TRIBUNALS OF INQUIRY*

*By The Rt. Hon. Sir Cyril Salmon***

My address—Tribunals of Inquiry—is not perhaps a topic pulsating with human interest nor one appropriate for recondite legal studies, but it is I think a matter of common interest to both our countries and indeed to all civilized nations.

In all countries, certainly in those which enjoy freedom of speech and a free Press, moments occur when allegations and rumours circulate causing a nation-wide crisis of confidence in the integrity of public life or about other matters of vital public importance. No doubt this rarely happens, but when it does it is essential that public confidence should be restored, for without it no democracy can long survive. This confidence can be effectively restored only by thoroughly investigating and probing the rumours and allegations so as to search out and establish the truth. The truth may show that the evil exists, thus enabling it to be rooted out, or that there is no foundation in the rumours and allegations by which the public has been disturbed. In either case, confidence is restored. How, in such circumstances, can the truth best be established?

I have recently been Chairman of a Royal Commission which was convened to consider this question, partly because of some misgiving about the machinery which had been set up under the Tribunal of Inquiry (Evidence) Act, 1921. We heard a great deal of evidence including that of three former Lord Chancellors, the Lord Chief Justice, the Master of the Rolls and a number of other distinguished judges and counsel, all of whom had in the past been concerned in one capacity or another with inquiries under the Act—some of them as chairmen or members of the tribunal. We also heard evidence from members of the public who had been involved in the inquiries and we made a comparative study of the law and practice of the United States of America and a number of Commonwealth and other countries relating to this subject.

The Act itself was passed because of our profound dissatisfaction with the method of inquiry into public scandals which had been in vogue from the early seventeenth century until 1921. The Act itself was a big step forward. The Royal Commission, however, was able to suggest many im-

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provements which I hope and believe will be adopted and to the most important of which I shall presently refer.

Before 1921, we had used Select Parliamentary Committees to investigate alleged wrongdoing in high places. Such a method of investigation by a political tribunal was wholly unsatisfactory. Being a progressive people it took us only little more than about 300 years to do anything about it. In the United States of America, however, which is still more progressive than we are, they still use virtually the same method. Congressional committees of investigation, like our Parliamentary committees, consist of members representing the relative strength of the majority and minority parties. Clearly such bodies can never be free from party political influences. This is a very real defect in any tribunal investigating allegations of public misconduct—particularly as the subject matter of the inquiry often has highly charged political overtones.

The history of such investigations in England by Parliamentary committees is, to say the least, unfortunate. Let me give you but one example. Early in the present century there occurred what became known as the Marconi Scandal. In 1912 the Postmaster General in a Liberal Government accepted a tender by the English Marconi Company for the construction of State-owned wireless telegraph stations throughout the Empire. There followed widespread rumours that the Government had corruptly favoured the Marconi Company and that certain prominent members of the Government had improperly profited by the transaction. The Select Parliamentary Committee appointed to investigate these rumours represented the respective strengths of the Liberal and Conservative Parties. The majority report of the Liberal members of the Committee exonerated the members of the Government concerned whereas a minority report by the Conservative members of the Committee found that these members of the Government had been guilty of gross impropriety. When the reports came to be debated in the House of Commons, the House divided on strictly party lines and by a majority exonerated the Ministers from all blame. This is the last instance of a matter of this kind being investigated by a Select Committee of Parliament.

In the United States there is a standing congressional committee of investigation into matters of alleged public misconduct and it seems to be in permanent session. Reports are sometimes accepted by the public, but sometimes they are received with scepticism and fail entirely to allay public disquiet. Indeed for this reason, when matters of the gravest importance arise for investigation, an ad hoc tribunal is not infrequently appointed to avoid the matter being referred to the Congressional Committee. An example of this is to be found in the appointment of the Warren Commission, to which I will return.

As I have already indicated, it was because in England investigation by a political tribunal of matters causing grave public disquiet had been discredited

that the Tribunal of Inquiry (Evidence) Act, 1921, was passed, with a view to setting up some permanent investigating machinery to be available for use when required. Fortunately there have been only 15 inquiries under the Act during the 45 years since it was passed. The Act provides that if both Houses of Parliament resolve that it is expedient that a Tribunal be established for inquiring into a definite matter described in the resolution as of urgent public importance, and in pursuance of such resolution a Tribunal is appointed, then such a Tribunal shall, for certain purposes, have all the powers, rights and privileges that are vested in the High Court. It can enforce the attendance of witnesses whom it may examine under oath, and it may compel the production of documents. If any person summoned as a witness fails to attend, or if he does attend refuses to answer any question to which the Tribunal may legally require an answer, or fails to produce any document in his power or control which the Tribunal legally requires him to produce, or does anything which would constitute contempt of court in a court of law, then the Chairman may certify the offence to the High Court which may inquire into the facts and hear evidence, including any statements that may be offered in defence. If the witness is found guilty he may be punished in the same manner as if he had committed a contempt of court.

A witness before the Tribunal has the same privileges and immunities as in a court of law. The Tribunal may authorize any person who appears to the Tribunal to be interested to be represented by a solicitor or counsel or otherwise. It is expressly provided that the public are to be admitted to all hearings unless the Tribunal finds that this is against the public interest.

