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THE OFFICE OF LORD CHANCELLOR*

It is a great privilege to be invited to address this great university and particularly to do so under the chairmanship of my old friend the Attorney General. In England the Attorney General used to be called the bulldog of the Crown. When I was the Attorney General I was called the corgi of the community. The corgi, as you know, is a Welsh dog. You, Mr. Attorney, have already explained that, as Lord Chancellor, I wear three hats. You said "caps" I think, but that makes no difference. The important point is that I do not wear them all at the same time. But it is the case that I combine in my office the office of being the head of the judiciary, speaker of the House of Lords and a member of the Cabinet, the heart of the Government of the country. So you see, I defy in my post every honourable and reasonable principle of constitutional propriety. The office, of course, and its functions are a product of history, of the evolution of our constitution rather than any neat and tidy constitutional principles. And I will give you a brief account of the historical processes which led to the present functions of the Lord Chancellor being what they are.

First of all as to the judicial function and that really dates way back in history. The first Lord Chancellor of whom we are really aware was a monk called Ogmundus and he came over to England in the year 596 with St. Augustine to convert the English barbarians and I suppose Lord Chancellors have been busy trying to do it ever since. There have been four saints among my predecessors and those saints begin with St. Swithin who as you who have resided in England will well know is responsible for all the bad weather we have had in England in every summer, except this one, and I hope therefore that the new Lord Chancellor is establishing a new climatic tradition. Then there was Thomas *a* Becket and Thomas *de* Canterlupe and Thomas More. They were all assassinated. It used to be a very tricky and bloody business to get rid of the Lord Chancellor in those days. I am not quite clear from the Attorney's speech how they get rid of an Attorney General in Malaysia. But nowadays, of course, the Lord Chancellor can lose his post any day by the drop of a ballot paper or any night by telephone call from No. 10, of the Prime Minister saying thank you very much for the services you have so signally rendered to the nation.

For the ladies who are present, you may care to know that women's lib struck early in the history of my office. There was a woman Lord Chancellor

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in the year 1253. It was the reign of King Henry III who went off to the wars which were a current fashion and sport in those days. He did not trust any of his barons. As you may know, Mr. Attorney, it is always a very dangerous thing for a head of state to leave his country, so when he went away he decided there was only one person he could trust and that was his wife. What a lucky husband he was! And he duly appointed Queen Eleanor as the Lord High Chancellor.

Now the executive role that I mentioned earlier, I started with the judicial role, but in historical terms perhaps I should have started with the executive. From the 11th century on the King had his own secretary and he was known as Chancellor. Even now when I sign statutory instruments as Lord Chancellor I sign them Elwyn-Jones C, representing the historical beginnings of the office. The name Chancellor is derived from that of the usher, a very modest origin indeed, in a Roman law Court who habitually sat at the cancellus behind the lattice screens of the court. Until the 16th century, the time of the Protestant reformation in my country, the Chancellor was invariably in holy orders, he was often a Cardinal or an Archbishop, but since that time Chancellors have nearly always been laymen and lawyers. The Lord Chancellor continued to be a key member of the King's Council and his inner group of advisers. Indeed the Lord Chancellor still takes precedence over all ministers of the Crown, even the Prime Minister. He ranks in precedence after the Royal Family and the Archbishop of Canterbury. You may be interested to know that, although we have abolished the death penalty for murder in my country, it is still the penalty for treason, and to assassinate the Lord Chancellor is an act of high treason, which will be followed by the hanging of the culprit. Whether that gives me any cause for comfort is another matter. With the development of the Cabinet system, the Lord Chancellor came to be a senior member of it as, of course, he is to-day. The Cabinet, as you know, is the heart of the executive deciding all important questions of policy be they domestic or foreign. So there is his role historically cast in a key position in the executive.

As to his judicial function, he is, as I have said, the head of the judiciary. While Her Majesty The Queen appoints all the judges, she does so on the advice of the Lord Chancellor. This is true of all the judges up to and including those of the High Court; proposals for the appointment of Law Lords in the House of Lords and the Privy Council, and the Lords Justices who sit in the Court of Appeal, are submitted to the Queen by the Prime Minister, but again on the advice of the Lord Chancellor. The Chancellor also recommends the nominations to the Queen of Magistrates and the multitude of chairmen and members of tribunals up and down the country. He also appoints Queen's Counsel although again the letters patent are signed by The Queen.

