THE HAMLYN LECTURES

Thirty-First Series

SOCIAL HISTORY AND LAW REFORM

O. R. McGregor

STEVENS

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AND
LAW REFORM

BY

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Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

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The Thirty-First Series of Hamlyn Lectures was delivered in February 1980 by Professor Lord McGregor of Durris at the University of Kent at Canterbury.

AUBREY L. DIAMOND,
Chairman of the Trustees.

September 1980

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INTRODUCTION

I am very sensible of the honour which Miss Hamlyn's trustees have conferred upon a layman by their invitation to deliver these lectures. I do not know whether to be more alarmed by the formidable list of distinguished lawyers who have preceded me or by the fact that the only other layman whose name appears on it is Lady Wootton, our most renowned exponent of social science. A lecturer under this Trust is required to help those whom the Chancery Division of the High Court still thought of in 1948 as "the Common People of the United Kingdom" to "realise the privileges which in law and custom they enjoy in comparison with other European Peoples." A brief of this nature more easily moves English lawyers to adopt the language of Mr. Podsnap and to reiterate Lord Hailsham's belief that "our courts are better, our judges are better, and our lawyers are better than those of other nations, however good they may be,"[1] than to accept Lord Gardiner's judgment that "the courts exist for the people and not the people for the courts."[2]

In the first part of these lectures, I shall reflect on the present relations of law and the other social sciences, consider some consequences that have flowed from the historiography of English legal institutions and then go on to trace the ways in which some Victorian law reformers went about the business of adapting the law to social change. In the second part, I shall apply the conclusions of the first to recent developments in two branches of the civil law which are of extensive and direct concern to the common people, with the object of assessing how well they are being served.

[1] H.L. Official Report, Vol. 313, cols. 676, 677, quoted Barbara Wootton, *Crime and Penal Policy* (1978), p.81.
[2] *Ibid.*, Vol. 306, col. 200.

CHAPTER 1

SOCIO-LEGAL RESEARCH: THEORISTS AND FACT GATHERERS

The last two decades have seen a marked revival of interest in studies of the administration of justice and of the social and economic results of law in action. Practical expressions of this intellectual activity materialised surprisingly quickly. The Joseph Rowntree Memorial Trust set up a Legal Research Unit at Bedford College in 1965, the Nuffield Foundation followed suit in 1971 with its own Legal Research Unit, and the Law Faculty of the University of Birmingham established an Institute of Judicial Administration in 1969. In 1972, the Social Science Research Council, in partnership with the Rowntree trustees, provided funds for a Centre for Socio-Legal Studies in Oxford.[1] The Council also constituted a Law and Social Sciences Committee charged with administering grants for postgraduate students and stimulating interdisciplinary research throughout the institutions of higher education. It is fitting at this time to recall that Sir Otto Kahn-Freund, the leading exponent of the utility of collaboration between lawyers and social scientists, took the lead in setting up the Oxford Centre and the S.S.R.C. Committee. An expanding literature has emerged from these developments and is extending the pioneering work of Wolfgang Friedmann, first published in 1959 as *Law in a Changing Society*. There are now series of legal texts written to give the law a social and economic context. True to the principles of its founders, the Modern Law Review has been making a feature of articles with a socio-legal content, and other journals are projected. Sufficient enthusiasm for sociological investigation has spread among a fringe of younger teachers of law to sustain a

[1] The partnership was short-lived. The trustees wished their contribution to be used for activities which could not be undertaken with public funds. However, the S.S.R.C. insisted that the Rowntree grant should be paid directly to the Council in such a way that its only effect would have been to reduce the Council's liability. As a result, the trustees severed their connection with the Oxford Centre.