The Act, however, provides in reality no more than the nucleus of the machinery necessary to achieve its purpose. Little is specifically laid down and there are some remarkable omissions from it, e.g. the Act contains no provision as to qualification of the members of the Tribunal nor as to the procedure to be followed in an inquiry. Many of the gaps, however, have been filled in and the deficiencies made good by the practice (entirely unwritten) that has gradually evolved over the last 45 years through the applications of the principles of the common law and common sense. This is entirely in the English tradition.

The improvements recommended by the Royal Commission are no more than a logical development of the present practice: some will need no legislation; other recommended improvements will require amendments to the Act.

It may be of interest to give an illustration of how the procedure gradually developed. Prior to the Budget in 1936 there had been substantial dealings in the City of London of such a nature that they gave rise to widespread rumours that impending changes in taxation proposed in the budget had been improperly disclosed. A Tribunal was set up under the Act of 1921 to conduct what became known as the Budget Leak Inquiry. The suggestion

which the Tribunal eventually found established was that the Colonial Secretary of the day had improperly disclosed Budget secrets to his friends Sir Alfred Butt, M. P. and a Mr. Bates who had made use of them for personal gain. In this Inquiry the cross-examination of the chief suspects was carried out by the members of the Tribunal themselves. The assumption of the cross-examining role by the Tribunal had the inherent disadvantage that it tended to make the Tribunal appear hostile to the witnesses whose conduct was being investigated. Accordingly the procedure was re-considered when allegations of bribery against Ministers and other public figures were being investigated by the Tribunal presided over by Mr. Justice Lynskey in 1948. The Attorney-General himself first examined and then proceeded to cross-examine the principal witness. The same procedure was followed when the present Lord Chief Justice presided over a Tribunal in 1957 to inquire into allegations of improper disclosure of information relating to the raising of the Bank Rate.

Although this procedure avoided the difficulty inherent in that followed in the Budget Leak Inquiry, it had difficulties of its own. The purpose of examination-in-chief is to establish the evidence being given by the witness. The purpose of cross-examination is to test and if necessary to destroy it. If both these tasks are undertaken by the same counsel, however brilliant the *tour de force,* it tends to create the atmosphere of a clever charade rather than that of a serious public inquiry. Moreover, the witness will be perplexed and probably left with the feeling that he has not been fairly treated.

In 1962 the procedure was further developed to avoid this difficulty. In that year a Tribunal was set up under the Chairmanship of Lord Radcliffe to inquire into the circumstances in which the spy Vassall had been employed by the Admiralty and "allegations . . . reflecting on the honour and integrity of persons who as Ministers, naval officers and civil servants were concerned in the case". Some of the witnesses were allowed to be examined by their own counsel. Other witnesses who were examined by one of the team of counsel appearing for the Tribunal, were not cross-examined by the same counsel but by another of the Tribunal's counsel. In this Inquiry also the practice was evolved of allowing persons implicated to be supplied with a statement of the allegations against them and a resumé of the evidence in support of those allegations. Moreover, for the first time certain witnesses, on the recommendation of the Tribunal, received an ex gratia contribution towards their costs.

Two main problems arise in relation to all Tribunals of Inquiry.

1. How to make them effective for establishing the truth.
2. How to protect the individual citizen who may become involved in such an inquiry, against injustice and unnecessary hardship.

In England the first problem has been largely solved and it was accordingly upon the second problem that the Royal Commission mainly concentrated its attention.

But the first problem is of the greatest importance and I will now consider it.

The members of the Tribunal should be men of the highest standing in whom the public has complete confidence. It is, however, just as important that they should be able to serve on the Tribunal full time and attend all its hearings. This may sound axiomatic, but it is apparently not yet universally accepted. Certainly the Warren Commission consisted of seven Commissioners of the highest standing but the average Commissioner heard only 45% of the testimony: one of them only 6%—another, who attended the largest number of hearings as much as 71% and only three heard more than half the testimony.

No responsible person can doubt the integrity or ability of the individual Commissioners nor that their purpose was to discover the whole truth. It is no part of my task to consider whether or not they achieved that purpose. I will assume that they did. However faulty the method employed may be, by chance the target is sometimes hit. There were, however, in my view, many faults in the procedure adopted by the Warren Commission which certainly could have hindered them in reaching their goal and which if generally adopted by other Tribunals would in many cases obscure the truth.

The lesson to be learnt from the Warren Commission is that over-delegation and over-elaboration should at all costs be avoided. Delegation is no doubt highly desirable in many fields. It should, however, play no part in the judicial or quasi-judicial process. Ex hypothesi the Judge or member of a Tribunal cannot satisfactorily delegate the task of appraising the evidence and reaching a conclusion on the basis of the evidence which he accepts. These are tasks which should be personally performed. It is usually impossible accurately to appraise evidence which you have not heard. The weight to be attached to a witness's truthfulness, accuracy and recollection, depends very largely upon his demeanour, upon the impression he makes on the Tribunal which sees and hears him.

