# *SPECIAL LECTURE SERIES*

*Human Rights & the Democratic Process*

*by*

*Lord Scarman, PC, OBE*

*(1983)*

*The Monarchy*

*by*

*Lord Blake*

*(1984)*

*The Fall & Rise of the Entrepreneur*

*by*

*Lord Young of Graffam, PC*

*(1985)*

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# *INTRODUCTION & ACKNOWLEDGEMENT*

*Since 1983 Gresham College has annually invited a person of distinction to deliver its Special Lecture – The subjects are varied, but all are of topical and often controversial interest.*

*The College now takes the opportunity of publishing the First three lectures in the series which have been edited from transcription and compiled by Carol Dulling.*

# BIOGRAPHIES

## LORD SCARMAN

*Leslie George Scarman was born in 1911. He was educated at Radley College & Brasenose College, Oxford where he was a classical scholar.*

*He became a barrister in 1936, and Queens Council in 1957. A judge of the High Court of Justice, Divorce and Probate, he was Lord Justice of Appeal from 1973 - 1977 and Lord of Appeal in Ordinary from 1977. From 1965-73 he was Chairman of the Law Commission and from 1973-76 was a member of the Council of Legal Education.*

*He was awarded the OBE in 1944, made a Privy Councillor in 1973 and a Life Peer in 1977. His artistic involvements include membership of the Arts Council from 1968-1970 and 1972-1973 and Vice Chairmanship of the English National Opera from 1976-1981.*

*His publications include, Patterns of Law Reform (1967) English Law – the New Dimension (1975) and The Scarman Report – The Brixton Disorders (1981).*

## LORD BLAKE

*Robert Norman Blake was born in 1916. He was educated at Norwich School and Magdalen College Oxford where he obtained a First in PPE (Politics, Philosophy and Economics). In the Second World War he served in the Royal Artillery in the Western Desert, was taken prisoners at the fall of Tobruk in 1942 and escaped from Italy in 1944. He was Tutor in Politics at Christ Church Oxford from 1946-68 and has been Provost of The Queen's College Oxford since then.*

*His principal publications have been: ed. The Diaries of Field Marshal Haig (1952); The Unknown Prime Minister, The Life and Times of Andrew Bonar Law (1955); Disraeli (1966); The Office of Prime Minister (1974); A History of Rhodesia (1977); ed. The English World (1982); Disraeli's Grand Tour (1982); The Conservative Party from Peel to Thatcher (1985); The Decline of Power 1915-64 (1985) in the Paladin History of England. He is Editor of The Dictionary of National Biography. He was made a Life Peer in 1971. He is a Fellow of the British Academy, a Trustee of the British Museum, a Trustee of Chatsworth, Chairman of The Rhodes Trust and Chairman of The Royal Commission on Historical Manuscripts. Lord Blake is also a Director of Channel Four Television and has often taken part in radio and television programmes.*

## *LORD YOUNG OF GRAFFHAM*

*David Young was born in 1932 and was educated at Christ's College, Finchley, and University College, London where he read law. He qualified as a solicitor in 1956. Following a short time in practice, he joined Great Universal Stores Limited until, in 1961, he established his own industrial construction group.*

*After the 1979 election, he became Industrial Adviser and later Special Adviser to the Secretary of State for Industry. In April 1980 he was appointed a member of the English Industrial Estates Corporation. After the Cabinet reshuffle in September 1981, the Secretary of State asked him to continue as his Special Adviser. He has also acted as an adviser to the Secretary of State for Edcuation and Science. With his particular interest in training, he was elected Chairman of the Administrative Committee of the World ORT Union (Organisation for Rehabilitation through Training) for 1980 and 1984. Lord Young became Minister without Portfolio from September 1984 when he became a member of the Cabinet, with a special remit to promote policies for the growth of enterprise and the creation of jobs. Prior to this he was Chairman of the Manpower Services Commission from April 1982, and he became a member of the National Economic Development Council in 1982.*

*Shortly after giving the Gresham Special Lecture, Lord Young was appointed Secretary of State for Employment in September 1985.*