British Journal of Law and Society, founded in 1974. Behind all these enterprises lies a conviction that collaboration between lawyers and other social scientists will promote greater mutual understanding and appreciation of the relevance of each other's field of study to problems with which they are both concerned. Unhappily, this conviction has been much more in evidence among lawyers than among social scientists.[2]

Several waves of influences have shaped these developments as well as wakening a desire among laymen for knowledge about the role of law in society. The first has been the seemingly irreversible proliferation of crime and violence, and the obvious failure of existing methods to cope with this has forced consideration of how, to whom and for how long scarce cell space should be allocated. Moreover, the influence of psychiatry on the law and the penal system has been such that, as Lady Wootton observed more than 20 years ago, "the concept of illness expands continually at the expense of moral failure,"[3] with the consequence that what used to be clear notions of legal and moral responsibility have become blurred not only in discussions but in statutes as well. One result of this development has been that issues of law, order and morality are now high on the agenda of public and political discussion.

The second wave has been a reconstruction of the familial code which has involved a willingness to take account of the happiness of individuals at the expense of the legal integrity of the institution of monogamous marriage. The momentous innovations of the Adoption and Legitimacy Acts 1926 broke the age-long insistence upon the inalienable rights of parents over children, as well as introducing into England the *legitimatio per subsequens matrimonium* of Roman law which had been rejected when the Barons debated the Statute of Merton in 1263. Wives have secured a large measure of equality with their husbands, and the bonds of marriage, which used to be described as the essential safeguards of monogamy, have been weakened to the point at which between

[2] An example is the excellent introduction to *The Legal Structure* (1974) by M. D. A. Freeman.

[3] "Sickness or Sin," *The Twentieth Century*, May 1956, p. 43.

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one-fifth and one-quarter of the married population are likely to seek licences to marry again from the divorce court. Most petitioners will obtain these by post without having to attend a court hearing.

In the third place, recent decades have witnessed the removal of customary and legal constraints upon certain forms of previously disapproved of or illegal sexual behaviour and upon their portrayal in print or by the visual arts or for commercial purposes. Men and women have also acquired new rights over their own bodies and new freedoms to choose how and with whom to exercise their reproductive powers. These freedoms constitute a watershed in social development. In 1854, John Stuart Mill recorded in his private diary the belief

> "that what any persons may freely do with respect to sexual relations should be deemed to be an unimportant and purely private matter, which concerns no one but themselves. If children are the result, then indeed commences a set of important duties towards the children, which society should enforce upon the parents much more strictly than it now does. But to have held any human being responsible to other people and to the world for the fact itself, apart from this consequence, will one day be thought one of the superstitions and barbarisms of the infancy of the human race."[4]

In Mill's sense, we have been growing up fast these 30 years. Our emergence from infancy and barbarism has sparked off the first sustained, academic and public debate on the relation of law and morality since the publication in 1873 of Fitzjames Stephen's *Liberty, Equality, Fraternity*, which attacked Mill's *On Liberty*.

The final destruction of the formal Victorian sexual code has been accompanied and hastened by public discussion and parliamentary debate upon reports and proposals for changes in the law which have come in the last 25 years from a stream of official and

[4] Hugh S. R. Elliot (Ed.), *The Letters of John Stuart Mill*, Vol. II (1910), p.382.

parliamentary enquiries into such provocative subjects as divorce,[5] homosexuality,[6] prostitution,[6] human artificial insemination,[7] censorship in the theatre,[8] the succession possibilities of bastards,[9] adoption,[10] the working of the Abortion Act 1967,[11] one-parent families,[12] violence in the family,[13] marriage guidance[14] and obscenity and related topics.[15] Many of these reports were paralleled and their recommendations approved by similar, though unofficial, investigations, especially by the churches, and notably by the established church.[16] Indeed, from this point of view, the Church of England has a strong claim to be regarded as one of the principal architects of the permissive society.

The fourth influence which has promoted a concern for the law among laymen has been a spreading awareness during the last 15 years of the limitations of the legal aid scheme, set up in 1950. At the end of the 1960s in two pamphlets, *Rough Justice* and *Justice for All*, both Conservative and Labour lawyers gave currency to a

[5] Royal (Morton) Commission on Marriage and Divorce, Report, Cmd. 9678 (1956).

[6] Committee (Wolfenden) on Homosexual Offences and Prostitution, Report, Cmnd. 247 (1957).

[7] Committee (Feversham) on Human Artificial Insemination, Report, Cmnd. 1105 (1960).

