

# Reviews

## ENGLISH LAW – THE NEW DIMENSION

The Hamlyn Lectures, Twenty-sixth series, by Sir Leslie Scarman, (1974) pp. 88, Stevens, London.

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“At a time when the criminal law of this country was in a state to disgrace a half-civilized country,” said Lord Justice Greer, in a judgement delivered in 1932, “judges of high authority and writers of text books had been brought up to regard it as the ‘perfection of reason’<sup>1</sup>.” He might well have omitted the adjective ‘criminal’ and let his observation apply to the law generally. He was speaking of a time when there were over two hundred offences in English criminal law which carried the death penalty; and when debtors could be arrested on mesne process and thrown into debtors’ prisons (there were three of them in London alone, ‘the filthiest and most abominable in the Kingdom’<sup>2</sup>) there to languish until they found some means of paying their debts, or until death put an end to their unfruitful lives.

There have been great improvements in the criminal law and in the law generally. But there are still judges and writers of text books who echo the old refrain that the law is the ‘perfection of reason.’

The trouble with perfection is that it leaves no where else to go. It is the journey’s end. If our early ancestors had decided somewhere along the winding path that has led to the degree of civilization we now enjoy that they had reached perfection, man might still be swinging by his tail, naked, from the trees, and eating his meat raw.

Fortunately, at its various stages of growth, there have always

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1. *Leon v. Casey*, L.R. (1932) 2K.B., 576 at 588.

2. These words are quoted by Sir W.S. Holdsworth, *A History of English Law* (1952) vol 13, 320. He was quoting from Webb: *English Prisons*, 75.

been a few lawyers who have recognized the degree to which law has fallen short of perfection. In the front rank of today's men of the law, who ask disturbing questions about the adequacy of contemporary law, stands the man who has written this book — Sir Leslie Scarman. He has challenged the self-sufficiency of the present legal order. He has questioned the capacity of the law to deal, by itself, with current legal problems. He has asserted, in most uncompromising terms, that the law cannot travel alone in these complex times; if, indeed, even in simpler days, it ever could. "There is no cosy little world of lawyers' law," he once said, "in which learned men may frolic without raising socially controversial issues."<sup>3</sup> Again, he declared . . . "to meet and overcome the challenge of law reform, we must call not only for the technical learning of the lawyer, but for a full understanding of, and sympathy with, the habits, feelings and values of ordinary men. Unless this challenge is met, law reform will be, in very truth, a barren exercise."<sup>4</sup>

Law must be up-to-date and as simple as its subject matter will allow — this is his broad theme. And to achieve these dual ends, we must set about in an orderly and systematic fashion to simplify and modernize the law. This goal can be reached only by following a planned legislative process. "In the face of these difficulties and uncertainties," he asks, "what answer has English case law today to Maitland's question: "are we facing modern times with modern ideas, modern machinery and modern weapons?" I fear, no satisfactory answer. I would submit that we ask of our Courts too much if we leave to them without continuous legislative support the task of developing and modernising the law."<sup>5</sup>

In an address to the Canadian Bar Association, Sir Leslie Scarman described himself as "one of an oppressed minority"<sup>6</sup> — a London Cockney, born and bred. He was born in 1911. After schooling at Radley; he won an open scholarship, in 1930, to Brasenose College, Oxford. He was called to the Bar in 1936, and took silk in 1957. He was appointed a judge of the Probate, Divorce and Admiralty Division of the High Court of Justice of England in 1961. In 1965, when the Law Commission's Act established the Law Commission of England and Wales, he became its first chairman. What was the purpose of this Commission, and how did it pursue this purpose? Professor H.R. Hahlo has explained: "Acting within the letter and spirit of its mandate, the Commission is taking the law reform bull

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3. Sir Leslie George Scarman, *Law Reform: the New Pattern*, (Routledge and Kegan Paul, 1968) 27.

4. *Ibid.*, 7-8.

5. Sir Leslie George Scarman, *A Code of English Law* (University of Hull, 1966) 10.

6. *Proceedings of the Canadian Bar Association*, Vol. 51(1968)254.

by the horns by embarking upon an extensive scheme of codification.”<sup>7</sup>

After a fruitful term of five years as chairman of the Law Commission, Sir Leslie returned to judicial duties as a Judge of the Court of Appeal. In 1974, he delivered the 26th series of lectures under the Hamlyn Trust.

To fulfil the purpose of this Trust, his lectures have been published to make them available to the many who could not enjoy the privilege of hearing them delivered.

Here are Sir Leslie’s opening words: “My purpose in these lectures is to attempt an answer to one question: Is English Law capable of further growth within the limits of the common law system? – or, to put the same question in other words – Has the common law reached the end of the road?”

He suggests that, in our present world, there are social, political and economic, challenges, which will destroy the system if the system cannot successfully meet them. Perhaps, the most urgent of these challenges is the social challenge. This challenge arises from two recently emerged social beliefs. The first is that men and women are demanding the right to personal happiness, to self-fulfillment, as they see it and not as others see it for them. The second is that everyone has the right to the active protection of the state against poverty, disease and old age. “Social justice,” he asserts, “by which today’s society means justice in depth not only penetrating and destroying the inequalities of sex, race and wealth but also supporting the weak and the exposed, is believed by some to be beyond the reach of the traditional combination of common law rule and equitable relief supplemented where necessary, by statute: it appears to need new law, new principles, new remedies, new machinery and new men.”