On the other hand, the task of making the necessary inquiries in the field, and taking proofs from potential witnesses must of course necessarily be delegated. The Warren Commission divided the fields of inquiry into six separate areas and allotted each area to a distinguished and busy practitioner. These, like the Commissioners, were unable to devote very much of their time to the work of the Commission and each of them delegated his work to industrious and able juniors. Moreover, the Tribunal interposed between itself and the men in the field an executive director or general counsel as he was variously called, who again had two deputies. With this degree of delegation and sub-delegation, the members of the Tribunal became much too remote from the men carrying out actual inquiries and accordingly lost the power closely to direct and control the investigation, e. g. the important task of deciding who should and who should not be interviewed amongst the potential witnesses and which of them should be called to give evidence before

the Tribunal was left entirely for the investigators in the field to decide. Several witnesses whose evidence, if accurate, might have been vital were never called, e. g. a Mrs. Walther claimed to be an eye-witness of the assassination. According to her statement made to the F. B. I. she saw a man with a rifle in an upper storey of the building from which the fatal shot is thought to have been fired and with him she saw another man. Her statement contained one or two minor inaccuracies but this is not unusual in even the most valuable statements. Mrs. Walther was never called as a witness even although her evidence as to the presence of the second man was perhaps corroborated by another witness whose evidence was rejected by the Commission for lack of "probative corroboration". Mrs. Walther's evidence might have supplied that corroboration or, of course, it might have been discredited. The point is that it was never called or evaluated by the Tribunal and the decision to discard Mrs. Walther's testimony was not taken by the Tribunal but entirely by subordinates.

In a scholarly book on the Warren Commission written by Mr. Edward Jay Epstein he euphemistically refers to what he calls "the political truth" and suggests that this is what the Commission was looking for. I do not agree with that suggestion; nor do I think that there is any such thing as the political truth. To my mind it is impossible to compromise about the truth. What is true is true and must be proclaimed by the Tribunal however undesirable it may be politically. What is distorted to make it politically acceptable is false. I have no doubt that this was the view of the distinguished members of the Warren Commission.

I suppose, however, that at the outset the Commissioners and everyone else everywhere must have hoped that the evidence would show that Oswald was the lone assassin. Every experienced judge must know that sometimes he starts with the hope that he may be able to reach a certain conclusion, either because to him it seems just or sensible or even in the national interest. He knows too that there is a subconscious tendency or temptation to mould the facts to accord with that conclusion. This is a tendency or temptation against which every experienced judge of intellectual integrity is always on his guard; and so I am sure were the Commissioners. The difficulty is that when there is so much delegation and sub-delegation, some of the not very experienced junior members to whom so much is left may find it difficult to put out of their minds and remain entirely uninfluenced by the knowledge that everyone including their superiors hopes that the evidence they discover will fit the desired conclusion. Accordingly there is always the risk that some of the evidence and reports which filter up to the Tribunal will be tinged with the knowledge of what it is hoped that they will reveal. This is another potent reason why the detailed control of the investigation and of the collation of the evidence should be kept in the hands of the members of the Tribunal.

The Commission, like most Tribunals of Inquiry, worked under great

pressure of time. It is always urgently required that the report will be published and public confidence restored at the earliest possible moment. Yet in spite of this, the investigation was extraordinarily elaborate and wide-ranging. To attack on an over-wide front means dissipating one's powers; the attack tends to slow down, lose driving force and finally effectiveness. It is, as a rule, the best policy, whether in war or law to concentrate one's forces on attacking what really matters. In the Warren Inquiry, however, 43% of the testimony concerned Oswald's life history, and there was much besides which was only on the very periphery of the case. When an investigation ranges over such a wide field there is always a very real danger that amongst a welter of barely relevant facts the importance of some vital fact will be missed and essential evidence will not be called, e.g. it was of the very greatest importance to discover whether only one or more than one assassin was concerned in the murder of President Kennedy. The President was struck by two bullets, one of which exited through his throat. It was the second bullet which killed him. After the first of these bullets but before the second one struck him, Governor Connally was hit. According to the evidence based on an analysis of the film of the assassination the maximum time in which Governor Connally can have been hit after the President was 1.8 seconds. Yet according to the F. B. I. evidence Oswald's rifle was incapable of being fired twice in less than 2.3 seconds—without even allowing for aiming time for the first shot. If this evidence be correct and if Oswald fired the first shot which hit the President, it follows that either Governor Connally was also hit by that shot or he must have been hit by another shot fired by some other gunman. If the first bullet did not hit the Governor as well as the President, two different men must have been shooting about the same time. Oswald could not have hit the President and the Governor with two separate shots fired within 1.8 seconds of each other because his gun was incapable of firing two shots within that time.

The vital significance of this matter seems to have escaped the notice of the Commissioners for they found that it was "not necessary to any essential finding of the Commission to determine just which shot hit Governor Connally". The exact contrary is true. They went on to find that there was very persuasive evidence to indicate that the first bullet to hit the President exited from his throat and then hit Governor Connally. And so of course there was such evidence, namely that of the autopsy report on which the Commission relied which showed that the first bullet hit the President in the neck and exited through his throat. But there was other evidence. The F. B. I. carried out an investigation immediately after the assassination and 17 days later on the 9th December, 1963, they produced a summary report in four volumes followed by a supplementary report in a fifth volume on the 13th January, 1964. The Commission relied on much of the material contained in these reports. According to these reports however—and two F. B. I. agents were present at the autopsy—the first bullet struck the President not

in the neck but just below his (the President's) shoulder, it penetrated "less than a finger length" and "there was no point of exit". Obviously if the bullet hit the President below the shoulder it could not have exited through his throat since it was established that its trajectory was downwards at an angle of 45 to 60 degrees—as one would expect since it was apparently fired from the sixth floor of a fairly tall building. It would follow from this that the exit wound in the President's throat was made by the killing bullet which hit him in the back of the head and not by the first bullet to strike him and the killing shot was fired after Governor Connally had been hit.

