LORD CHANCELLOR'S SPEECH AT

OSGOODE HALL, TORONTO

Wednesday 17th September 1969

Your Honour, Mr. Treasurer, Benchers, Ladies and Gentlemen,

May I first of all express my thanks to the Law Society of Upper Canada for inviting me to give the Convocation address here today, and my sincere and heartfelt appreciation for the Honorary degree of Doctor of Laws bestowed upon me. This will be a day which I shall long remember and I am very grateful to those who have had the responsibility for making the arrangements for me to come, particularly Mr. Treasurer Howland.

So, not having been kidnapped yet, here I am. I have been wondering what sort of ransom my colleagues in England would provide if I was kidnapped. I rather fear that, as they have survived for nearly three weeks without me, they might feel that they could continue that way.

This has been a very pleasant occasion, and I have been happy indeed to meet some of the members of the Law Society: in this respect Toronto has certainly lived up to its reputation, for I believe that the name derives from an old Indian word of a "meeting place", which it certainly has been for me today. I am only sorry that I cannot stay longer here and meet more of the members of the Society.

Returning as I am from an enjoyable and instructive three weeks in Canada to the rigours of another legal year, to the remains of one Parliamentary Session and to the onset of a new one, it may be that you will allow me to make some observations about freedom and control. Indeed, since in an early

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period of Canada's history, Toronto was a strong fort in a vast country of freedom and new initiative, these two concepts might strike a harmonious note in this place.

The relation between these two concepts inevitably involves a compromise at one place or another, and on the whole society succeeds in striking a rough balance between them. This is perhaps not unlike the case of the experienced barrister, who said that when he was young, he defended a lot of people who were innocent and they were convicted, and then when he was older and more experienced, he defended a lot of guilty people who were acquitted, and so, on the whole, justice had been done.

Of course, I do not wish to mention one of the classic areas where freedom is closely concerned, that is the political area, because in that field freedom has been a concept for which noble men have died through the centuries and which has since the down of civilization been the rallying cry against tyranny and oppression. I wish rather to consider the interplay of these two ideas as <u>social</u> forces in modern society. Consequently my theme is that of ordered freedom as a central concept of modern democratic society.

All Governments today, whether they are national or exercising jurisdiction within a state, have inevitably acquired greater powers as a result of the need to control our environment both economically and technologically. This ever increasing power leads to reaction evidenced by demands for greater individual freedoms and distinct or even positive dislike of authority. Hence the need to strike a balance and to ensure that authority encroaches no further than modern conditions require and is always alert to its basic duty of securing that the prevailing climate is one

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in which the individual can live his life to the full without encroaching on the rights and freedom of others.

This has been one of the essential tasks of the common law through the centuries, and the duty of lawyers today is to ensure that the law continues to play its part as an instrument of social policy in preserving this delicate balance between freedom and control. Inevitably today we must rely to a far greater extent than formerly on statute law rather than on the decisions of the courts for the articulation of these concepts. This emphasises the importance of there being a sufficient supply of lawyers who are ready to enter public life and become members of their national, provincial or local legislatures - a factor which should not be lost sight of in framing the curricula of legal education.

In so far as there is here a conflict between the individual and the executive, I think that lawyers have always rightly felt that their primary duty is to be astute to safeguard the rights of the individual against the executive. The first post-war Attlee Labour Government in 1945 was faced with the urgent task of creating a society in which the ordinary man might find a far greater measure of economic justice than he had been able to enjoy before the war. Inevitably this meant - particularly in a period when war-time shortages were still the order of the day - that there had to be a high degree of planned control from the centre if the new society which we have come to know as the Welfare State was to be brought into existence. You may remember that at that time, owing to the legal doctrine that the Crown can do no wrong, if you were run over by a post office van, while

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they might pay you damages you had no legal rights and could not in any circumstances sue the Government in tort and the only remedy for a breach of contract by the Government was the unsatisfactory procedure of a petition of right. It was the Attlee Government which, in the Crown Proceedings Act, for the first time gave every citizen substantially the same rights, both in contract and in tort, against the Government as he had against anyone else.

But it is no use having legal rights if you cannot afford to enforce or defend them and it was the Attlee Government which passed the Legal Aid and Advice Act. This is, I know, a live subject in Ontario. I can only say that civil legal aid has worked extremely well in [redacted] but we have only recently extended it widely in the field of criminal legal aid and our experience here suggests that it may be resulting in cases being fought in which there would formerly have been pleas and we are considering what to do in the matter.

