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"MINORITY RIGHTS IN A PLURAL SOCIETY"

by

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"Minority Rights in a Plural Society"

by LORD SCARMAN

This evening I have set myself a limited task - to explore a single, but fundamental, implication of the plural society and to ask the question: what is the role of the law in helping to resolve the dilemma it poses. The dilemma arises when the rights of an individual are put at risk in the interests of a disadvantaged group. Is it acceptable to require an individual to make the sacrifice? If it is, how far is it reasonable to go?

I take it that when we speak of a plural society, we mean a society which is made up of a number of groups which, willingly or unwillingly, recognise themselves, for the time being at least, as members of a larger group, the so-called plural society. Northern Ireland provides an illustration of unwilling recognition of a plural society by one group within it; the U.S.A. is an illustration of a plural society made up of a very great number of groups, most of whom (but by no means, all) are pleased and proud to be members. There are further significant complexities to be noted in this very complex concept. The political and social grouping of the groups is always shifting. A plural society is a kaleidoscope, the pattern changing according to the issue of the moment. But there is a permanence in the groups themselves. The differences between the groups are either physical, in which case it appears impracticable - if not impossible - to eliminate them, or so fundamental that it would be thought an act of apostasy or treachery to disregard them. Women cannot become, and do not wish to become, men. People cannot change, and do not wish to change, the colour of their skin. People of differing ethnic origins wish neither to hide their origin nor to suppress their separate cultures or religious beliefs.

It is this attitude to group differences that is the distinguishing feature of the plural society. One very important consequence follows. The purpose of the law must be not to extinguish the groups which make up the society but to devise political, social and legal means of preventing them from falling apart and so destroying the plural society of which they are members.

The risk of failure is great. Very few plural societies have fulfilled the aspirations of all the groups within them. Many have achieved survival by the emergence of one dominant group, by no means always a majority, who have ruled for a time to their satisfaction. Not all ruling groups have been tyrannical or oppressive: but very few have succeeded in avoiding the frustration of the groups whom they have held in subordination. The Roman Empire and British India spring to mind as plural societies which made a great effort to secure justice for all, but ultimately failed.

The failures of history prompt two questions. Is there anything to be gained by endeavouring to make a plural society work to the satisfaction of all its members? Should we not recognise that it cannot, and direct our efforts to finding a substitute? The questions are, I think, irrelevant. Plural societies are the product of irreversible movements of mankind. Short of genocide or mass transportation, most of them are here to stay. While it may be possible to carve up a continent or sub-continent into single group states, it cannot, for instance, be done in a small island like Britain; neither can it be done in places like Southern Africa where the mix of races defies physical separation. Nor, I suggest, is it to be desired that we should seek to break up plural societies. For if we can manage the problems of justice between groups and individuals, a plural society has much to offer of great value to mankind - a variety of cultures, activities and skills, which a homogeneous society cannot offer.

My first point is, therefore, that plural societies are here to stay, that they offer much of value to their members, and that the challenge is not how to convert them into homogeneous societies, but how to manage them fairly and acceptably as plural societies.

The problems are formidable. They raise political, legal and social issues which no society has yet resolved satisfactorily.

Can we in Britain, the newest of plural societies but with a proud heritage as defender of the liberties of man, solve them? I am an optimist: I believe we can. But we must be prepared to experiment politically and legally. In the legal field we must

be ready to abandon old habits and devise new methods. And here we find there is at once a conflict of interests which has to be resolved if the experiment is to have any chance of success. It is a platitude that society must be just. But what in the context of a plural society do we mean by justice? Are we seeking justice as between groups? Or do we remain true to our western philosophy that what ultimately matters is the right and duty of the individual human being, and that justice implies for every one of us "equal justice under the law" - to quote the inscription over the portico of the U.S. Supreme Court building. Clearly we desire both justice as between groups and equal justice under the law for every one of us. The dilemma of the plural society is that it is not always possible to achieve both. How, then, does one regulate, justly, the clash of interest between the group and the individual?

The Bakke case, now awaiting decision in the U.S. Supreme Court, has exposed the dilemma. A white student, applying for a place in the medical school of a University, has found himself passed over in favour of a black student with less qualifications. Have his constitutional rights been infringed, it being assumed that he was rejected because it was desired to increase the number of black doctors? Is not his rejection an act of discrimination against the white man based on his colour and ethnic origin? Is it right that the individual should pay the price needed to provide advancement for the disadvantaged group - in this case the very high price of denial of career opportunity? Morally, it is difficult, though not impossible, to defend a legal system which imposes upon an individual the burden of personal sacrifice so as to ensure opportunity to others.