Moreover the F. B. I. Supplemental Report includes photographs of the President's coat and shirt. These photographs, which were neither included nor referred to in the Commission's Report nor in the 26 volumes of evidence which accompanied it, show a bullet hole between five and six inches below the collar. They are difficult to reconcile with the finding that the bullet hit the President in the neck. It is certain that he was hit by no more than two bullets, the second of which certainly hit him in the back of the head. Where did the first one hit him? In the neck, as the Commission found, or six inches below the collar line as the F. B. I. reports show? If the F. B. I. reports are correct, it would seem that there must have been a second assassin. It is possible that there is some explanation of the facts to which I have referred, but none was attempted in the Commission's Report. It should have been.

The Commission—although it deals in great detail with many peripheral matters—never explains nor even refers to the obvious discrepancy between the F. B. I. reports and its own findings on a point which was at the very heart of the matters being investigated. Other valid criticisms are that the evidence which was called does not seem to have been tested by sufficiently vigorous cross-examination. This I think was because of an unduly tender regard for the witnesses. It was felt that as they had all come forward voluntarily, it would be unfair to subject them to any real cross-examination. But a witness whose evidence is accurate has nothing to fear from fair cross-examination, however thorough it may be. Again the Report itself was not written by the Chairman or even by any of the Commissioners but by a large number of subordinates. Tedious as the task may be, I think that the Report in any Inquiry of great importance should be written by the Chairman personally.

Many of the conclusions reached by the Commission are clearly correct. There can, for example, be no real doubt but that Oswald took part in the assassination. Nevertheless, because of the defects in the procedure due, I think, chiefly to over-delegation and over-elaboration, many relevant questions were left unanswered and it is impossible to be satisfied that the whole truth has been revealed.

I have referred to the Warren Commission in order to illustrate some of the

defects in procedure which should be avoided by Tribunals of Inquiry. In this connection I must also refer to the Inquiry in England into what was known as the Profumo Scandal. In 1960 Mr. Profumo, the Secretary of State for War, made a personal statement in the House of Commons denying, amongst other things, that there was any truth in the rumour that he had had a liaison with a young woman of about 20 years of age named Christine Keeler. This young woman had then recently been prominently in the news in that she had failed to appear as a vital witness at the Central Criminal Court at the trial of a man named Edgecombe whose mistress she had been. He was charged with shooting at her with a pistol after she had left him and also with having previously slashed another man with a knife in her presence. The rumour was that Mr. Profumo had used his influence to enable his former mistress to leave the country for fear of what she might disclose should she give evidence. Sometime after Mr. Profumo had made his personal statement to the House of Commons, he admitted that part of it was untrue in that he had slept with Christine Keeler. His association with her, however, had ceased in December, 1961, and he had had no part in her disappearance abroad. A draft of his personal statement had been submitted to a number of his ministerial colleagues and indeed had been finally settled by them. At the time they knew that Miss Keeler had written an account of her supposed liaison with Mr. Profumo and that it was in the hands of the Press—as also was a letter from him to her starting with the word "Darling". Mr. Profumo's colleagues, after questioning him closely, accepted his story. They did not, however, take the precaution of sending for the article nor for the "Darling" letter, nor did they make any inquiry from Miss Keeler or a Dr. Ward or a certain peer who were supposed to have had first-hand knowledge of the liaison. They accepted Mr. Profumo's word alone. A triumph of faith over scepticism—or credulity over common sense.

There was a further rumour that Mr. Profumo's association with Miss Keeler involved a serious security risk as he was sharing her favours with the Russian naval attaché. There was the gravest public disquiet amounting to a crisis of confidence about (1) a Minister of the Crown having made a solemn personal statement to the House of Commons and therefore to the nation, part of which was untrue; (2) the statement having been approved by colleagues whom it was said ought to have known that it was untrue; (3) the security risks involved; (4) the suggestion that a Cabinet Minister had used his position for purposes of his own in order to enable a vital witness in a criminal trial to disappear abroad.

The Government decided to initiate an inquiry into these matters. It chose, however, not to appoint a Tribunal under the Act of 1921, in spite of the fact that for 43 years tribunals functioning in accordance with the Act had effectively discovered and established the truth. Instead it appointed a most distinguished Judge, Lord Denning, to carry out an inquiry dehors the Act. The uncharitable said that the Government, which at the time was

in a shaky position, did not proceed under the Act of 1921 because if it had, the inquiry would have been held in public and Mr. Profumo's ministerial colleagues who approved his personal statement on his word alone would have cut such poor figures under cross-examination that the Government would have fallen. The official excuse was that there were so many wildly salacious rumours current at the time, e. g. about the details of Mr. Profumo's association with Miss Keeler, about bathing parties and dinner parties at which the guests were unclothed and had been served by a Minister wearing nothing but a mask and a small apron, that it would have been most undesirable to investigate them in public. This is no doubt true. The point is whether such rumours should have been investigated at all. It is no part of the duty of government to satisfy idle curiosity about scandalous gossip. Questions as to the details of a Minister's association with his mistress, or as to whether he or his friends bathe or even dine in the nude are hardly matters of urgent public importance or likely to cause a nation-wide crisis of confidence; they are best ignored. The fact that rumours about such matters were circulating can hardly be regarded as a valid excuse for avoiding a public inquiry under the Act of 1921 into the four really serious matters which were causing the gravest public concern.