Now the judicial functions of the Lord Chancellor originated in his responsibility for issuing and sealing writs and in his membership of the King's Council. He presided over the Court of Chancery and theoretically he still does. There he administers equity which as you will remember used to be said to be as long as the Chancellor's foot. I am happy to say that I have not set my foot in that Court since I have been appointed, but equity still prevails there although there was some time ago a much speaking judge in the Chancery Division and his court was known as the din of inequity. When time permits the Lord Chancellor presides over the House of Lords sitting judicially and over the Judicial Committee of the Privy Council and I will have a word to say about that in a moment.

Until the Great War broke out in 1939, the House of Lords, as the second chamber of Parliament over which the Lord Chancellor presides, met at half past four in the afternoon and this made it possible for Lord Chancellors to preside over the judicial sittings of the Lords, as the Supreme Court of the United Kingdom, which starts at 10.30 am. In those days the Lords of Appeal in Ordinary sat in the Chamber of the House of Lords itself to determine cases, their membership of course being selected from the outstanding judges of the country and very occasionally directly from outstandingly brilliant members of the bar. But during the war this arrangement became impossible. If the House of Lords did not sit until half past four, especially in the winter, it became impossible to get home before the consistent and terrible air-raids on London started. It was accordingly decided that their Lordships in the House of Lords meeting as a second Chamber should begin their session on Monday, Tuesday, Wednesday and Thursday at half past two and on Friday at 11 o'clock in the morning and appeals to the Lords judicially were then heard by the appellate committee sitting in a committee room upstairs, consisting of the same Lords of Appeal in Ordinary. But they were technically a committee of the House and ever since that time they have sat as an appellate committee, as it is called, in a committee room upstairs. Clearly even the Lord Chancellor cannot be in two places at the same time and it has become almost impossible for the Lord Chancellor since the war to sit judicially except for a fortnight in January and a fortnight in October when the courts are sitting, but Parliament is not. If the names of Lord Chancellors now rarely appear in the law reports, it is for those practical reasons rather than from any reticence, or, I hope, lack of expertise on their part.

I now turn to the role of the Lord Chancellor in Parliament. He is the Speaker of the House of Lords which as you know is the second Chamber in our Parliament. It has been attended by Lord Chancellors ever since the 13th century. Up to the 17th century, indeed, the Lord Chancellor sometimes attended the House of Commons as well. And it led to great occasions in our history taking place. There was for instance the remark-

able occasion in the year 1523 when Cardinal Wolsey came to the House of Commons aggrieved by the fact that, according to the biographer Thomas More, "nothing was so soon done or spoken in the Commons, but it was immediately blown abroad in every alehouse." That was, of course, before Hansard and the gentlemen of the press were reporting what was happening in Parliament. It came at a time when the King wanted a great subsidy from Parliament. Cardinal Wolsey was Chancellor then. He was the great Cardinal who built Hampton Court and who you will remember from your Shakespeare warned his successor about shunning ambition: "by that sin fell the angels." He sometimes seems a character created by Shakespeare, but he really did exist in fact. He went to Sir Thomas More, who described the occasion, with all his pomp, with his maces, his pillars, his pole-axes, his hat and his great seal too. But when Cardinal Wolsey asked for a subsidy, no-one in the House of Commons spoke. The Cardinal said: "Here is without doubt a marvellously obstinate silence." And he departed from the place empty handed. Quite a dramatic confrontation between those great figures it indeed must have been.

But now the Lord Chancellor presides over the House of Lords I am not sure that he any longer has pole-axes or pillar, but he certainly has his mace, his hat and the great seal too. And he still wears the full regalia, the full bottomed wig, the court coat, the silk gown, the silver buckled breeches and the silver buckled shoes. Save on great State occasions when he breaks out into gold.

