APPENDIX

All our Conspirators

by Geoff Robertson

Laws are of two different kinds: statute law and common law. Statutes are Acts of Parliament laws passed by elected representatives which have merely to be interpreted and applied by the courts. Common law, on the other hand, is the body of doctrine built up by court decisions over the centuries — 'judge made law' as opposed to laws which originate in the democratic process. Once an Act is passed, it cannot be altered except by another Parliamentary initiative. The common law, however, is constantly being shifted and adapted by judges to meet new situations which are seen as disruptive of civilised society. This process, which undermines the democratic philosophy that all laws must receive the assent of the people's representatives, is sanctioned by the legal tradition that judges only "declare" what the common law has always been, rather than "make" new law. But this is a semantic quibble: their "declaration" of the law necessarily "extends" the common law, with the effect of proscribing conduct which was not previously thought to be criminal: the result is a new law, as surely as if it had been passed by an overwhelming Parliamentary majority.

The doctrine of conspiracy has in recent years proved the most fertile ground for judges and prosecutors to "discover" that old laws meet new situations. "Conspiracy" is an infinitely elastic common law formula which can be stretched to criminalise conduct which Parliament has declined to make specifically illegal. The Hain case provides a classic illustration of common law in the making: it was part of an important legal debate which in the 1970s gave birth to the two common law conspiracies of trespass and intimidation: new and frightening weapons for the authorities to press into service against peaceful protest.

What sort of conduct amounts to a criminal conspiracy? The answer is that it must either be immoral, criminal, or of a kind which could provoke an action for damages in a civil court. The Hain case was not concerned with the "public morals" conspiracies which had been used to silence the "underground press' in the late 1960s. He was charged with conspiracy to commit some minor criminal offences, notably intimidation, punishable by a £20 fine (an illustration of how a trivial offence punishable by a small fine in magistrates' court can be elevated, at least where more than one person is involved, into a crime of the utmost seriousness by using the conspiracy device. Suddenly the penalty is increased from some statutory maximum authorised by Parliament — perhaps a fine, or a short jail sentence — into an offence punishable by life imprisonment).

But the great legal significance of *R v Hain* is in the development of the doctrine that a mere interference with another's legal right may, in certain circumstances, be a serious criminal offence. Civil wrongs, as distinct from crimes, are injuries which the victim himself can remedy by suing for damages.

He has no right to receive police assistance in punishing his opponent. But where two or more persons "conspire" to commit a civil wrong, such as a trespass or a breach of contract, they become subject to the rigors of the criminal law.

In the early 1970s judges decided that agreements to commit civil wrongs and agreements to injure another person in such a way that the "public interest" is involved (e.g. by trespassing on land owned by "the Authorities" or disrupting a sporting event) were indictable as criminal conspiracies. The question of whether the "public interest" is involved was for the judge to decide, and his decision cannot be challenged by the defence or overruled by the jury. *R v Hain* was a case which reaffirmed the power to jail those whose activities conflict with the "public interest" — as divined by judges. The political potential of similar conspiracy decisions in the United States prompted Clarence Darrow to denounce the conspiracy law as "a worn-out piece of tyranny, this dragnet for compassing the imprisonment and death of men whom the ruling class does not like ...". This rhetoric expresses the same sombre message which heads the chapter on conspiracy in the leading textbook on English Criminal Law:

> "The crime of conspiracy affords support for any who advance the proposition that the criminal law is an instrument of Government"

What is a "conspiracy"? The Oxford Dictionary defines "to conspire" as "to combine privily for an unlawful purpose, especially treason, murder and sedition ..." But the first lesson juries (and often defendants) learn is that a "conspiracy" in law is merely an agreement, and not necessarily a legally binding or even a serious agreement. "A nod or a wink may amount to a conspiracy" the jury was warned at the Angry Brigade Trial. The "conspiracy" of the Shrewsbury pickets was inferred from the mere fact that they were among 300 workers who invaded certain building sites. When their QC complained that "some of these men met for the first time on these sites" the trial judge interrupted "You know very well it can be a conspiracy when they never met and never knew each other". All the prosecution has to prove at a conspiracy trial is that the defendants made an agreement: if the judge decides that what they have agreed to do is "unlawful", the jury must convict.