The procedure followed in the Profumo inquiry cannot be regarded as an acceptable model for Tribunals of Inquiry and indeed in my view should never be followed again. The Inquiry was held behind closed doors. None of the witnesses heard any of the evidence given against him by others nor had any opportunity of testing it. The transcript of the evidence was never published. Lord Denning had in effect to act as detective inquisitor, advocate and judge. It is true that in spite of the serious defects in this procedure, the report gained a large measure of acceptance. This, however, was only because of Lord Denning's rare qualities and high standing. Even so, the acceptance of the report may be regarded as a brilliant exception to what would normally occur when an inquiry is carried out under such conditions. Although Lord Denning thought that the procedure offered some advantages, he was most conscious of the disadvantages inseparable from it. He said "... being in secret, it had not the appearance of justice.... At every stage... I have been faced with this great anxiey: how far should I go into matters which seem to show that someone or other has been guilty of a criminal offence, or of professional misconduct, or moral turpitude or even incompetence? My inquiry is not suitable to determine guilt or innocence. I have not the means at my disposal. No witness has given evidence on oath. None has been cross-examined. No charge has been preferred. No opportunity to defend has been open. It poses for me an inescapable dilemma; on the one hand if I refrain from going into such matters my inquiry will be thwarted.... Suspicions that have already fallen on innocent persons may not be removed. Yet, on the other hand, if I do go into these matters I may well place persons under a cloud when it is

undeserved, and I may impute to them offences or misconduct which they have never had a chance to rebut."

The manifest defects in this procedure may not have such grave consequences where in truth there is no foundation for the rumours or allegations causing a nation-wide crisis of confidence. The Report will state the truth. The only ill consequence that may follow is that since everything takes place behind closed doors, the truth may not be generally accepted and the public may be left with the feeling that the inquiry has been no more than what is sometimes referred to as "the usual whitewashing exercise". If, however, there is in reality an evil to be exposed and any of the allegations or rumours are true, it is extremely difficult, if not practically impossible, for the report to establish the truth. When a person against whom allegations are made is not allowed even to hear the evidence against him, let alone to check it by cross-examination, when he has "never had the chance to rebut" the case against him, how can any judicially-minded Tribunal be satisfied, save in the most exceptional circumstances, that the allegations have been made out?

In these most exceptional circumstances, if they ever occur, in which such a Tribunal felt justified in making an adverse finding against anyone, that person would feel and the public might also feel that he had a real grievance in that he had no chance of defending himself. It follows that the odds against any such Tribunal being able to establish the truth, if the truth is black, are very heavy indeed. Any government which in the future adopts this procedure will lay itself open to the suspicion that it wishes the truth to be hidden from the light of day.

Having referred to two recent inquiries, one in the United States and one in England, to illustrate faults in procedure to be avoided, I will now try to enunciate the procedural methods most likely in my view to enable Tribunals of Inquiry to establish the truth. These methods are largely those laid down by and evolved under the Act of 1921.

1. The terms of reference should be defined as precisely as possible so as to keep the inquiry within reasonable bounds. On the other hand Tribunals should not be fettered by terms of reference which are too narrowly drawn.

2. The members of the Tribunal should be of the highest standing, whose general reputation will command public confidence in their ability, experience and complete impartiality. The Chairman must be a person holding high judicial office. Apart from assurance that having a judge as Chairman gives to the public that the inquiry is being conducted impartially and efficiently, it ensures that the powers of the Tribunal will be exercised judicially. No special qualifications should be laid down for the other members. They may or may not be lawyers, their avocations depending upon the particular circumstances of the case into which they are to inquire. None of them, however, should have any close connection with any political

party because the sort of matters in respect of which inquiries are ordered most often have highly charged political overtones. It would certainly be desirable in most countries that once the government has decided to set up a Tribunal, the members should be nominated by the head of the Judiciary so as to avoid any appearance of possible political bias. Each member should be available for the whole of every working day during which the Tribunal is functioning. It seems to me unlikely that it would be possible to find more than three such men available at any one time. And experience has shown, in England at any rate, that three is an ideal number for such a Tribunal.

3. The Tribunal should be vested with the power to compel the attendance of witnesses and the production of documents. Any person summoned as a witness who fails to attend or refuses to answer any question which the Tribunal legally requires him to answer or fails to produce a document which the Tribunal legally requires him to produce should be guilty of an offence. The Tribunal itself should have the power to deal summarily with such an offence by way of imprisonment or fine. The term of imprisonment which it should be empowered to impose should be such as to act as a strong deterrent against flouting the Tribunal's orders. Under the English procedure there is a rather elaborate provision of certification of the offence by the Tribunal and reference back to the High Court for punishment—the offender having an opportunity of putting forward any defence in the High Court. The Royal Commission did not recommend any alteration of the practice partly because it had stood for over 40 years and worked satisfactorily on the only occasion on which it had been invoked; partly because it was felt that there would be difficulties in extending the power of committal.

If, however, the matter is being considered as res integra, I think it would be tidier and more fitting to give the Tribunal itself the power of enforcing its own orders—providing that the Chairman is always a person holding high judicial office.