Assuming we can answer the moral question, the legal problem is to determine how far we can allow the system to go in relief of disadvantaged groups. I turn first to the American experience in search of an answer. American society has been plural in character from its inception. Their success as a society is one of the great human achievements of all time. Their experience must, therefore, be an invaluable guide - particularly as their legal and ethical thinking is derived

from the same sources as ours. Their first task, after independence, was to unite the states without destroying them as states. They devised the federal solution. Federation is a way of handling the plural society - though it does not meet all the problems. The U.S. Constitution, into which a Bill of Rights was incorporated in 1791, provided their judges with the opportunity of developing the political and civil rights of the citizen in a federal state. From the first the Americans appreciated that their job was to make a success of a plural society:- "E pluribus unum" is the legend on the great seal of the U.S.A. Significantly, the seal of the Supreme Court has an additional feature - a solitary star to symbolise the grant of judicial power to one Supreme Court in a diverse society. Their approach was essentially legal: the federal courts were to protect the Federation and the citizen. They went into civil war to defend both. The war settled the question of political and civil rights - but left unresolved the problem of those groups who were socially and economically disadvantaged. How then could the law help the weaker groups to break out of their cycle of accumulating disadvantage? The enjoyment of political and civil rights they found was not enough. Characteristically, the Federal Courts were expected to work out an answer to the question.

Two famous cases illustrate the difficulties, and the progress made. Mr. Plessy, a black, tested the law of Louisiana by entering a railway coach reserved for whites. On 18 May 1890, in Plessy v. Ferguson, the Supreme Court sustained the constitutionality of the Louisiana statute. Races, it ruled, could be segregated if equal facilities were provided. The decision, as is notorious, was used to maintain racial segregation in education. On 17 May 1954, the Supreme Court decided the case of Brown v. Board of Education, holding unanimously that "in the field of public education the doctrine of 'separate but equal' has no place." It took the U.S.A. 60 years of smouldering discontent and racial frustration to reject as inconsistent with a just plural society the doctrine of social apartheid. But their system did enable them to do so, and to return to their great task of constructing a united society without destroying its diversity.

But Bakke's case now exposes how inadequate equal political and civil rights by themselves are to solve the social and economic problems. It is not enough merely to reject the 'separate but equal' doctrine. Even the great principle of "Equal justice under the Law" cannot be evenly applied without injustice to some disadvantaged groups who need the chance of breaking out of their cycle of accumulating disadvantage. "Reverse discrimination", as it is called, may be necessary to give them their chance. The challenge comes from the heightened sense of the community's obligation to afford to all social and economic opportunity and security. Their provision costs money. The resources even of a country as richly endowed as the U.S.A. cannot meet the total demand for education, housing, health, employment and social security. If all groups are to have their fair share the law in the fields of taxation, education, training, welfare, career opportunity and employment may have to bear more severely on some individuals merely because they belong to a better placed group. It is an explosive situation: but a path has to be found which can be accepted by all as just. The Americans have not yet provided their final answer. But they have devised a method - a combination of legislative and judicial development pursuant to, and controlled by a written constitution and a Bill of Rights.

The British experience is vastly different. With nothing in our law comparable to the American Bill of Rights, and with no federal experience, we have made more use of legislation and less use of the judges. We have been slower than the Americans in granting full political and civil rights to all - though this has now been achieved. Nevertheless, where the interests of Church and State have not been directly affected, minority groups have been treated tolerantly, not suffering to any frustrating degree. Jews, Catholics, Quakers, Non-Conformists have been able to achieve wealth and influence in British society. There has been, until recently, no race problem - no doubt because there have been no racial minorities of any significant size. When, therefore, in the sixties immigration introduced into British society significant minority groups ethnically, physically and culturally different from the indigenous population, the naturally tolerant British