His role as chairman of the House of Lords is a curious one, because he has absolutely no control over the proceedings at all. Neither the mace nor the woolsack is deemed to be in the House. He does put formal questions to the House, but if he wishes to speak there as a minister, he moves three paces to the left to get as near as he can to the authorised seat of the Lord Chancellor in the House of Lords which is on the Earls front row and the result is that the Lord Chancellor becomes involved in a curious sort of quadrille. If, for instance, I have to introduce and deal with a bill in the House of Lords, say a recent bill on reforming the law of intestacy, the proceedings will begin by the clerk at the table – the Clerk of Parliaments – calling on the Lord Chancellor. I then take three sharp paces to the left and then I move the second reading of the Bill and after I have finished, I say "I beg to move". I then move three paces to the right back in front of the woolsack and then I say to the House: "The question is that this Bill be now read a second time." I then sit down. Then the debate continues. At the end of the debate, I am entitled to move again three paces to the left to reply to the debate, then I move back to the woolsack and once again put to the House: "The question is that this Bill be read a second time." As many as are of that opinion will say "content" the contrary "not content" and sometimes the "contents" have it. You can see that it becomes an extremely complicated business, Mr. Attorney, when you are

at the committee stage of a bill, but at least it gives the Lord Chancellor abundant exercise which he no doubt needs since he has to reside in the House of Lords as well as work there.

The Speaker of the Commons, of course, has very different powers and functions. During my 29 years as a Member of Parliament, it was my experience that even there the authority of the Speaker was not always accepted, at any rate, in the spirit, even though it was in the letter. There was, for instance, an occasion when one of the Irish members called a minister a liar — which is, of course, a highly unparliamentary expression no doubt in your Parliament too – and Mr. Speaker called upon him to withdraw that statement. And he said: "Very well, if you so command I will, but if on my way home to-night I was to walk across Westminster Bridge and were to see the Right Honourable Gentleman walking across with Ananias on one side of him and Sapphira on the other (the greatest liars in history) I would think he was keeping excellent company."

I turn now to the role of the Lord Chancellor as Minister. As I have said he is a member of the Cabinet and he presides over key committees and when anything of considerable difficulty occurs he is usually called upon to chair the committee of ministers dealing with it. In the Cabinet obviously he takes an active part in discussions, above all on legal and constitutional matters, and on foreign affairs questions with legal implications. He accompanies the Prime Minister abroad on great occasions, and sometimes for negotiations like the negotiation of what turned out to be the Rhodesian non-settlement; although when I took to sea on Tiger and Fearless for that purpose, Mr. Attorney, I did so in my capacity as Attorney General and I am glad to say I did not prove to be a very bad sailor.

You will see from what I have said that the Lord Chancellor occupies a highly sensitive position in the balance of our constitution. When a judge by one of his obiter pronouncements or by one of his extra-mural activities appears to outrage Parliament or ministers or Members of Parliament, I am expected by them to do something about it. When a Minister or a Member of Parliament in turn appears to attack a judge unfairly and to be threatening his independence by bringing pressure to bear upon him, I am rightly expected by the judiciary to do something about that. When the Government itself or a Government Department is alleged to be breaking the rule of law, I am expected by the public and the press quite rightly to do something about that. I do my best to do all these things and I no doubt end up by pleasing nobody. As my predecessor, Lord Hailsham, has put it, to the student of Montesquieu and the American constitution, the office of Lord Chancellor is thus an anomaly hard to explain and at first sight impossible to defend. But an examination of his actual functions shows that in actual practice the anomaly wholly disappears. He is there not because the doctrine of the separation can be safely disregarded, but

cannot be disregarded. In particular the independence of the judiciary from political interference is a cardinal principle of liberty to be preserved at the price of constant vigilance. In the absence of a paper constitution the separation of powers is the primary function of the Lord Chancellor, a task which he can only fulfil if he sits somewhere near the apex of the constitutional pyramid armed with a long barge pole to keep off marauding craft from any quarter. That is the colourful language of Lord Hailsham and you must not ask me how a barge can get near the apex of a pyramid, except possibly in the time of Noah, but then, of course, there were no pyramids. But the gist and essence of what my distinguished predecessor said is absolutely true.