4(a). The Members of the Tribunal and counsel appearing before them should have absolute immunity against any form of legal proceedings in respect of what they say or do in the course of a hearing before the Tribunal. The same immunity should cover the contents of the Tribunal's Report. By a strange oversight, no such immunity was conferred upon the members of the Tribunal by the Act of 1921. The Royal Commission has recommended that this omission be remedied. The experience of centuries has shown that this immunity is essential for the efficient administration of justice. This efficiency would be much impaired if those taking part in the administration of justice could be deflected from doing their duty through fear of being harassed by vexatious litigation. The same considerations apply to Tribunals of Inquiry.

4(b). Witnesses appearing before the Tribunal should have a similar immunity in respect of what they say when giving evidence. They have such

an immunity in England under the Act of 1921. This means that they cannot be sued for anything they say in evidence, e.g. if a witness says "A. is a liar. His evidence is untrue," A. cannot sue him for defamation. It does not mean, however, that his answers as a witness cannot be used in evidence against him in any subsequent civil or criminal proceedings. The Royal Commission recommended that a witness's immunity should be extended so that neither his evidence before the Tribunal, nor his statement to the Treasury Solicitor nor any documents he is required to produce should be used against him in any subsequent civil or criminal proceedings except in criminal proceedings in which he is charged with having given false evidence before the Tribunal or conspired with or procured others to do so. This extension of a witness's immunity would be in line with the law of Canada, Australia and India. It would also in my view be of considerable assistance in obtaining relevant evidence, for persons are often chary of coming forward as witnesses for fear of exposing themselves to the risk of prosecution or an action in the civil courts. Moreover, this extension of the immunity would make it difficult for a witness to refuse to answer a question on the ground that his answer might tend to incriminate him. Thus not only would the witness be afforded a further measure of protection but the Tribunal would also be helped in arriving at the truth.

No doubt this extension of a witness's immunity entails the risk that a guilty man may escape prosecution. This would be unfortunate, but it is surely much more important that everything reasonably possible should be done to enable a Tribunal to establish and proclaim the truth about a matter which is causing a nation-wide crisis of confidence than that a guilty man should go free. Moreover, it is only the witness's answers and statements which could not be used against him. His guilt, if he were guilty, could still be proved aliunde if other evidence became available. In practice, however, it would in any event be difficult, at any rate in England where criminal trials are heard by juries, to prosecute a witness in respect of any misconduct found against him by the Tribunal. The publicity which these hearings usually attract is so wide and so overwhelming that it would be virtually impossible for any such person afterwards to obtain a fair trial before a jury. So far no such person in England has ever been prosecuted.

5. There must be an organization with sufficient staff experienced and competent to carry out inquiries, interview potential witnesses and take proofs under the close direction and control of the Tribunal. In England this work is most successfully undertaken by the Treasury Solicitor and his staff. They are all civil servants and as such recognized to be free from party political influences. I do not know whether there is a similar organization in Israel. If there is not, the work might be undertaken by one of the big law firms here. It would, I think, be difficult to recruit an ad hoc staff each time a Tribunal is set up. I cannot over-stress the importance of this preliminary work. Clearly it cannot be done by the members of the Tribunal themselves, for

they should have no direct contact with the witnesses until these appear to give evidence at the hearings. It is of the highest importance, however, that the Tribunal itself should direct the lines of inquiry, and decide who are to be interviewed as potential witnesses. The proofs of evidence should then be placed before the Tribunal and the Tribunal alone should decide who are and who are not to be called as witnesses. Such decisions should never be left to the staff, however excellent it may be. It should never be forgotten that it is the personal responsibility of the members of the Tribunal to inquire as well as to report.

6. A Tribunal should not base any finding or comment on anything save the evidence given before it at a hearing. Proofs of witnesses whom it has decided not to call should be ignored.

7. Each witness should be examined by his own counsel, if he is represented, otherwise by one of the team of counsel appearing for the Tribunal. He should then, if necessary, be cross-examined by another of the Tribunal's counsel and then on behalf of anyone affected by his evidence. Finally there should be an opportunity for re-examination. The members of the Tribunal may of course put questions as and when they think fit. I would stress that cross-examination is a powerful and effective weapon for stripping away the inaccurate and the false, and for arriving at the truth. It should, of course, never be abused. It should, however, be used vigorously but fairly by counsel for the Tribunal whenever the evidence given by a witness becomes suspect. I strongly dissent from the view that because a witness comes forward voluntarily to give evidence and is the Tribunal's witness, it would be unseemly to subject him to fair cross-examination in order to check his testimony.

8. The hearings of the Tribunal should be conducted in public. This is most important for it is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth.

When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely that of restoring the confidence of the public in the integrity of public life.

It may be that if the inquiry were held in private some witnesses would come forward with evidence which they would not be prepared to give in public. No doubt secret hearings increase the quantity of evidence but they tend to debase its quality. The loss of the kind of evidence which might be withheld because the hearing is not in secret would be a small price to pay for the great advantages of a public hearing. Moreover, experience shows

that the Tribunals of Inquiry which have sat in public have not been hampered in their task by lack of any essential evidence.