"Unlawful" is by no means confined to serious criminal conduct: it includes minor criminal offences, civil wrongs which merely give someone the right to sue for damages (e.g., libel or trespass) and activities which are not against the law at all, but which conflict with the moral values which the judge wishes to uphold. It does not matter that the agreement is never carried out, or even that the conspirator had a change of heart and does all in his power to frustrate its fruition. His guilt is fixed for all time at the very moment that he gives his assent to the plan. Nor does it matter if, at the time they made the agreement, the conspirators did not realise that its object would be declared "unlawful" or "immoral" in future court proceedings. Ignorance of the law is no defence — even when "the law" really means "the prejudices of the judiciary".

The crime of conspiracy entered the law of England in 1304, in the form of an act to punish malicious prosecutions. Edward Fs Ordinance of Conspirators defined them as:

> "They who do confeder or bind themselves by oath, covenant or other alliance .. . falsely and maliciously to indict or cause to indict, or falsely to move or maintain pleas; and also such as cause children within age to accuse men of felony whereby they are imprisoned and sore grieved".

Several centuries elapsed before the political potential of the conspiracy charge was, in the words of one eminent legal historian, "emphasised by the Star Chamber, which recognised its possibilities as an engine of government and moulded it into a substantive offence of wide scope, whose attractions were such that its principles were gradually adopted by the common law courts ...". Before its abolition in 1641, the Star Chamber had established that the essence of the crime of conspiracy is the actual agreement, and hence no overt actions need be proved by the prosecution to obtain a conviction. Moreover, conspiracy was no longer limited to actions for malicious prosecution, but extended to agreements to commit all crimes, however trivial. These two cardinal principles are still being applied, by the courts, 300 years later, to situations that Star Chamber judges would never have envisaged. The rule that the crime is committed when the agreement is made was carried to its *reductio ad absurdum* in 1890, when a woman was convicted of conspiring to procure her own abortion, although she was not in fact pregnant, and although Parliament had expressly excluded an aborted woman from liability when it made abortion a crime in 1861. In 1964 the Court of Appeal reinvigorated the rule that agreements to commit petty offences are punishable by life imprisonment when it approved a charge of conspiracy to contravene the Road Traffic Act, even though the maximum penalty for the actual section which the defendants had agreed to contravene was but a small fine.

The most devastating extension of the conspiracy law since the Star Chamber days was to punish, as though they were serious crimes, agreements to do acts which themselves entailed only civil liability for damages at the complaint of an injured party. The encroachment of this doctrine was stealthy at first, beginning with cases of "conspiracy to defraud" by not paying a civil debt. But in 1832 one judge caught these straws in the wind and wove them into the fabric of the criminal law in a pattern which has had a baleful influence on judicial thinking ever since. Lord Denman defined a conspiracy as "an agreement to do an unlawful act, or a lawful act by unlawful means". "Unlawful" included actions giving rise merely to civil damages.

The immediate casualties of this formula were the incipient Trade Unions, whose every strike or picket was elevated into a criminal conspiracy. A conspiracy conviction exiled the Tolpuddle Martyrs, while "conspiracy to obstruct an employer and interfere with his lawful freedom of action", "conspiracy to annoy and interfere with the masters in the conduct of their business" abound in these nineteenth century industrial cases. In 1871 there is even a case where a group of women were convicted of conspiracy for saying "Bah" to blacklegs. Finally political pressure forced Disraeli to pass the Conspiracy and Protection of Property Act 1875, which abolished conspiracy charges in respect of trade disputes unless they related to agreements to intimidate or to commit crime. This relieved legal pressure on the Trade Unions at the time, but left a loophole which almost a century later was relentlessly exploited by another Tory government to

prosecute building workers whose picketing activities, although furthering genuine trade disputes, were alleged to be conspiracies to commit minor criminal offences. The crime of intimidation is defined in Section 7 of the 1875 Act:

> "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority
>
> (1) uses violence to or intimidates such other person or his wife, or children, or injures his property; or
>
> (2) persistently follows such other person about from place to place; or ...
>
> (3) watches or besets the house or other place where such other person resides, or works or carries on business, or happens to be, or the approach to such house or place; or
>
> (4) follows such other person with two or more other persons in a disorderly manner in or through any street or road;
>
> shall on conviction . . . be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months".