# *Index*

# *Human Rights and the Democratic Process*

*by*

*The Rt. Hon. Lord Scarman P.C., O.B.E.*

*The Gresham Special Lecture*

*delivered in the Old Library,*

*Guildhall, London*

*on*

*5th May 1983*

*It is indeed an honour to give the first Gresham Lecture and I feel that the brief outline which our Chairman has given of Gresham College and its origins, indicates that, on an occasion such as this, one should not be too concerned with the difficulties immediately current and surrounding us. We should perhaps on occasions of this sort try and lift our heads above the choppy waters in which normally we have to navigate our boat and to study a more distant horizon, hoping that by so doing we may chart a course which will lead us to objectives that we seek to achieve and, without any apology, it is that sort of journey on which I propose to take you during my talk. The journey's end that I have in mind, is the achievement for all of us, and I emphasise the word 'all', within our society of a sure protection of our human rights and fundamental freedoms; and the question which I am asking is, how effective is the democratic process in moving us towards that journey's end and maintaining those rights and freedoms? If there are inadequacies in the democratic process, how are we to set about the task of remedy?*

*In answering the first question, I would wish to begin at the beginning. What is meant by the democratic process? The answer is simple. The democratic process is government by the people, for the people, no more no less. Undoubtedly it is the principle which most democratic countries claim to accept. But it is important in dealing with humanity and with human institutions to look at practice as well as principle. I suppose one could say of modern society that the democratic process has necessarily to be translated into a representative form of government based upon universal suffrage in which decisions are ultimately taken by a majority. As soon as one adopts that working formula or definition, some of us are going to ask, and I ask at once, where in such a process does one find safeguards for the minorities? And I suppose, very broadly, the answer has to be that safeguards for the minorities in society may or may not be built into the democratic process. The only thing one can say of the democratic process is that such safeguards as are inherent in the process itself are political and not legal. Public debate, the vote, the possibility that todays minority may prove tomorrows majority and vice versa, are the sort of political safeguards that are necessarily present in the democratic process. But there is no necessary legal protection for minorities in a system which is essentially based on rule by the majority. I do not aspire in a short address to look in any depth at history or indeed at the current world around us. But both history and the existing world provide many illustrations which show that the democratic process in itself does not ensure that all the people will have their human rights and fundamental freedoms protected. Historically, the Americans knew this when they had concluded their successful war of independence against the colonial power of Britain. As soon as they had declared their independence, they enacted a written constitution.*

*Naturally, it was based on the democratic process; it contained a very interesting legal package. It was a package of defined interacting powers distributed between the President, Congress and the Supreme Court; and none of those three key institutions had unlimited power. When one looks at the existing world what does one find? Again, I can take it only in the most general terms. One finds in the modern world very many democracies. Most of them have carefully-drawn constitutions guaranteeing human rights and fundamental freedoms. Yet in practice, in many of the existing democracies of the modern world, human rights and fundamental freedoms yield to the power of the State and that power is exercised in many of them according to the dubious necessities of those in power. So what in a word, can be said to be the conclusion to be drawn from the historical data, that is to say, history in the true sense of looking back over the past so as better to understand what is going on around us. I think it is this: that no political process, indeed no legal system even in a democratic process with written guarantees for rights and freedoms, can guarantee human rights and fundamental freedoms. The only sure protection of human rights and fundamental freedoms is an active and alert public opinion. Nevertheless, if that is the verdict of history, within that verdict there is much to be said for a positive contribution to the protection of basic rights to be made by the constitution of the democratic process. Certainly, the elective institutions of democracy are themselves invaluable — they recognise as a matter of principle the voice of public opinion in determining the public actions of governmental authority at all levels. Secondly, the democratic process does permit change of government without the necessity of revolution: in the democratic process public opinion can make itself not only heard, but decisive.*

*It will be immediately clear from these preliminary observations that my subject tonight is not at the deepest level of protection of human rights in our society; my subject is concerned with the protection which can be afforded by a legal system. I am not doubting that the protection afforded by public opinion is very real in a democracy. I am not discussing the level at which public opinion is formed and developed, important though that is. Education, freedom of speech and association occupy the basic territory which I am not exploring. Schools, the media of communication, the public dialogue inside and outside Parliament — these are the true areas where freedom either flourishes or dies. As a mere lawyer, I leave that to others with more experience than I can claim. Without derogating from the immense importance of that basic level of the democratic process, I proceed without more ado to ask the legal question, 'how best within a constitutional system can one promote and protect the vital freedoms of thought, speech, action and association, which are necessary to ensure that everyone, every member*