were faced with a problem, that of the plural society which their experience had not fitted them to meet. The coincidence of immigration with the awakened ambitions of women created in one decade a problem which neither the law nor our institutions were ready to meet. The reaction was typical - pragmatic, empirical. We have not yet thought out a solution of principle. We have simply acted to meet urgent difficulties, preferring to use administrative and legislative methods wherever possible. No declaration of principle such as the American Bill of Rights has been attempted: but there is a spate of detailed legislation, the Immigration Acts, the Race Relations Acts of 1965 and 1968, the Equal Pay Act of 1970. At the same time the Divorce Reform Act of 1969, and the Matrimonial Property and Proceedings Act 1970 were strengthening the independence and increasing the opportunities of married women. Finally two closely related statutes were enacted, the Sex Discrimination Act 1975 and the Race Relations Act 1976. In a word, we have sought to do by detailed legislation what the Americans seek to achieve by reliance on a written constitution, a Bill of Rights and judicial decision. They have one great advantage over us. The Bill of Rights and the Supreme Court engage the loyalty and respect of the American people. The same cannot be said of the Equal Opportunities Commission or the Commission for Racial Equality, or the two statutes. Every American school-child reveres the constitution of the U.S.A., the Bill of Rights and the Supreme Court. But, if Bruce Forsyth were to ask his finalist in his TV programme which gets very close to the British people, The Generation Game, "What is the Equal Opportunities Commission?" do you think, for one moment, he would get a correct - or any - answer? And the sort of problems which these Acts throw up for judicial or administrative decision appear to many to border on the ridiculous. Nevertheless, notwithstanding the bureaucratic shape of our legislation, a feature which does not endear it to the public, it has attempted a solution based more upon the promotion of understanding and reconciliation than upon the heavy hand of the law. And it does include a limited attempt to tackle the Bakke problem. Section 35 of the Race Relations Act permits a degree of reverse discrimination in favour of members of a particular racial group who have special needs in regard to

education, training, welfare and ancillary benefits. Section 37 permits certain bodies offering facilities for work-training to discriminate, in favour of persons of a particular racial group: section 38 extends this provision to certain employers. The significance of those sections is that they recognise that members of a disadvantaged group may properly and lawfully be offered educational, training and welfare services in preference to others. The law is thus loaded in their favour. Discrimination against them is unlawful: but some discrimination in their favour is lawful.

This is very dangerous ground.

The risk is that in seeking to do justice to those who are disadvantaged we impose injustice on others. If the law is not loaded in favour of the disadvantaged, they will never achieve true equality of opportunity and freedom of choice. But, if it is, others will be denied opportunity and suffer curtailment of their freedom of choice. And any permanent loading of the law in favour of a particular group of persons may put the unity of society at risk of collapse. Nonetheless, I suggest that we can accept that an unbalanced law, discriminating in favour of some groups while making any discrimination against them unlawful, is necessary if we are to start building a civilised plural society. But at the same time, in a truly mature society we must recognise such laws as ultimately unjust. How then can we ensure that a temporary unbalance in the law, necessary during the current phase of development, does not become a permanent feature of the law? The answer, I suggest, must be that the law should declare the general principle of equal justice for all under the law, while recognising a temporary and limited exception in favour of members of disadvantaged groups. It is in this context that one sees the value of a Bill of Rights declaring the principle and objectives of the law so far as human rights are concerned. It is not a substitution for detailed anti-discrimination laws: but a reminder that such laws must not be taken so far as to imperil fundamental freedoms, and are, at their best, only a means to an end. We can, and for the present, must accept the loading of the law in favour of one group at the expense of others, defending it as a temporary

expedient in the balancing process which has to be undertaken when and where there is social and economic inequality. But the law must continue to emphasise the ultimate value of the individual. We must never lose sight of the fundamental principle, equal justice for all individuals under the law. In a homogeneous society it may well be unnecessary to declare by statute the basic rights and duties of men. But, as soon as the complexities of a plural society arise, a Bill of Rights, as the Americans have found, can provide a body of principle upon which the legislature as well as the courts can build. A Bill of Rights will remind legislators and governments that detailed laws providing relief for disadvantaged groups are only means to an end, not ends in themselves, and that they must be drafted so as to be consistent with the human rights of everyone. It will also provide criteria for the judicial interpretation of such legislation. It will enable the public to appreciate that the bureaucracies which such laws establish, the loading of the law in favour of the disadvantaged, and the restrictions imposed on other people's freedoms are no more than expedients to be discarded once the objective of genuine equality is achieved.

The complexities of the plural society are such that without a Bill of Rights we are in danger of losing our sense of direction. Faced with our current problems - only one of which I have explored - many people are asking: where are we going? If towards a corporate state where the units which matter are collective in character, where the individual's only chance of fulfilment is through the group, in that event a Bill of Rights is a serious obstacle to any such movement. A Bill of Rights and the corporate state cannot live together. But, if we have retained our view that it is man, not his method of organising himself, which ultimately matters, and that the law is to be based, as hitherto it always has been, on equal justice for all, then a Bill of Rights is imperative to keep alive our principles during a period of social development in which it is necessary to load the law in favour of deprived groups.

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(C) M.R.G.