The language of this section provided an obvious inspiration to the draftsman of the Hain indictment: legal rights to watch and play cricket and football were allegedly infringed by intimidation, persistent following of team members, watching and besetting their hotels, and so on. This device of coupling a conspiracy charge to the minor criminal offence of intimidation was pioneered by Bennion's lawyers. One year later this very same "conspiracy to intimidate" charge was adopted by the Government as a means to put down working class protest of the "flying picket" variety which had erupted during the building workers' strike. The Home Secretary urged police to prosecute for intimidation, especially since "The law as it stands... makes it clear that sheer numbers attending can of itself constitute intimidation". His first victims were convicted and imprisoned at Shrewsbury for conspiring to contravene the very Act which had been designed, in 1875, to end conspiracy prosecutions of Trade Unionists.

The Hain case also made its contribution to the startling legal discovery that an agreement to commit a trespass — a mere temporary presence on another's property without permission — constitutes a serious criminal offence if the public interest is deemed (by the judge) to be at stake. We have seen that it was theoretically always possible to charge with conspiracy those who agree to do actions which would give others a right to sue for damages. But since the 1875 legislation, the "unlawful act" charged was always in prosecuting practice either criminal, immoral, or at least accompanied by fraud or malice. Mere trespass did not qualify as an "unlawful act" until 1946, when one Bramley was convicted at the Old Bailey for his part in housing homeless ex-Servicemen in disused Army shelters. His trial judge, Sir Hugh Stable, ruled that an agreement to trespass was a criminal offence whenever the public interest was involved. But the Brarnley case was never fully reported and its implications were forgotten, so that by 1969 a leading textbook on criminal law could confidently state "an agreement to commit a civil trespass is not indictable". One man who had understandably not forgotten the Bramley ruling, however, was the judge who made it. In February, 1969, during the furore over "direct action" against Springbok tours Sir Hugh wrote to the

Daily Telegraph, urging that Peter Hain be prosecuted for criminal conspiracy to trespass — modestly omitting to mention that the main authority for the existence of such a law was his goodself. Francis Bennion duly complied, acknowledging his debt, perhaps, by briefing Sir Hugh's son, Mr. Owen Stable, QC, to bring Hain to justice.

The political potential of the Stable family heirloom was no longer lost on the prosecuting authorities: they took advantage of it in 1971 to convict some Sierra Leone students who had occupied their country's High Commission, acting, as Lord Hailsham conceded, "from a genuine sense of grievance" against a government they believed "arbitrary, tyrannical and unconstitutional". Obviously it had become time to decide whether "conspiracy to trespass" really did exist in criminal law and these students were made the reluctant guinea pigs. From a civil liberties viewpoint they set an unfortunate example, because their occupation involved an unacceptable degree of force — threats with toy guns which the victims believed were real and imprisonment of High Commission staff. Hain, whose direct action tactics were determinedly non-violent, had his appeal against conviction shelved until the House of Lords could decree what the law really was. The efforts of the students' counsel, Sir Dingle Foot, to confine the scope of the conspiracy laws were unavailing.

Lord Hailsham approved conspiracy prosecutions of the parties to agreements which would, if carried out, give an aggrieved individual the right to sue for more than nominal damages, e.g., for breach of contract, trespass or libel, *or* where execution of the agreement 'invades the domain of the public', e.g., by trespassing on land owned by the Government or by disrupting a sporting event. The Sierra Leone Embassy decision, delivered in June 1973, will have a chilling effect on political protest. Already nine Welsh language protestors have been tried at the Old Bailey for conspiring to trespass in a BBC studio, although they had never actually set foot on BBC property. In Birmingham five building workers were charged with conspiracy to trespass when they entered the offices of a local firm to protest, at the instigation of their trade union, against the firm's practice of supplying "lump labour" to builders. Three television cameramen who followed to film their arrest were charged with the same offence: a sinister example of how the new crime can be used to inhibit the press.