*of society enjoys the protection of law (sufficiently comprehensive and detailed to acts, social and economic) which 20th century man has come to regard as his birthright?' That is the question to which I shall address my remarks this evening.*

*I think I have said sufficient already to indicate that the democratic process is not enough in itself. It provides a political, but not necessarily a legal protection. The process envisages majority rule, but there are dangerous quirks and eccentricities in the fulfilment of majority rule. Indeed, it does not always succeed in fulfilling it: and, even if it does, minorities remain at risk. But the democratic process can also produce minority rule either because the electoral system is itself flawed or because a powerfully placed minority control the process. It is a paradox of democracy that the process can work to the disadvantage of the majority. So upon the simplest analysis of the democratic process you can find in some circumstances the majority at risk. Moreover, since the democratic process is essentially a way of exercising power in the State, the process is subject to Lord Acton's famous maxim, "power tends to corrupt and absolute power corrupts absolutely". As a lawyer I ask, therefore, can we set limits to the power of the democractic process, which, without undermining it, will ensure that there is respect and protection for human rights? I have no doubt at all that the only chance we have of strengthening the protections of the democratic process is by looking to the legal system. The courts can and should be guardians of individuals and minorities; they should protect them against the power not only of the State but of others who occupy dominating positions in our society. Now, what should the courts be able to offer? First, they should be able to offer an independent judiciary; secondly, they should be able to offer interpretation of the law by independent judges according to legal, not political principles; and thirdly, they should be able to offer fearless application of the law, undeterred by political, social or economic interests. How do English courts emerge when tested by these criteria?*

*The present position of our courts in institutional terms is as follows: our senior judges enjoy a security of tenure which is such that their independence is, as far as anything can be in law, guaranteed. High Court Judges and Judges of the Court of Appeal are removable only upon resolution passed by both Houses of Parliament. As far as you can do it institutionally, the independence of our courts is guaranteed. Secondly, there is a tremendous support for the independence of English Courts in the existence of the Common Law. Common Law countries have a characteristic in common, which is not to be found in other systems of law: the judges are law makers. The common law is itself a customary law created by the judges. Historically it was in existence*

*long before Parliament was ever thought of, and only the judges can make common law. Parliament can make enacted law, statutes, and by passing Acts of Parliament, Parliament can substitute a statute for common law in certain areas. Statutes are not universal in their application, but the common law is. All these areas of the law where no statute applies are the areas where the judges make the law. Let me explain. The law abhors a vacuum. It is no good a judge saying in a case he is trying, 'Dear me, there is no statute which covers the facts of this case and I can't find any rule of common law, therefore, I am not going to decide the case'. He cannot say that he has to decide the case. If there is no statute, then under the common law system he has to go to the principles evolved over the centuries by the judges in the field of common law and equity. If he cannot find a comparable or analogous rule to apply to the case, it becomes his duty as a judicial law-maker to evolve one. He will do it by the logical process of analogy or comparison with the nearest appropriate existing rule. It is a creative function and only he in our constitution can do it.*

*The strength of our judiciary, though limited as I shall show, is, therefore, very real. It is something upon which we can build to ensure that our legal system buttresses the political protection offered by the democratic process. I ought at this stage to give you one or two illustrations of the system at work, otherwise the argument is so abstract that it may be difficult to believe that it is really true. In the property law there is a very distinctive concept, so distinctive that it is found only in common law countries – the concept of the trust. Property is held by trustees (who are the legal owners) for the benefit of others, who are beneficiaries having equitable interests but who are not the legal owners. This is a principle which, although by now codified in a series of statutes, owes its origin entirely to judicial dissatisfaction in the past with the state of our property law. It is an illustration of how our courts can act as law makers. A more recent example, (it originated in the 19th century) is the action for damages in respect of personal injuries on the grounds of negligence. There really was no such thing as the civil law of negligence before the 19th century. Come the 19th century and the industrial revolution, people began to get injured in factories and in industrial accidents, on the railways and elsewhere. They came to the courts and asked for compensation and the judges evolved a law of negligence which is with us to this day. This was not the work of Parliament, it was the work of the judges. The law of negligence, with the whole sysem of compensation for injuries suffered in road accidents, in the home and in industry, is based upon the common law, even though certainly in the industrial field a great deal of statute law has, since about 1845, been grafted onto the law by Parliament; but the judges created it. Those two illustrations, I hope, will show why I say, with some confidence, that our*