Although it is of the greatest importance that the hearing should be in public, there may be most exceptional circumstances in which justice demands that the Tribunal should have a discretion to hear some of the evidence in private. Under sec. 2 of the Act of 1921 the Tribunal has no power to exclude the public unless it is of the opinion that "it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given". These words have so far only been construed as applying to cases in which hearing the evidence in public would constitute a security risk. This is because no question has yet arisen as to whether they may confer a wider discretion. The Tribunal should have a wider discretion, certainly as wide as the discretion of a Judge sitting in the High Court of Justice in England. This discretion enables the public to be excluded in circumstances in which a public hearing would defeat the ends of justice. Justice, it has been said, is truth in action.

It is impossible to foresee the multifarious contingencies which may arise before a Tribunal of Inquiry. I can imagine cases in which, for instance, a name might be required of a witness and it would be fair that he should be allowed to write it down rather than state it publicly. The Tribunal might consider it desirable to exclude the public from the inquiry for the purpose of making an explanation to a witness or admonishing him. The Tribunal might consider that the interests of justice and humanity required certain parts of evidence to be given in private. This would be only in the most exceptional circumstances which indeed might never occur. The discretion should, however, be wide enough to meet such cases in the unlikely event of their occurring. Clearly that discretion should be exercised with the greatest reluctance and care and then only most rarely.

There are some who think that the Press should be prohibited from reporting proceedings day by day and that the evidence should be made public only after the publication of the Tribunal's report. This would no doubt eliminate the pain caused by publicity to some witnesses who are called before the Tribunal and indeed to some persons who are mentioned in evidence without perhaps being called as witnesses. I think, however, that on balance it is in the interest of those innocent persons against whom allegations have been made or rumours circulated that they should have the opportunity of giving their evidence and destroying the case against them in the full light of publicity. Moreover if, as I believe, it is essential for the inquiry to be held in public, surely those members of the public who are unable to attend the hearing in person are entitled to be kept informed through the Press of what is taking place? Besides, if the evidence is not published daily and the public has to wait for weeks or months for authentic information about what is occurring before the Tribunal, rumours will tend to grow and multiply and the crisis of public confidence may be heightened.

9. There should be no right of appeal from the Tribunal. Tribunals have no questions of law to decide. It is true that whether or not there is any evidence to support a finding is a question of law. Having regard, however, to the experience and high standing of the members appointed to Tribunals and their natural reluctance to make any finding reflecting on any person unless it is established beyond reasonable doubt by the most cogent evidence, it seems highly unlikely that any such finding would ever be made without any evidence to support it. Any adverse finding which a Tribunal may make against any persons will depend upon what evidence the Tribunal believes. Accordingly it would be impossible to reverse such findings without setting up another Tribunal to hear the evidence all over again. This would be as undesirable as it would be impracticable. In matters of the kind with which Tribunals are concerned, it is of the utmost importance that finality should be reached and confidence restored with the publication of the report.

There are other matters to which I wish to refer since they bear upon the effectiveness of Tribunals. The first is as to whether or not there should be statutory Rules of Procedure. There is much to be said for having such rules for they would ensure that the correct practice would in all cases be followed. On the other hand, the disadvantage of having such rules is that they would necessarily be detailed and rigid. This might enable any ill-disposed person to take advantage of any alleged technical breach of the rules for the purpose of obstruction or delay by applying to the court for mandamus or prohibition. Moreover, the procedural requirement of Tribunals will differ according to the circumstances of each case, and it is accordingly desirable to keep the procedure as flexible as possible. The Royal Commission decided that it was best not to have Statutory Rules of Procedure but to lay down general principles in its Report which it felt could safely be left to Tribunals to follow—thus protecting the interests of justice without hampering the Tribunals in their inquiries.

Another topic we considered which may not be of such importance in this country as it is in England is as to whether or not the Tribunal should be represented by the Attorney-General. As you no doubt know, the Attorney-General in England has two traditional functions, one political as a member of the government, one non-political as the Chief Law Officer of the Crown. Most of the matters which Tribunals of Inquiry have investigated have been of a highly political nature, sometimes concerning alleged misconduct by members of the government. Although the Attorneys-General have in the past appeared in their non-political capacity before Tribunals of Inquiry and no doubt carried out their duties with complete impartiality, their position appears anomalous to the public. Moreover, persons involved in the inquiry whose interests are inimical to those of the Minister or Ministers concerned, are liable, however wrongly, to think that the odds have been weighted against them and that the Attorney-General, because he is a member of the government, is pulling his punches or not hitting hard enough. The

Royal Commission considered that it was undesirable and unnecessary for Law Officers of the Crown to be put in a position in which they were exposed to such criticisms. We therefore recommended that the Tribunals should be represented by independent counsel of the highest standing with no close association with any political party.

Having considered how best to ensure that Tribunals of Inquiry shall establish the truth, I will now consider how best to protect individuals caught up in the inquiry from injustice and unnecessary hardship.

The Tribunals' Inquiry is inescapably inquisitorial. There is no *lis*, no plaintiff or defendant, no prosecutor or accused; there are no pleadings defining the issues to be decided, no charges, indictments or depositions. It is therefore difficult for persons to know in advance of the hearings what allegations may be made against them. Normally persons cannot be brought before any court and questioned, save in ordinary civil or criminal proceedings. Such proceedings are hedged around by long-standing and effective safeguards to protect the individual. We in England and you in Israel alike are accustomed to the adversary system and the inquisitorial system is alien to our concept of justice. The inquisitorial powers necessarily conferred upon Tribunals of Inquiry expose the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private and to the risk of having baseless allegations made against him in public—thereby causing him much distress and pain.