A few months later, Hain's appeal came before the Court of Appeal, which seized the opportunity to throw the conspiracy net even wider. Hain, it will be remembered, was convicted of a conspiracy to interfere with the lawful rights of persons to watch a David Cup match against South Africa by running onto the Court and distributing anti-apartheid leaflets. His trial judge instructed the jury that they should find him guilty if he interfered with the public's rights by unlawful methods which are "of substantial public concern — something of importance to citizens who are interested in the maintenance of law and order". This means that demonstrators commit a crime punishable by life imprisonment if they interfere with public "rights" (whatever they are) by methods which agitate the "law and order" brigade, although the methods themselves are not illegal.

At the appeal, Hain's counsel argued that a handful of Young Liberals running across a tennis court, causing no damage, using no force and disrupting play only

for a very short time, were not employing "unlawful means of substantial public concern". Lord Justice Roskill riposted "Hain would not have done it had it not been a matter of public concern". The court incorporated this circular argument into its judgement: "the whole object of the exercise would not be achieved if the event had not aroused widespread public interest". In other words, effective protest *by definition* involves matters of "substantial public concern" because the court equates this with "attracting public attention" which it uncharitably assumes to be the purpose of all protest demonstrations. On this interpretation, even token interruptions of events — John Arden leaping onto the Aldwych stage to confront the Royal Shakespeare company's performance of his play "The Island of the Mighty", pram-pushing mothers stopping traffic to demand a pedestrian crossing; hecklers drowning out a politician at a public meeting — are now all within the dragnet of criminal conspiracy. At the end of the day, we have the spectre of an infinitely elastic formula, devised by the Star Chamber and gratefully adopted by modern judges and prosecutors as an instrument for convicting those who would otherwise not be indicted at all because no existing crime outlawed their conduct. Legal ingenuity for its own sake is counterproductive when it fashions new laws without reference to the democratic process, and when it opens up a wide field of uncertainty as to what conduct is in fact criminal. It is to the fundamental precepts of the criminal law, and the threat to them posed by conspiracy, that we must now turn.

Dicey, the great constitutional theorist, considered that the chief requirement of "The Rule of Law" was certainty: no citizen should be declared a criminal unless he had broken a specific rule established before he offended against it. Ignorance of the law is no defence — *provided* the law is both comprehensible and accessible to all citizens. Jeremy Bentham further demanded that criminal laws should carry a recognisable tariff of punishments, so that their deterrent effect can operate at the point when a potential criminal is weighing his risks. He is hardly likely to be deterred if he is unaware that his contemplated action is in fact criminal, or if he has no conception of the severity of the sentence it will merit. Thus certainly is the very cornerstone of the criminal law, cherished in England as a guarantee of liberty, at least by comparison with authoritarian regimes which invest their officials with discretionary power to punish political dissidents whose activities are "not in the public interest". Yet as early as 1890 one textbook on English criminal law stated as a fact that the conspiracy law "leaves so much discretion in the hands of the judges that it is hardly too much to say that plausible reasons may be found for declaring it to be a crime to do almost anything which the judges regard as morally wrong or politically or socially dangerous".