*courts have not only the independence but a very strong legal system enabling them to act creatively and independently.*

*Nearer to our times (and by that I mean nearer to my subject, which concerns 20th century man) is the development of the work of judicial review since the end of the war by the judges. This is a technical term; what does it mean? Some lawyers would call it administrative law. It means that since the introduction of the welfare state in the years immediately following the war, there has been a great increase of government action intruding upon the lives of ordinary citizens, conferring upon many of them rights (for instance, under the national health and under social security) and conferring upon others, notably employers, some very detailed duties. The system has been designed by Parliament to be administered by an apparatus of offices, tribunals and appeal tribunals. It is very largely outside the ordinary system of the law, but the judges have brought it within, by the device of judicial review of administrative decisions — a device which has now been recognised by statute in the Supreme Court Act, 1981. Judicial review enables the courts to review the legality of the work of the executive at all levels — central and local — and also the legality of the actions of specialised agencies operating in specialised areas of the law. A notable area in which judicial review may be seen at work is our immigration law, where very sensitive issues as to human rights and freedoms frequently arise.*

*How do the judges use the strengths and the creative opportunities offered them by our common law system? Technically in this way they apply the law by two processes: interpretation of statutes and the evolution of common law and equitable rules. And so to the question, 'how do the courts, our courts, measure up to these responsibilities and what do they offer?' My answer is simply this: the courts of this country do offer within their limits an independent and flexible, but highly sophisticated system of reviewing the legality of the acts of the executive discretion by public authorities. This is exercised universally over the whole of society or in a specialised field such as immigration. It is a very substantial contribution to the sum of our rights and freedoms, but is it enough? One must accept that it is a formidable contribution to the armoury of weapons available to protect individuals and minorities, but it is not a complete protection. It is not complete because the democratic process at its hghest level in British society is beyond the reviewing power of the courts. Parliament enjoys a sovereignty which the courts must obey. Every enacted word of Parliament is beyond judicial challenge in this country for by the Act of Settlement of 1688 the judges must obey the enacted law. Of course they can interpret it (and the principles of interpretation are themselves judge-made) and a lot can be done and has been*

*done in the name of interpretation to strengthen the law's protection of the individual, but unlike many other democracies, we do not have laws which are constitutionally protected from amendment or repeal — a protection which in many countries, eg. the U.S.A., it is the duty of the courts to enforce. We have not got a written constitution. Irrespective of the subject matter of a statute, every enactment of Parliament is free from review of the Courts. There is no difference between the effectiveness of Magna Carta and an amendment to the Lotteries Act. Within their fields, each is supreme. But in systems where the distinctions between a written constitution, between constitutional laws and ordinary laws exist — as for instance in America and India — constitutional laws are protected by the courts in various ways. No constitutional law is, of course, totally immune from change. Generally speaking, where there is a distinction between constitutional and ordinary laws, constitutional laws cannot be repealed or amended by subsequent Parliaments, save by an elaborate legislative process incorporating safeguards. In a bi-cameral constitution, there may be the power of one House or both Houses, by a substantial majority eg. two-thirds, to amend a constitutional statute. But one feature is commonly found, where the distinction between ordinary and constitutional legislation is recognised. The courts have, in those countries, a power to review legislation — their power being limited to ensuring that the constitutional laws are not changed save by the appropriate legislative process and ensuring that ordinary laws which are enacted are themselves consistent with the constitution. This role of constitutional review is operated within America by the Supreme Court and in other democracies by their Supreme Courts. We have no such judicial review of legislature within the United Kingdom, nor can there by any such review in the United Kingdom unless Parliament and people are prepared to introduce a written constitution.*