The developments of the last few years further illustrate my main theme of the way in which developing social controls are balanced by the abandonment or modification, in the interest of greater freedom, of those controls which have ceased to serve a useful purpose. The present Labour Government has had to exercise a wider measure of control over prices and incomes in the interest of the community at large than any of its predecessors had dared to do and inevitably there are some fields in which this has led to hardship and the disappointment of legitimate expectations - I have in mind in particular the solicitors' profession in England and Wales

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whose charges are closely controlled by statutory committees and I was hoping to be able to introduce new scales just at the time when we were caught by what has come to be known as the Prices and Incomes Freeze three years ago. So the solicitors have had to wait for their increase while the incomes earned by the profession are examined by the Prices and Incomes Board. This is hard on them, but there is no doubt that the prices and incomes policy as a whole has been a great advantage in enabling us to hold inflation at bay.

But, of course, this is an example of a control which the ordinary man is apt to experience most strongly in his own pocket. I think there can be little doubt that controls of this kind, essential as they are, play their part in helping to accentuate people's dissatisfaction with what they regard as the encroaching demands of government. This is not peculiar to us in the United Kingdom. Its best-known manifestations in the fields of student unrest are familiar to all democratic societies and indeed to a number of other countries which are by no means democratic. I think the moral to be drawn from this is that Governments must be astute to see that such legal and social controls as they impose can be justified against the strict test of necessity and that adequate opportunities exist of enabling grievances to be voiced and investigated. As far as my Government is concerned we have, as you know, made a start in the United Kingdom with the establishment of the Parliamentary Commissioner for Administration, an institution borrowed from the Scandinavian countries where he is known as the Ombudsman. At present the Parliamentary Commissioner is limited to the investigation of

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complaints of maladministration in central government departments, but we are in process of making similar arrangements in the field of local government, where I suspect that the shoe pinches harder than it does in central government. The Parliamentary Commissioner has sweeping powers to walk into any Government Department and look at any file, including documents which even a High Court Judge is not allowed to see, and can question any civil servant. The fact that the Parliamentary Commissioner, Sir Edmund Compton, has found only a very small proportion of the complaints against central governments departments to be justified does not mean that we were not right in setting up this new office, for the fact that complaints against the administration can be promptly, fully and impartially investigated and that, if they are without foundation, this can be publicly established is a source of reassurances to the public and to the civil service alike.

Another sphere in which the liberties of the subject have recently been increased is that the House of Lords, having decided that it was no longer/to be bound by its own previous decisions, has now decided that, whereas formerly if a Minister gave a certificate that it would be contrary to the public interest to produce a government document, the matter can now be decided by a judge. I always thought that this was what the law ought to be because it is really only the judge who can weigh on the one hand the question of public interest involved and on the other hand the importance of the document to the parties in the case he is trying.

Hitherto the executive has always had the sole right to decide who is to be allowed into the country, but questions of immigration as of deportation

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are of such importance to families in these days that we have recently passed an Act enabling immigrants who are denied entry to appeal to an Appellate Tribunal. I have also introduced legislation which has been enacted to extend the jurisdiction of the Council on Tribunals, which is the Watch-dog of the public in relation to Tribunals, and has supervision over their rules and procedure, and the Act now extends their jurisdiction to many kinds of Ministerial Inquiries.

In this Parliament we have made great advances in other directions in relaxing outmoded controls in the interest of individual freedom where this can be done without damage to the community as a whole. Some of these changes have come about owing to the initiative of private Members of Parliament, while in other cases the Government themselves have led the way. For example, the proposed reform of our divorce law, which is being considered by Parliament at the present time, is sponsored by a private Member though the Government have made time available in both Houses of Parliament for the Bill to be fully considered. As a matter of history no Government has ever introduced a Bill to alter the grounds of divorce. The original Matrimonial Causes Act enabled the parties to go to a court of law instead of to an Ecclesiastical Court and then it became a private Bill in the House of Lords but it did not alter the then grounds for divorce. Every subsequent change in the grounds of divorce has been effected by a private Member's Bill on a free vote. It is also a matter of interest, I think, that the Lords, which used to be extremely reactionary in social matters, has in recent years led the way. The fact is, of course, that the gradual introduction of Life Peers during the last ten years has done a good deal to

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change the composition of the House. In the case of the Divorce Bill, as in the case of those dealing with homosexual acts by adults in private and the liberation of our abortion law, the matter was started by lengthy discussion in the Lords which led to articles in the Press and documentaries on television until the House of Commons woke up one morning to find to their surprise that the Gallup Polls showed that 70% of our people wanted a more liberal abortion law. Incidentally, the Divorce Bill provides a striking illustration of the value of the Law Commission which the Government set up in 1965 to keep the whole of English law under review with a view to its reform. (Perhaps I should add that there is a separate Law Commission for Scotland charged with a corresponding duty.) Numerous attempts have been made by private Members' Bills during previous Governments to reform the divorce law so as to enable a divorce to be obtained where the marriage has irretrievably broken down and the parties had been living apart for a number of years. After the failure of the last attempt in 1963 the Archbishop of Canterbury appointed a committee to go into the matter and it recommended the abolition of the doctrine of the matrimonial offence and its replacement by irretrievable breakdown as the sole ground for divorce. The trouble about this was that if the courts had had to investigate the matrimonial history in every detail to see whether the marriage could really be said to have broken down they would have been overwhelmed and far more courts and judges would have been required than we could possibly have provided. So I asked the Law Commission for their advice on the sort of legislation which would work in practice if Parliament were to decide to accept the principle of a relaxation in the divorce laws