Lord Diplock, dissenting from the proposition that conspiracy to corrupt public morals still had a place in English law, complained that if it did, no citizen could make moral decisions involving another with certainty that he would not be prosecuted. Successive governments have closed their ears to such protests — perhaps because the conspiracy law is a useful stick to threaten radicals, perhaps because the whole area has become too vast and complicated for anyone other than lawyers to understand and even they have difficulties. It took

eight years before twelve eminent lawyers appointed by the Law Commission produced so much as a "working paper" on conspiracy law reform. When they ultimately did so, in June 1973, they argued that the whole "unlawful act" doctrine, which was largely responsible for Hain's prosecution, offended against the fundamental principle of certainty in the criminal law:

> "It seems to us not merely desirable, but obligatory that legal rules imposing serious criminal sanctions should be stated with the maximum clarity which the imperfect medium of language can attain. The offence of conspiring to do an unlawful act offends against that precept in two ways. First, it is impossible in some cases even to state the rules relating to the object of criminal agreements except in terms which are at best tautologous and unenlightening. Secondly, in those cases where at least a statement of the offence is possible, that statement covers such a wide range of conduct that it is impossible to decide whether an offence has been committed or not."

The working paper recommended that all conspiracies to do acts such as trespass, which are not criminal, but merely "unlawful" should be abolished.

The Law Commission's concern for the certainty of the criminal law is amply justified by the "public interest" test laid down by Lord Hailsham in the Sierra Leone Embassy case *(R v Kamara)* as the reason for punishing non-violent civil trespass. Who is to decide what is "in the public domain" or, as Judge Gillis put it in the Peter Hain trial, what is "something of importance to citizens who are interested in the maintenance of law and order"? The Court of Appeal in the Sierra Leone case was aware of this difficulty:

> "If the public interest is to be considered, as counsel for the Crown suggested, who is to decide what it is? The Judge? Or the jury? Are either competent? Should evidence be admitted on this issue? If not, why not? If the judge is to decide, he may well take the verdict from the jury; if the jury is to decide, part of the law of conspiracy can be stated in four words: *'salus populi, suprema lex'*."

The House of Lords reserved this decision for the judge, which means in practice that "public interest" questions will be decided by the prejudices of an elderly conservative quite out of touch with the public whose interest he will be called upon to divine. For example, Judge Gillis had no difficulty in rejecting Peter Hain's submission that Test matches with South Africa were not in the public interest because they would strain race relations in England. No doubt most judges can be relied upon to instruct their juries that the disruption of sporting fixtures and the defaming of visiting Portuguese dictators are matters of vital public concern, while a conspiracy to occupy the offices of *Release* or to defame Father Adrian Hastings, would lack the ingredient of public interest necessary to justify a criminal law. How, for example, did Judge Gillis divine that it was a matter of public concern to play cricket matches against South Africa? He completely ignored the political repercussions, and struck a Kiplingesque pose: "The game of cricket is the most English of English past-times. . . it has been played on our village greens for over 250 years ..."

Occasionally the continued existence of these vague, dragnet charges is defended on the grounds that although they could be absurdly oppressive if vigorously enforced, for example if every couple who agreed to park illegally were jailed for conspiring to contravene the Road Traffic Act, the prosecuting authorities use common sense and only enforce the conspiracy law against conduct deserving punishment. But police have an obligation to investigate and prosecute all provable cases where a serious crime has been committed: not to do so would be a dereliction of duty. To argue that a serious criminal offence should only be prosecuted in certain blatant cases is to abandon the rule of law to the rule of police value-judgements. As Lord Reid has pointed out "a bad law is not defensible on the ground that it will be judiciously administered". In any case, as Francis Bennion so eloquently demonstrated, every citizen has a constitutional right to initiate a prosecution for criminal conspiracy. This leaves vague laws at the mercy of manipulation by cranks, bigots or people with a vested interest in silencing critics. Amongst the latter may be counted the wealthy white South Africans who subscribed to the "Pain for Hain" campaign.

The process of sentencing a convicted conspirator is also crippled by uncertainty, especially in complicated cases where he may only be guilty of agreeing to one insignificant "unlawful act", but is nevertheless sentenced as though he hatched the entire plot. Lawyers were able to dissect the first count of the Hain indictment into 147 different "unlawful activities". Were the jury to decide that Hain had committed only one of them, e.g., that he agreed to shine a mirror in a player's eyes, this would not be revealed from the foreman's monosyllabic grunt of "guilty". So the judge could sentence Hain on the basis that he had agreed to 146 other unlawful activities. This was emphasized when Hain, convicted of conspiring to disrupt a tennis match in a number of different ways, complained "I am still not certain of which particular I was found guilty". "You have not been convicted of a particular, but of a conspiracy" replied Judge Gillis.