[8] Joint Select Committee on Censorship of the Theatre, Report, (1966–67; H.C. 503 or H.L. 255).

[9] Committee (Russell) on the Law of Succession in Relation to Illegitimate Persons, Report, Cmnd. 3051 (1966).

[10] Committee (Houghton/Stockdale) on the Adoption of Children, Report, Cmnd. 5107 (1972).

[11] Committee (Lane) on the Working of the Abortion Act 1967, Report, Cmnd. 5579 (1974).

[12] Committee (Finer) on One-Parent Families, Report, Cmnd. 5629 (1974).

[13] Select Committee on Violence in the Family, First Report (1976–77; H.C. 329).

[14] Consultative Document from Working Party on Marriage Guidance, Home Office, 1979.

[15] Committee (Williams) on Obscenity and Film Censorship, Report, Cmnd. 7772 (1979).

[16] Examples are: *The Family in Contemporary Society* (1958), *Fatherless by Law?* (1966), and *Putting Asunder: A Divorce Law for Contemporary Society* (1966).

concept of unmet legal need, though urging different methods of reducing it. The Lord Chancellor's Advisory Committee on Legal Aid accepted their diagnoses and concluded that research should be encouraged "which we hope will be financed by one of the Foundations, into the reasons why those who need and are entitled to legal advice and legal assistance do not get it."[17] The Nuffield Foundation responded quickly to this appeal, but the findings of the research which it prompted were a less important outcome of the initiative than the creation of the Legal Action Group in 1972, which the Foundation supported throughout its early growth. The Group has been a significant contributor to a burgeoning movement for citizens' rights. By emphasizing legal rights in respect of social welfare, it has directed attention within and beyond the legal profession to the crucial function of tribunals for citizens in dispute with the state over entitlement to benefits in many fields of social policy. The importance of this branch of the law has been more quickly and widely recognised by laymen than by lawyers. But by 1974, the stage had been reached when Mr. Justice Finer could state in a judgment that "much of the law of national insurance and supplementary benefits is of the greatest importance in the daily work of the (Family) Division . . . and demands as much study from practitioners as any other branch of the family law, of which it is essentially a part."[18] The legal profession is shedding the outlook and habits of a world in which its main task was to protect rights of property and to preserve freedom of contract, and it is slowly adapting to the requirements of an industrial welfare society.

Fifth, among the other influences which have generated lay concern with the law and the administration of justice is the Industrial Relations Act 1971 and its aftermath. Widespread anxieties about the policies of trade unions and, especially the numbers and conduct of strikes, have made the legal position of trade unions a central issue of present political controversy and have already led

[17] *Report on the better provision of Legal Advice and Assistance* Cmnd. 4249 (1970), p.11.

[18] *Reiterbund* v. *Reiterbund* (1974) 2 All E.R. 461.

to verbal skirmishes concerning the circumstances, if any, in which citizens may or ought to disobey the law.

Sixth, there has been the establishment of such new agencies as the Commissions for Racial Equality and Equal Opportunities which are charged with the enforcement of laws directed against social and economic discrimination. Perhaps more pervasive in their effects has been the development during the last quarter of a century of a variety of means which enable citizens to complain about the performance of concentrations of power. These range in type from the local ombudsmen to the BBC's complaints panel, from the Consumers' Councils of public utilities to the Council on Tribunals when it deals with complaints about the proceedings of administrative tribunals and public inquiries, and they include such bodies as the Press Council and the Advertising Standards Authority. The interest of central and local government in the protection of consumers is firmly established in the Office of Fair Trading, set up in 1973, and in the Trading Standards Authorities. There is now a network of complaints procedures, public and private, which has grown up unsystematically as a series of *ad hoc* responses to pressures from citizens in search of cures for grievances. Many of these bodies enforce their rules by hortatory procedures. Their aim is to set standards rather than to secure convictions, to persuade not to coerce.