Now the massive duties which I have described as having to be performed by the Lord Chancellor involves a diet of a mass of papers which I am afraid have proliferated even more since the discovery of the photostat machine. The volume of papers is about half political and half judicial administration. The first half consists of papers for the next day's Cabinet or Cabinet Committees, or, of the papers which are in future coming before them. The economic papers as you can imagine are lengthy and complex in the conditions of to-day: added to these are the telegrams which have flooded in to the Foreign and Commonwealth Office throughout the day because under our doctrine of Cabinet responsibility, I am as much responsible for a decision on foreign policy as any other member of the Cabinet. The other half is departmental. The Lord Chancellor is generally responsible for the administration of justice throughout the country. He is directly responsible for the administration of the Law Courts in the Strand and of all the Circuit Courts and the County Courts in the country. For obvious reasons he has frequently to see the Lord Chief Justice and indeed, since we have established direct rule over Northern Ireland, the Lord Chief Justice not only of England and Wales, but of Northern Ireland as well. He has also frequently to see the Master of the Rolls, the President of the Family Division the Vice-Chancellor and, of course, the Attorney General, who is the Lord Chancellor's alter ego and spokesman of the House of Commons.

The Lord Chancellor has what another of my distinguished predecessors, Lord Gardiner, called a scandalous amount of judicial patronage. It is, however, governed by well established conventions and it is exercised after a most careful consultation and, if I may say so, not inadequate knowledge in the Lord Chancellor himself. I see no harm in disclosing the secret, if it is a secret, that important appointments to the judiciary are recommended to the Queen only after long and careful consultation with, among others, the heads of the Divisions of the High Court, that is the Master of the Rolls, the Lord Chief Justice, the President of the Family Division and the Vice-Chancellor of the Chancery Division. And as I have said, it is the Lord Chancellor who recommends the appointment of the higher judiciary and the Circuit Judges and the Stipendiary Magistrates, of the Recorders and

the Q.C.s the Registrars and some 19,000 Justices of the Peace. To help, him in this last task, he has Advisory Committees throughout the country which he himself appoints. And this is a curious historical fact, I also appoint 500 clergymen to livings up and down the country, that is a survival from the days of Henry III when he took over the properties, the manostries and the churches of the Roman Catholic Church, kept the best ones for himself and gave the ones he did not want to the Lord Chancellor. But there again great care is taken to find the right man for the right job and I act with the advisement of specially appointed staff and after consulation with the Bishops and the Church Wardens. So this patronage is exercised after most careful examination and thought.

Now there is no time for me to deal with all the other varied activities of the Lord Chancellor. There are a number of responsible bodies outside the Parliament or the Law Courts which he is responsible for; the Public Trustee who has in his charge the funds in court and hundreds of millions of money of members of the public. He is responsible for the Land Registry, the Public Record Office, the Court of Protection, the lands tribunals, the pensions appeal tribunals, a myriad of other tribunals and he is also the minister responsible for the Council on Tribunals, for the Judge Advocate General's Department and for the Official Solicitor. He is also responsible for maintaining judicial comity with Commonwealth and foreign Judges.

I was appointed to the office of Lord Chancellor at a time of change in the life of the law in my country. There is no harm in that because the law of my country, as I apprehend also of yours, Mr. Attorney, is a living law, but it is now subjected more than ever to new external and internal pressures. As to external pressures, there has been the involvement of our law in the international commitments of our country through the United Nations, the Council of Europe with its Convention of Human Rights and its Commission of Human Rights, and finally the European Community and the Treaty of Rome.

Then there are the internal pressures on the shape of the law. Some of these are beneficial in my country as no doubt they are in yours. An example is the demand that the law should be made true to its ideal of justice. Another is that the driftwood in the law should be removed. These are tasks to which Parliament and our excellent and invaluable Law Commission apply their minds to, as well as the other reforming agencies within the professions, both the Bar and the solicitors, and I hope and believe that in your country also your legal profession is astute in the field of law reform. But it may well be that we are still far removed from the aspirations which were so eloquently expressed by my predecessor, Lord Brougham, in his famous speech on law reform in February 1828. He spoke on that occasion for six hours – don't be worried, I will not follow his example – but he concluded his speech with famous words when he