In the first 'Angry Brigade' trial, Jake Prescott was sentenced to 15 years imprisonment — an appropriate term had he actively participated in all the bombings. Yet the conspiracy verdict was consistent with a jury finding that he had merely posted three 'Angry Brigade' letters to *The Times* — conduct deserving of a suspended sentence or at most a short jail term. This built-in unfairness in conspiracy charges embarrassed the authorities when the 'Stoke Newington 4', alleged to be much more centrally involved in the bomb plots, were jailed for 10 years and Prescott's sentence had to be reduced in consequence. Although most statutory offences have a maximum penalty, the punishment for conspiracy is "at large", giving the judges an absolute discretion and police a convenient way of subverting the intentions of Parliament when it approved a particular maximum limit. Recently, for example, pornographers have been charged with "conspiracy to contravene the Post Office Act" rather than with an offence against the Act itself, merely to enable judges to jail them for longer periods than the maximum provided in the Act. At Shrewsbury, Denis Warren was jailed for 3 years for conspiring to contravene legislation which itself carried a maximum penalty of only 3 months.

The conspiracy device is ideal for scapegoat prosecutions. The wide definition

of “agreement” can place in the same dock defendants who have hitherto been unaware of each other’s existence. Several of the 24 Shrewsbury building workers met for the first time in the police cells: they were selected from a picket line of 300 by such fortuitous factors as their identification from press and TV films of the demonstration. Now every person who joins a picket line risks a conspiracy prosecution for the simple reason that the necessary “agreement” can be inferred from the mere fact of his attendance. It matters not that the picketing is peaceful: as Mr. Robert Garr explained to Parliament “sheer numbers attending can of itself constitute intimidation”. At Shrewsbury, much of the agitation was sparked off by an employer who threatened pickets with a loaded shotgun, yet this provocation was irrelevant to their guilt of conspiracy to intimidate.

Peter Hain was singled out from thousands of demonstrators against sporting apartheid: his public image made him a suitable scapegoat, although the prosecution knew the identity of others who were actually responsible for committing the “unlawful acts” which Hain was alleged to have countenanced. The classic use of conspiracy to convict scapegoats representing a mass movement was the trial of the Chicago 7, who had nothing in common except their presence in Chicago for the Democratic Convention. Hayden was an anti-war radical, Dellinger an old-fashioned pacifist, Hoffman an extrovert yippie, Davis a studious post-graduate who read chemistry textbooks during Rubin’s courtroom antics, and so on. They all suffered guilt by association, but their “agreement” to do unlawful acts simply did not exist, except in cloud-cuckoo conspiracy land. “We can’t even agree on lunch” complained an exasperated Abbie Hoffman when he took the stand.

Modern democratic political theory has it that Government depends on the consent of the governed, and obedience is owed to laws passed or approved by a majority of elected representatives. In the seventeenth century, when conspiracy was “moulded into an engine of Government”, Parliament met infrequently and was in any case subservient to the Sovereign. It was convenient in this age that the King’s Judges should develop the criminal law on a case-by-case basis, punishing new forms of wickedness as they arose. But the subsequent development of the law-making role of Parliament, to the point reached today where it meets with sufficient regularity to legislate against any undesirable conduct, makes it unnecessary as well as unconstitutional for judges to wield a power to make new criminal laws, or to stretch existing laws to cover novel situations. While politicians are drawn from all strata of society and are despatched to Westminster as representatives with a mandate to legislate, judges are invariably elderly men who have lived a socially isolated life, and whose desire to enforce moral values may not accurately reflect those of many sections of the community.