In its history of 800 years, the common law has shown great vitality, great adaptability. It has met many challenges and has shown that it has the faculty to accommodate, when it cannot resist, change. But has it ever faced more serious challenges than those which confront it today? To meet and overcome these challenges what must the law and the lawyer be prepared to do? Sir Leslie gives his answer to this question: “If, therefore, the law and the lawyer are to make a socially valuable contribution to the operation of the social security system, there must be abandoned old-established habits of thought as to the nature of law and the whole gamut of practices summed up in the layman’s word of deadly insult, “legalism” – his word for rigid attachment to legal precedent, the substitution of legal rule for policy, the fettering of discretion, the adversary style, the taking of technical points, formality. In their place, we

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7. In an article: Here lies the Common Law, *The Modern Law Review* for May, 1967, 241-2.

have to accommodate in the legal system a public law which, while it supports the citizens rights and regulates the actions of the state in conflict situations arising between it and the citizen where the state is the provider, the policy-maker, and the judge, does not destroy the essentially administrative nature of the state's function or overlay policy and discretion with so-called legal rules."

Another pressing present-day challenge of the law is the challenge of the environment. In this area, Sir Leslie suggests that the law has been found wanting. "Tied to concepts of property, possession, and fault, the judges have been unable by their own strength to break out of the cabin of the common law and tackle the broad problems of land use in an industrial and urbanised society. The challenge appears, at this moment of time, to be likely to overwhelm the law. As in the area of the social challenge, so also the guarding of our environment has been found to require an activist, intrusive role to be played by the executive arm of government."

Mindful of the lesson to be learnt from the *Liversidge* case,<sup>8</sup>(in which Lord Atkin wrote a classic dissenting judgement), Sir Leslie, setting himself against the traditional view, advocates a built-in Bill of Rights which guarantees to all the fundamental human freedoms. "Without a Bill of Rights," he asserts, "protected from repeal, amendment, or suspension by the ordinary processes of a bare Parliamentary majority controlled by the government of the day, human rights will be at risk: "of what assurance is a law to prevent so great an evil, if it be in the same legislature to unlaw it again?"<sup>9</sup>

He sees the necessity for the Law Commission to play an even more active role, on a continuing basis, as the agency "to take and keep under review all the law . . . with a view to its systematic development and reform, including in particular the codification of such law . . . and generally the simplification and modernisation of the law."

Though not overly optimistic, Sir Leslie does not suggest that the traditional legal system, though heavily besieged, must be relegated to the scrap heap of history. The law can meet the challenges that face it, if the legal profession is ready to set its house in order. Are lawyers and judges and law teachers willing to adjust their thinking and work out a socially effective response to the challenges?

"My final question is, therefore, have we the will?" Sir Leslie asks, and asserts: "The answer lies with the legal profession. If, as a profession, we respond to the needs of society and show by our practice and thinking that we have a socially relevant and helpful contribution to make to the management and regulation of our soci-

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8. [1942] A.C.206.

9. Here Sir Leslie Scarman is quoting from Oliver Cromwell; see page 17 of his book.

ety as it prepares to enter the twenty-first century, we shall be wanted, and respected. Can we do it? First, the judges: they have behind them 800 years of the common law's independent existence during which they alone have been able to declare what is the common law. Society wished to lose neither their independence nor self-confidence. Society, if I read its movement aright, asks only that they transfer their traditional skills, spirit and attitudes from declaring a law, the basis and nature of which no longer suffices to meet society's need, to interpreting, and guarding against the abuse of power, a modern, statute-based, and more activist law. Society asks of the judges no more than that they be true to the ideals of Coke and Cromwell."

What is the new dimension which Sir Leslie suggests should be added to the present law? The common law is a private legal system. It places the emphasis on the individual — his person, his property, his reputation. Its first concern has been to do justice, according to law, between man and man. Today there is public law which must be taken into account. When the common law lawyer enters this field, he has to discard, says Sir Leslie, "some professional attitudes and practices which, because they have been with us so long, appear to the fundamental principles of the law." But what is public law? Sir Leslie says that the average lawyer knows so little about public law that he must offer an explanation. "Public law," he explains, "is concerned with the rights and obligations of the state in the setting of municipal law. The common law recognizes within that setting and subject only to a few unavoidable exceptions no distinction between the servants of the Crown and private persons: the law is the same for the private and for the public sector."

In a society into which the welfare state has come to stay, what is the one thing than can, perhaps, save the day for the legal profession? This is Sir Leslie's answer to this question: "The key to the survival of the rule of law as a living and socially relevant force is legal education. The nature, the purpose, and the implications of a law suited to the requirements of the society in which he will have to practice must be brought home to the student. The so-called "core" subjects required by the Council of Legal Education as a necessary part of a barrister's training are at present:

contract, tort, criminal law, land law, constitutional and administrative law, equity and trusts.

Are they relevant, or are they in the list because of their historical importance?" This question urgently demands an answer. In today's world, is legal education on the right track?

Here are Sir Leslie's last words of advice: "I would say to all three branches of the profession: Look to the new sources and fields of law and endeavour to retain the spirit of the old while abandoning

habits of thought and action derived from a society that no longer exists.”

In the 88 pages of Sir Leslie’s book there is much to be studied and pondered over. It belongs in Bacon’s third category – it is a book to be chewed and digested, to be read with diligence and attention. My fear is that it will not be read by those who need its message most. And that’s the pity of it. I expect that as we approach the 21st century (and as we look about us on our troubled world today, the question arises, will we make it?) we shall still hear talk about the law being the ‘perfection of reason’ from those who should know better.