said this: "It was the boast of Augustus that he found Rome of brick, and left it of marble. But how much nobler will be the Sovereign's boast when he could say that he found law dear and left it cheap; found it a sealed book and left it a living letter; found it the patrimony of the rich, left it in the inheritance of the poor; found it the two edged sword of craft and depression, left it the staff of honesty and the shield of innocence." I do not know whether you have achieved that transformation in your country. I am not satisfied yet that we have achieved it in ours, but I do believe that since that time the state of the law itself in my country and the administration of justice are now fairer than they have ever been. I think that we can reasonably claim in my country, and I have little doubt also in yours, that, no man is above the law and no man is below it. That much of the law is still a sealed book is I believe unfortunately true and for this no doubt Parliament itself and perhaps we the lawyers have a large measure of the blame. We are now studying reports which have come from the recommendations of a committee under Sir David Renton, Q.C, M.P, to see if the Statute Law can be made more comprehensible. For instance, when I was Attorney, we had a bill on leasehold enfranchisement and I noticed a paragraph in a schedule which said: "for the purposes of this bill a church is a railway" which does not really make it easy for the laymen fully to understand. There is therefore much to do there.

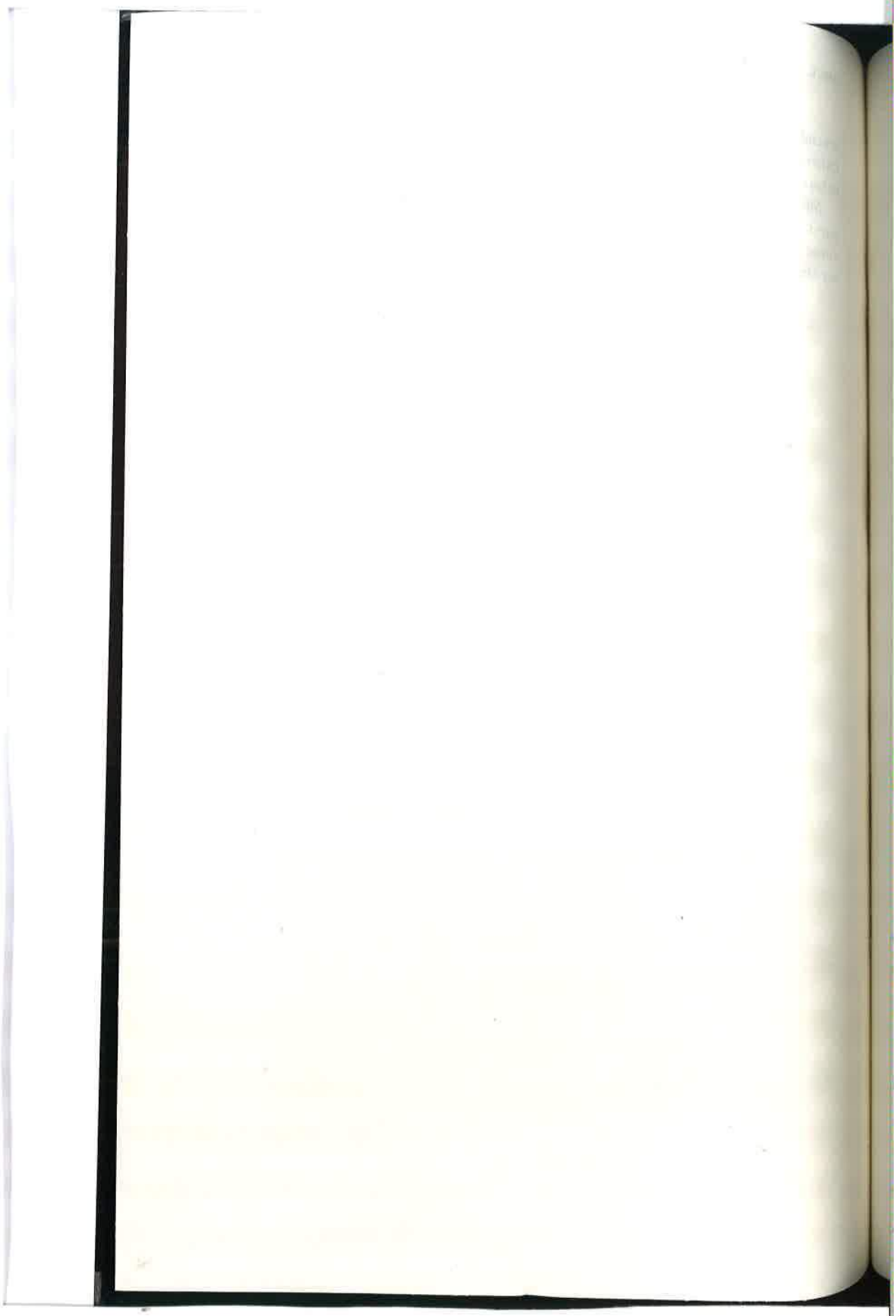
The obscurity of the law still presents even counsel with difficulties. I heard recently, for instance, this exchange between counsel and the judge. The counsel confidently: "My Lord, the law on this matter is clear and indisputable. It says so and so." The judge, testily: "The law says nothing of the kind." Counsel, humbly: "Well, it certainly was the law up to the moment of your Lordship's intervention." I am sure all lawyers practising here have felt like saying that from time to time. The complexity and uncertainty and obscurity of the law is something that lawyers should be concerned about because clearly we have no vested interest in that state of affairs. We find cases are taking longer to try, and I am bound to say I sympathise with the observation of Lord Parker of Waddington who said: "A judge is not supposed to know anything about the facts of life until they have been presented in evidence and explained to him at least three times." I expect the judges who are here have suffered that too from time to time.