*A few years ago we very nearly did introduce a written constitution: its name was 'Devolution' and it was to be found in two bills one of which was very interesting indeed. The Scotland Bill became the Scotland Act 1978. The Scotland Act set up a Scottish Assembly and gave that Scottish Assembly the power to enact statutes; it gave it legislative power, just, but the legislative power was confined to those matters which the Scotland Act enabled the Assembly to legislate upon. The Judicial Committee of the Privy Council was given the power to review Scottish legislation and ultimately to declare void any Scottish legislation which was unconstitutional in the sense that it was beyond the powers conferred by the Scotland Act. This is the nearest we have ever got in this country to a constitutional review of legislation.*

*In terms of human rights, what is the advantage of entrusting a power of constitutional review to the courts? It is a constitutional protection against*

*legislative interference with the rights and freedoms which are embodied in the constitution. It is perfectly possible to embody a code of human rights in a constitution. It has been done in a very large number of countries in the modern world. It was done as long ago as 1791 in America when they enacted their Bill of Rights. Incorporation into the constitution of a code or charter of human rights and fundamental freedoms, is the mechanism whereby the courts can be introduced constitutionally, as a legal safeguard within a democratic society. A model, which it would not be difficult for this country to adopt is to be found in the European Convention of Human Rights a convention to which we are party, which we have ratified but which we have never incorporated into our own municipal law. If we were to follow the example of almost all its signatories and make it part of our own law the courts would have a potent weapon for the protection of all members of our society irrespective of their position. The courts could ensure that there would be no discrimination. They would have a constitutional statement of principle which would strengthen legislation such as the Sex Discrimination Act of 1975 and the Race Relations Act of 1976.*

*It is a sad reality that many of the minorities, including many of the ethnic groups in our society are unlikely to wield political power, and have difficulty in exerting political influence. If the courts are to be a sufficient protection, they have to have the backing of the sort of constitutional law which I have indicated. It is true that without that backing the courts can still afford a measure of protection particularly against the executive, but the legislature, i.e. Parliament, is beyond any form of judicial restraint. The demand for judicial protection against the abuse of power is strong. The courts are already seen by many of the members of the ethnic groups in our society as affording real protection, even without the role of constitutional review. The courts are being asked much more frequently than they were when I was a young man to vindicate human rights. The business of the courts in the matter of the Immigration Act 1971 (which is a very active continuous business, occupying courts at all levels up to the House of Lords every working day of the week) is a good illustration of how shrewd members of the ethnic minority groups are at seeing that the courts, for all their limitations, represent a chance of getting their rights considered and protected. Another significant factor is the increasing exercise by citizens of this country of the right to petition to the European Commission for Human Rights and to the Court of Human Rights in Strasbourg. Resort to these European institutions indicates how strong is the feeling amongst the minorities of this country that it is to the courts that they must turn if they are going to have a real chance of getting their rights vindicated. The increasing volume of business in the field of judicial review and the increasing volume of petitions going to the European Commission for*

*Human Rights in Strasbourg, are a very significant development and an indication as to the way in which members of our society are going to insist on the courts coming into the arena and doing what they can to protect them.*

*I have indicated, albeit in outline, the reasons why I wish to leave with you the proposition that human rights as fundamental freedoms require a strictly legal i.e. a judicial protection, as well as the political safeguards of the democratic process. There is a gap which British courts cannot at present fill. That is the reason why we should be considering constitutional reform; for there is no legal protection in this country against a mischievous or tyrannical Parliament. This protection exists in almost every other common law country, since most common law countries do now have written constitutions and a Supreme Court. The United Kingdom has itself conferred on emerging countries which were once subject to its colonial power, written constitutions and judicial protection of the constitution. The United Kingdom is itself a party to the European Convention which provides a judicial protection of the human rights catalogued in the convention. Though it be long term, the case for constitutional movement along the lines that I've suggested is overwhelming. In a plural society where there are bound to be minorities which are unlikely to exercise political power or influence, I would say that the protection by the courts of human rights incorporated into the law as constitutional rights is essential to the freedom of such a society.*