Moreover, laws which originate in Parliament are subjected to scrutiny by expert draftsmen and lawyers, to parliamentary debate and amendment, to submissions from interested bodies, to public criticism and to publicity, warning potential offenders of the penalty in store. But developments in the conspiracy laws are noted only in dusty volumes of law reports quite inaccessible to the general public. And this “judicial legislation” has other drawbacks. There is the difficulty and uncertainty of extrapolating any clear legal rule from up to five lengthy judgements. There is the danger of making law in a vacuum, impervious

to social needs and the will of the people. And then there is the inevitable colouring given to the law by those who make it, Judges 'each of whom' Lord Diplock has himself been moved to admit, 'has his personal idiosyncrasies or sentiment and upbringing, not to speak of age'. Judges hardly possess the qualifications for making laws which will answer the needs and receive the approval of the community as a whole.

The classic example of how conspiracy lends itself to judicial manipulation in order to by-pass the law-making role of Parliament is the crime of conspiracy to trespass, revived first by Freedom Under Law Limited and then by the Director of Public Prosecutions to save the country from swarms of squatters, sitters-in and Springbok-stoppers. When 'sit-ins' and disruption of sporting fixtures became regular occurrences in the late 1960s, tougher legislation was frequently advocated inside and outside Parliament, but in the event no action was taken. Even the Society of Conservative Lawyers, which appointed a working party under Sir Derek Walker-Smith QC to study the situation, decided in 1970 that no additional legislation was necessary. In reaching this conclusion, they assumed that "conspiracy to trespass" did not exist in English law. Their report, 'Public Order', specifically considered "The creation of an offence of criminal trespass. . . a new criminal offence in what has hitherto been a part of the civil law. It may be that circumstances and the development of militancy and other violent techniques could make such a change necessary. But for the purpose of this study we would prefer, for the time being, to consider this as a card of last resort which may, however, have to be played if circumstances should so require". They contemplated, of course, that the "card of last resort" would be played from a flush conservative parliamentary hand, and not from up a flushed conservative Lord Chancellor's ermine sleeve.

But on 4 July, 1973, Lord Hailsham and three judicial colleagues, in order to legitimise the police action against the Sierra Leone students and, indirectly, FUL action against Hain, discovered the existence of a law which in effect provides "It shall be an offence, the maximum punishment for which shall be life imprisonment, for two or more persons to agree to trespass upon the property of another, in cases where, in the opinion of the trial judge, the agreement is sufficiently a matter of public concern to come within the ambit of the criminal law". Had Mr Heath attempted to convince the House of Commons, or indeed the Society of Conservative Lawyers, that the country urgently required a Public Order Bill which provided such drastic penalties for minor breaches of the civil law, his efforts would have been bitterly fought and widely derided as a panic measure designed to crush the robust expression of genuine grievances. Lord Hailsham has defended the continued use of conspiracy charges on the grounds that "I personally prefer a bit of common law which is furry at the edges". But his control over conspiracy laws with furry edges during the 1970-74 Conservative Government enabled him to fashion that fur into hair shirts for those whose political activities he abominates, without the slightest reference to elected representatives or public debate, but merely the support of this other Law Lords from a panel for the most part as reactionary as himself. When he handed down judgement in the Sierra Leone Embassy case, 'conspiracy to trespass' became the law of the land as decidedly as if it had been unanimously passed on the third reading of the Public Order (Suppression of Free Speech and

Political Protest) Act 1973.

There are three fundamental precepts of criminal law in a democratic society its meaning and scope should be reasonably clear, it should express the will of the elected representatives of the people, and its procedure should conform to accepted standards of fairness. The conspiracy charge traduces each of these precepts. In the first place, certainty in the criminal law is prized because it enables a citizen to order his conduct so as to avoid transgressions: it is his right to know in what situations executive power may be marshalled against him. 'The Rule of Law' should set definite limits beyond which those in authority cannot pass in harassing political opponents. The rule of the conspiracy law, however, is so uncertain that judges and prosecuting authorities act as pile-drivers, staking out the bounds of criminality as it suits them, from case to case.

