority to the enforcement of such rights (cf. Jane Fortin, 'Sex Discrimination Laws - Success or Failure?' 128 New L.J. 700). If this is so there may be some justification for laying more of the burden of proof on the employer as Fortin would wish.
30. cf. pg.56 of this thesis.
31. Abortion Act 1967. S.1(1)(a).
32. cf. pg.107 of this thesis.
33. Ibid. pg. 174 and pg.181. Note 6.
34. Basil Mitchell, Law, Morality and Religion in a Secular Society (1970). pg.80.
35. cf. pg.174 of this thesis.
36. Ibid. pg. 176f.
37. Ibid. pg. 29f.
38. Ibid. pg. 58f.
39. Ibid. pg. 106f.
40. Ibid. pg.204f.
41. Ibid. pg. 108.
42. Ibid. pg. 210f.
43. Ibid. pg. 214f.

CHAPTER 12

CONCLUSIONS

Conclusions

The four theologians examined are engaged upon a continuation of the age old quest of Christianity to understand God better, and as a result of this understanding to put into practice how we determine God wishes us to live and relate to each other. Each age must ~~do~~^{perform} this process afresh, building and adapting on the wisdom of its predecessors, to meet modern conditions and problems. Our specific task has been to examine the nature of God's Justice, to derive from this precepts for man's guidance in practical living and to apply these to particular legal problems in the Britain of the 1970's. In this task, although the theologians have been drawn from widely differing confessional standpoints we have come across a significant degree of unanimity as illustrated by the last Chapter. In particular, clear precepts have been derived for man's guidance in practical living.

It could well be argued that the need for legislation would be dramatically lessened should Christian precepts be universally followed. This is especially so in regard to many of the areas under consideration in this study, dealing as they do with matters of morality. It is certainly part of the Christian task to get people to behave in a Christian way and so negative the need for law designed to enforce morality. However, should this task of the individual prove ineffective the Christian has a responsibility to operate through institutions and government. This does not mean taking over such institutions in the guise of a Christian political party, for Christians can legitimately hold a wide variety of political views, nor does it mean usurping the skill of the legislator and providing detailed draft bills. It does, however, mean offering precepts or guidelines for legislators.

As we have seen in the legislation examined in this study, behind each bill is a guiding philosophy as well as mere concrete precepts or guidelines. This 'spirit of the law' is of vital importance in its interpretation and subsequent development. It determines what sort of fruit the legislator will bear - in what sort of way it will change

or modify human actions, behaviour and thought. If Christians opt out of this vital area they cannot be surprised if new guiding philosophies, some subtly close to Christian ideals, some poles apart emerge. We have seen throughout this study that the prevalent legislative philosophy today is Utilitarianism. This may be Social Utilitarianism, implying that the Government is the better judge of the happiness of the majority and can regulate by laws and administrative processes, or it may be Individual Utilitarianism. This implies that the individual is the better judge of his own happiness or misery, and accordingly the law should leave him maximum freedom to make his own decisions without regulations from above. Neither contains, in itself, any transcendental reference. In the nature of things subjective judgements and pragmatic expedients are the order of the day. There can be no external reference apart from humanity, because the well-being of humanity, as determined by legislators, is the only thing that matters.

In contrast to this the theologians examined stand for an older, and it is argued more fruitful belief that there is a transcendent quality, traditionally known as Justice and that this may, on occasion override pronouncements of positive law. Above all that in theological terms this is rooted and grounded in God, and made concrete through his revelation to mankind. This does, of course, depend on human understanding, experience and reasoning, all of which are potentially fallible. Yet precepts so derived can be empirically tested by experience and by unanimity as well as by more indefinable factors such as prayer and conscience. Such precepts may well be referred to as 'natural' and part of 'natural right'. Undoubtedly they have to be extended to fit modern conditions and problems but concrete precepts derived from a transcendent Divine Justice can be offered and have been offered in some profusion within this study. These act not merely as guidelines for legislators but also as a critique of laws.

This process is no incidental luxury for Christians to indulge in but a matter of spiritual life or death. Legislation not based on Christian precepts is ever liable to lead man to set up himself as final arbiter instead of Divine Justice. Given the Christian realism about

human sin, the Christian argues that this is ever likely to lead into tyranny and misery and dehumanisation of one kind or another. This has been argued within this study in respect of some of the social reforms effected or proposed. Thus to take perhaps the clearest example, the ease with which abortions are now performed has led to a dehumanisation of the foetus as a source of life. So, where the foetus is unwanted, it becomes viewed as a sort of growth endangering the mother's health, which it is justifiable to remove. When the foetus is wanted it is treated with loving care and is referred to typically as an unborn baby. Yet the foetus itself, whether wanted or not, is in itself ~~analogous~~ ^{equivalent} to another foetus. Similarly it becomes far easier to justify euthanasia should empirical standards of 'quality of life' be used. 'This old person' it could be argued 'has such a poor quality of life, that it is not a life at all in any meaningful sense. Therefore it is morally permissible to administer euthanasia.'

The Christian moralist, on the other hand, is concerned with precepts which are endemic and emanate from God, rather than those which are empirical and emanate from man. This study has attempted to draw out their implications at one particular point of history and in relation to one particular, highly developed, legal system. On occasions it has found points of influence on legislations by Christian precepts, of agreement on legislation by Christian precepts and also of criticism or disagreement arising from Christian precepts. It claims to show that there is still Christian reflection in this vital area which exhibits a significant degree of unanimity. Whether this reflection will be further put into action remains in the realms of speculation. It can offer precepts, or guidelines for legislators, it can criticise laws but it has no power to enforce beyond persuasion, and, it would argue, the (admittedly imperfect) exhibition of that most glittering yet elusive jewel - the truth, which it would say resides in God and is seen in His Justice.

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