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based on a recognition of the fact that it is useless to try to keep in being by law a marriage which has quite plainly broken down in fact even though neither party may have committed a matrimonial offence. The Law Commission produced a most valuable report and its basic proposals were accepted by the Archbishop of Canterbury's Committee and form the substance of the Bill which was drafted by the Law Commission and which is now before Parliament. If the ground had not been prepared in this way, I very much doubt whether the present attempt to reform a divorce law, which is almost universally condemned as hypocritical and unsatisfactory, would have been any more successful than its predecessors.

Perhaps I should add that the Divorce Reform Bill itself provides a useful example of the need to balance freedom and control - in this instance, freedom for either party to a marriage to apply for a divorce if the husband and wife have lived apart for 5 years or more, and the control which is needed to ensure that the respondent, who may be in no way to blame, is financially provided for to the greatest extent possible in the circumstances.

Lest you should think that the Government in London leave all important measures of social reform in the fields I am concerned with to the initiative of private Members, let me mention the Family Law Reform Act which received the Royal Assent in July. This Act made two important and far-reaching changes in the law, one at least of which will affect every family in the country.

One important change made by the Act is its recognition that people who are unfortunate enough to be born illegitimate ought not to be penalised in the way that the law has penalised them hitherto and that in particular

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they ought not to be deprived of the right to succeed to property on the intestacy of an ancestor but should in this respect stand in exactly the same position as their legitimate brothers and sisters. This again accords, I think, with the spirit of the time and the sense of justice of our community.

Secondly, the Act also reduces the age of majority for all purposes, including that of marrying without anyone's consent, from 21 to 18. What happened was this. I am a very old member of the Labour Party but I never had any personal political ambitions but merely helped the Party when required through the Society of Labour Lawyers. Some years ago, at the request of Mr. Gaitskell who was then the Leader of the Labour Party, I became Chairman of a Youth Commission and thought that I had better remind myself of our law under which no one under 21 can own property or obtain a mortgage or give a valid receipt. He may be a pop star earning £10,000 a year, with a wife and two children, but he cannot make a valid will unless he is a soldier on active service. I looked to see why the age was 21 and not 22 or 20 but the books gave no answer to this problem so I asked my clever friends in the Universities but they also were unable to tell me. I therefore had to go back in history and back and back until I came to a period where the age of majority depended on your social class. The peasant's son came of age at 15, the merchant's son when he could count pence and measure cloth and it was only the knight's son who did not come of age until he was 21. But why did the knight's son come of age at 21? Why not 22 or 20? And then I discovered that the answer was that all these three tests were purely practical, the peasant's son was not going to learn any

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more after 15, the merchant's son was a practical test and, as this was the period when armour had never been so heavy before and was never to be so heavy again, they found that until he was 21 the knight's son could not sit on a horse with all that weight of armour and wield a great lance as well. About 200 years later, the tendency in English law always being to assimilate it to that of the upper classes, the judges decided that the age of majority should be 21 for everybody and, having decided that, they sank back exhausted and it is literally true to say that neither House of Parliament has ever considered whether 21 is the appropriate age today nor has there ever been any inquiry into what the age should be. One of the first things therefore I did as Chancellor was to appoint a Committee with a young divorce judge with a teenage family of his own as Chairman and five men and women of considerable experience of young people who heard evidence on the subject for two years and then produced a unanimous Report saying that there had to be an age, that whatever age was chosen would be too old for some and too young for others but they had no doubt that on balance the right age at which young people today ought to be treated as responsible was 18. And we have since agreed to Parliamentary votes at 18 as well.

I hope I have said enough to show you that even though we may be immersed in economic difficulties which may appear to leave little time for the consideration of problems of greater human interest - and perhaps more abiding interest - we are nevertheless in the United Kingdom doing our best to ensure that these problems are not overlooked. We are determined to do everything we can to ensure that the law plays its full part in helping to create the conditions in which people can realise their

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potentialities to the full, by giving them freedom within the framework of an ordered society which expects that its members will shoulder their responsibilities if they are to enjoy their rights.

But the fact remains that to the extent that there is an inevitable conflict in the sphere of freedom and control between controls by the executive and the liberties of the individual I hope that lawyers will always feel that Governments are quite capable of looking after themselves and that the citizens are entitled to look to the lawyers to be their watchdogs to see that there is no unnecessary interference with the liberties of the individual.