Time does not permit me to take the matter very much further, but there is one aspect of legal administration in which I have been greatly concerned and that is the extension of legal services to the poorest in the community who cannot afford legal representation. We have a massive system of legal aid in our country, but I have found since I have been Lord Chancellor that in spite of it lawyers just do not practise in the poorer neighbourhoods of the great cities. So law centres have sprung up manned, I am happy to say, mostly by young people, like some of the young people I see here to-day, who have seen the need and are filling it. It is clearly quite

crucial that legal services should be readily available to the ordinary citizen. Otherwise we cannot honestly and honourably claim that we have equality before the law.

Mr. Attorney, on one occasion the great English artist, Sickert, had a guest who talked too much and stayed too long. Sickert said to him: "Do come again when you have a little less time." If I go on any longer you will say the same of me.

†The Right Honourable, the
Lord Elwyn-Jones



Judicial Creativity and Preventive Detention in India: An Aspect of Indian Constitutional and Administrative Law

I

There has been a long standing controversy over the question whether courts make or do not make law. The traditional English view has been that courts only declare the law and do not make it.[1] However, in modern times, the view has crystallised that courts do not merely expound, declare or interpret the law, but play a law-creating role as well through their interpretative process.[2] The Indian Constitution confers an extensive power of judicial review on the Supreme Court of India.[3] In discharge of this power, the court has, on the whole, adopted a passive role. The dominant trend of the interpretative process has been "to go by the plain words used by the constitution-makers."[4] But cases are not completely lacking in which the court has broken from this self-imposed rule and adopted a creative role. The example, *par excellence*, of this approach is to be found in the series of cases on the Amendment of the Indian Constitution.[5] But barring these flashes, the Court's over-all attitude towards the constitution has been to adopt the norms of literal interpretation and eshew any desire to adopt policy considerations. Such statements as that the court is not concerned with policy may be found strewn throughout the case-law con-

[1] Lord Evershed announced in 1961 that the English judges do not legislate even interstitially with the possible exception of the law developed behind equitable remedies. See, Evershed, *The Judicial Process in XXth Century England*, (1961) 61 Col. L.R. 761, 789.

[2] See, generally, on this subject: Stevens, *The Role of a Final Court in a Democracy: The House of Lords Today*, (1965) 28 MLR 509; Allen, *Law in the Making*, 302 (1964); Cardozo, *The Nature of Judicial Process* (1921); Clark and Trubeck, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, (1961) 71 Yale L.J. 225; Davis, *English Administrative Law – An American View*, (1962) *Public Law* 139; Denning, *The Changing Law* (1959); Diplock, *The Courts as Legislators* (1965); Jaffe, *English and American Judges as Lawmakers* (1969); Friedmann, *Legal Theory* (1967); Radeliffe, *The Law and its Compass* (1960).

[3] Jain, *Indian Constitutional Law*, 139–181 (1970).

[4] Mukherjea, J., in *Chiranjit Lal* v. *Union of India*, AIR 1951 SC41. Also, Jain, *ibid.*, 758.

[5] *I.C. Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643; *Kesavanand Bharati* v. *State of Kerala*, AIR 1973 SC 1461; Jain, *ibid.* 777–805.