I regard the spectrum of quasi-judicial institutions as being in practice of greater potential significance to the daily life of the general public than are the civil courts. These remedies for complaints are enlarging the content of democratic citizenship by conferring new rights and protections which cannot easily or cheaply be pursued through the courts. Indeed, access to them is free, and they are beginning to enlarge the administration of justice by helping to demonstrate that the rule of law is not exclusively, or necessarily importantly, a matter for legislation or for lawyers or for courts and tribunals or for legal sanctions. In this way law will become part of ordinary life and an instrument for positive social betterment, rather than a negative means of regulating pathological or marginal situations.

Finally, the setting up of the Law Commission in 1965, recently described by both Professor Michael Zander[19] and Lord Hailsham[20] as the single most important event of this century in the field of law reform, has resulted in broad discussions and major reforms of, for example, family and criminal law and consumer protection as well as in a programme of consolidation of statutes. This permanent but advisory body reviews legal problems which it chooses to put into its programme, though this in turn has to be approved by the Lord Chancellor who may also make references of subjects. In addition, any member of the public may make a proposal but few have made use of this right.[21] The Commission procedure is to publish a working paper which expounds the existing law that has been selected for reform, examines the criticisms that have been directed at it and sets out the field of choice of reforms. Then follows the widest possible consultation with interested parties which "may take a long time but it can, and usually does, mean a swift passage through Parliament of a non-controversial Bill. . . ."[22] Lord Scarman is justified in his claim that this brilliant technique "represents a major advance in legislative method. It is perhaps the greatest contribution to the public life of the nation made by the Commission."[23] The Working Paper and the subsequent consultations have therefore constituted a forum in which the lay public have been drawn into debates on law reform. Another pioneering technique was involved in the Commission's decision, after seven years' experience, "to give careful thought to ways and means of making greater use of the social sciences both in determining law reform priorities and in the preparation of proposals . . . " In the Seventh Annual Report in 1972 the Commission said that "We hope to evolve a standard procedure for harnessing social sciences to law reform which will become as much a

[19] "Promoting Change in the Legal System" (1979) 42 M.L.R. 502.
[20] H.L. Official Report, February 12, 1980, Col. 150.
[21] Lord Scarman, The Jawaharlal Nehru Memorial Lectures, "Law Reform —The British Experience," Lecture 111, p.4.
[22] *Op. cit.*, Lecture 11, pp.3–4.
[23] *Ibid.* p. 4.

part of our method as the Working Paper procedure itself."[24] That resolve has remained an aspiration save for the national random sample survey among married couples in order to discover their opinions about matrimonial property and the pattern of ownership of such property,[25] conducted on behalf of the Commission by the Office of Population Censuses and Surveys. This was the first occasion when large-scale social research was directly designed by a law reform body for the purposes of law reform. It has also been the last so far.

The truth is that there is very little social research on which a law reform body can draw and, besides, some academics hold that such work would be a betrayal of their discipline. Indeed, the advocates of sociology of law are in conflict with enthusiasts for socio-legal studies over the proper aims of research. Professor Campbell and Mr. Wiles are proponents of the sociology of law, which they define as an inquiry into "the relationship between law and all aspects of social order, and between law and other social institutions which play a part in ordering society." They account for the backwardness of this subject by asserting that

> "English pragmatism and the self-confidence of an industrial society at the height of its power and expansion combined to limit interest in more fundamental problems and instead largely focused such attention as was paid to the social nature of law on questions of practical and immediate efficacy."[26]

This is a puzzling judgment on a period which must be taken to run from mid-Victorian to Edwardian days. It seems to neglect, for example, the work of Maine, Maitland, Dicey and Hobhouse.[27] Moreover, lesser figures wrote brilliantly on the sociology of law as defined by Campbell and Wiles. One instance will suffice. In the year when Sir George Colley was killed on Majuba Hill in the pursuit of national expansion, George Brodrick published *English*

[24] The Law Commission, Seventh Annual Report, 1972, p. 1.
[25] J. E. Todd and L. M. Jones, *Matrimonial Property* (H.M.S.O., 1972).
[26] Colin Campbell and Paul Wiles, *Law and Society* (1979), p. ix.
[27] In particular, *Morals in Evolution* (1st ed. 1906).

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