It is therefore most important that this inquisitorial machinery should not be put into operation more often than absolutely necessary and that when it is, every possible safeguard should be introduced to protect the innocent individual who may be caught up in it. For these reasons this machinery should never be put in motion for deciding questions of local or minor importance or even questions of history but should be reserved for pressing matters of vital public importance concerning which there is something in the nature of a nation-wide crisis of confidence. In such circumstances the use of this machinery is justified because it alone is effective to establish the truth. And it is only by establishing the truth that the purity and integrity of public life can be preserved. Much can be done in order to safeguard the individual. In the end, however, one must accept that it is impossible to eliminate all risk of personal hurt and even injustice to witnesses. This risk is inherent in any procedure which is effective for arriving at the truth. Even in normal judicial processes innocent persons are sometimes forced to attend court and give evidence and are subjected to suggestions and allegations which may be hurtful to them and damaging to their reputations. This is the inevitable price that has to be paid for arriving at the truth. And especially in matters with which Tribunals of Inquiry are concerned it is vital to the public interest that the truth should be established.

The Royal Commission laid down six cardinal principles to be observed for the protection of the individual. They were the following:

1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.

2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.

3(a). He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.

3(b). His legal expenses should normally be met out of public funds.

4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.

5. Any material witness he wishes called at the inquiry should, if reasonably practicable, be heard.

6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.

Most of these principles are, I think, self-evident, for they do no more than express a concept of justice which is accepted equally in Israel as it is in England. I would, however, make these general observations in relation to them.

It has been suggested that a preliminary hearing in private of the kind held by the Standing Congressional Committee in the United States would best ensure the observance of the first cardinal principle. I do not agree with this view. Where the public is seriously disturbed by rumours about any prominent person, I do not think, as I have already indicated, that the public will be satisfied by any findings of a preliminary hearing arrived at in private session to the effect that there is no substance in the rumours. Thus public concern will not be allayed; nor will the reputation of the person concerned be restored. If on the other hand the preliminary hearing convinced the Tribunal that there was a case to answer, this finding in itself might be prejudicial to the person concerned. There is also something unreal about re-hashing in public before the same Tribunal evidence which it has previously heard in private. I do not believe that the preliminary hearing is likely to achieve anything substantial except a waste of the time, money and effort which it takes to conduct. In my view the best method of ensuring the application of principles 1, 2, and 3(a) is to take great care in the preparation of the case before the hearing—and to leave ample time for this process.

There are no doubt always strong pressures upon a Tribunal to hurry on the hearing and publish its report with all speed. Dilatoriness must certainly be avoided but too great a price can and sometimes has been paid for haste. On the other hand, a few weeks more spent in preparing the materials for arriving at the truth is a small price to pay for avoiding injustice. Time spent in preparation helps in many respects. It enables the Tribunal to pinpoint the matters to be investigated and to consider and

decide which potential witnesses are to be interviewed. It gives the Tribunal's staff time to take careful proofs of evidence. It then enables the Tribunal to study these proofs and related documents and decide who should and who should not be called as witnesses. It is, of course, most important that all relevant evidence should be called and almost as important that irrelevant evidence—particularly if it is prejudicial—should be discarded. Time spent at this stage also enables the persons concerned to be informed of the allegations against them and the substance of the evidence by which those allegations are supported—early enough properly to prepare their case before appearing in front of the Tribunal.

The costs incurred in appearing before the Tribunal, particularly when the Inquiry takes a long time can—at any rate in England—be very heavy indeed. Tribunals have no power in England to make any order in respect of costs. Until the Vassal Inquiry, witnessess had always been left to bear this sometimes crippling burden themselves. In that case the Treasury, on the recommendation of the Tribunal, offered an ex gratia contribution towards the costs of some of the witnesses. This was better than nothing but it seems to me undesirable that a man should be offered money ex gratia and perhaps be made to feel that by taking it he is accepting alms at the public expense. In my view it is only fair that Tribunals should have the power in their discretion to order that a witness shall receive his reasonable costs out of public funds and this is what the Royal Commission has recommended. Clearly the Tribunal should retain a discretion over costs, but as a general rule, unless there is some good reason for depriving a witness of his costs, they should be awarded to him. These costs will then be received as of right and not out of charity.

I do not claim in this address to have drawn a blue-print for the conduct of Tribunals of Inquiry. I have, however, attempted to draw attention to some of the pitfalls to be avoided and to indicate a path which should lead to the establishment of the truth without imperilling the basic rights of individual citizens. This is always the fundamental problem—how to arrive at the truth with speed and certainty and at the same time to protect the individual from injury and injustice. There are countries where no such problems arise, where the rights of individuals count for nothing against the supposed interests of the state, where it is dangerous to express any lack of confidence and crises are resolved quite simply by force. In our countries, however, blest amongst other things by the civilizing influence of the common law, our whole system of government depends upon public confidence in the purity of our public life and is at the same time dedicated to preserving the freedom of the individual. That is why it is of such vital importance to us that when there is a crisis of confidence we should have the means of resolving it efficiently without trampling upon private rights. I shall rest content if I have succeeded in shedding any light upon the solution of this problem.