In the second place, orthodox democratic theory has it that government depends on the consent of the governed, and obedience is only owed to laws approved by the majority of elected representatives. Lord Reid has warned that "Where Parliament fears to tread it is not for the courts to rush in". Yet rush in they have, "developing the common law" by stretching the elastic principles of conspiracy to punish activities which they and the Director of Public Prosecutions deplore, but which Parliament has never seen fit to legislate against. Such a subversion of the legislative process might have been justified in the seventeenth century, when Parliament met infrequently and the task of law-making was entrusted to judges, who punished new forms of wickedness as they arose. The conspiracy law is a bitter but tenacious legacy of Star Chamber methods, which has outlived its purpose in an age where Parliament meets and legislates regularly. There is no longer any place for judicial law-making: the scope of 'public interest' and 'public morals' should be declared by the representatives of the public, and not by elderly members of an upper-class elite.

Finally, the tactical advantages reserved for the prosecution in a conspiracy case destroy the accused's right to a fair trial. It is often much easier to prove an agreement than it is to prove participation in the completed crime. Evidence which would be inadmissable were the defendant actually charged with committing the crime may be received to suggest that he agreed to commit it. And if the defendant is charged with both conspiracy and with the completed crime, then even if he is acquitted of conspiracy some of the otherwise inadmissable mud thrown pursuant to it may stick, so that the jury, prejudiced by what they have heard about the defendant's lifestyle and associates, may be satisfied with less than conclusive proof of his guilt on the other charges. The crowning unfairness is that a man convicted of conspiracy to commit a crime may be given any sentence his trial judge thinks fit — even if the statutory maximum punishment for the actual crime is no more than a small fine.

The danger posed to society by the existence of a dragnet law which lacks certainty, democratic origins and procedural fairness, is potentially very grave. It authorises trial and imprisonment of critics of conventional authority and value systems, in the same way as 'public safety' legislation bolsters executive tyranny in communist and fascist countries. Of course, whether it is so used depends upon the discretion of prosecuting authorities and judges: but the

fact that they have used that discretion with some degree of common sense in the past is no guarantee that they will do so in future, and certainly is no justification for the existence of the discretion in the first place. Emergency powers should be voted by Parliament only in emergencies, and not used as a device for punishing those whose politics embarrasses the Establishment. Being "done for conspiracy" increasingly means being no more than a victim of police suspicion, or of being a person who, for reasons of politics or lifestyle, the police wish to harass or silence, but are unable to do so by proving the actual commission of a crime. Public scepticism, which breeds at grass-roots among young people whose friends are victims of "conspiracy to possess cannabis" charges, is reinforced on a national scale by disquiet at the use of conspiracy laws in political 'show' trials such as those involving the underground press, anti-apartheid demonstrators and trade union pickets. It has generated a nightmarishly complicated set of precedents and principles, described by Lord Diplock recently as "the least sympathetic, the most irrational branch of the English penal law". As its leading academic critic, Professor Sayre, concludes, "A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law, it is a veritable quicksand of shifting opinion and ill-considered thought".

In 1973 the Law Commission, a body of eminent lawyers charged with recommending legal reforms the Government, emphatically condemned some of the developments in the law which had made the Hain case possible, arguing that "a law of conspiracy extending beyond the ambit of conspiracy to commit crimes has, in our view, no place in a comprehensively planned criminal code". In consequence, it advocated abolition of the old "unlawful act" doctrine, so that agreements to commit civil wrongs, such as trespass, libel, or breach of contract cannot be punished as though they were serious criminal offences. These civil wrongs can usually be redressed by individual victims suing for damages, without the intercession of the criminal law. The "public interest" is much too subjective and uncertain to serve as an authorisation for aggressive police intrusion into the private domain. If the Government feels that squatters and sitters-in constitute a danger to society rather than a temporary inconvenience to property developers and private institutions, it should have the courage to propose specific criminal legislation, clear in scope and with maximum penalties, rather than to rely upon judges to "develop the common law" stealthily in the desired direction, without the consent of Parliament. Until the conspiracy law is reformed on the lines suggested by the Law Commission, it will remain a bewildering and frightening Pandora's box, its key available not only to the Government but, as the Hain prosecution demonstrated, to private prosecutors who can afford the price.