

Ashes AND Sparks

Essays on Law and Justice

STEPHEN SEDLEY

CAMBRIDGE

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PREFACE

I

I wish I could present this collection of lectures and articles as a rounded philosophy of law and justice. While I have things to say on both subjects, I aspire to be neither Rawls (whom I did not know) nor Dworkin nor Sen (both of whom I know and admire). This is partly at least because what they do is macro-justice, while I do micro-justice. Although in a moment of self-parody many years ago I added 'changing the world' to my banal list of hobbies in *Who's Who* (a recreation which the *Daily Mail*, whenever it denounces me, cites with the utmost solemnity), the most a barrister or judge can ordinarily do is change the future for a few individuals.

As a judge, too, one can occasionally, superior courts permitting, change the law for the better. While this book does not include any of my judgments (a collection of extrajudicial writings is vanity enough), I hope I have done something in this direction. I have at least enjoyed the experience of first being declared a heretic by my judicial superiors for advancing the boundaries of what citizens can legitimately and enforceably expect from the state¹ and then, as heretics do if they are spared the flames, watching the heresy become orthodoxy.²

II

It may have nothing to do with anything, but reading English at Cambridge between 1959 and 1961 still strikes me as the best thing I ever did. The English school was full of learning and ideas, and (apart from Frank Leavis, who had made an enemy of practically everyone) it was not yet

¹ *R v. MAFF, ex parte Hamble Fisheries* [1995] 2 All ER 714; cf. *R v. Home Secretary, ex parte Hargreaves* [1997] 1 WLR 906.

² *R v. N & E Devon Health Authority, ex parte Coughlan* [2001] QB 213; *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] QB 365 (CA), [2009] 1 AC 453 (HL).

split by factional quarrels. To listen to C. S. Lewis on mediaeval literature, to Muriel Bradbrook on the Elizabethans, to David Daiches on Burns, to George Rylands on the Augustans and to George Watson on the literary critics; to be taken word by word through a piece of verse by Leavis, as skilled a close reader as he was a sectarian literary snob; to be tutored by such poets and critics as John Holloway and Donald Davie (I found too late that I could have had Siegfried Sassoon as a tutor): it was all more than any student could have hoped for.

After that, reading for the Bar seemed the nearest one could come to prolonging the lotus-eating years. Entry was not problematic: the Bar of England and Wales had shrunk in the post-war years to about 2,000 (compared with its present 14,000-odd) but, with the dawning realisation that legal aid was a respectable way of earning a living, work was starting to expand. The examinations in those years were not demanding. You could memorise the full syllabus for a paper in about six weeks; some of the lecturers were known to devote their final lecture to the topics that were going to come up; and if you failed you could retake the exam as often as you wished. The part of the course that caused me greater difficulty was eating six dinners a term for three years in my inn of court. I miscounted them in my final term, the summer of 1964, and, having eaten only five, was refused call to the Bar until I had eaten my way through another full term.

Being able to corral legal studies into short bursts of intensive rote-learning made it possible to combine them with earning an erratic but stimulating living as a musician and interpreter. I had little talent for either, but it paid the rent. I still have the guitar I lent one evening in 1962 at the Troubadour folk club to a tousled young American whose first LP had just been released in the States. We played a jam session which lasted into the small hours; then he went his way and I went mine.

Within days of being called to the Bar I found myself, as most of my contemporaries did, in court: there was no moratorium on practice. I learned, as we all did, partly through precept and example in the course of pupillage but mainly at clients' expense by making mistakes. Nearly half a century later, I can remember every detail of the pro bono petition on which I was briefed, still a pupil, for special leave to appeal to the Privy Council against a murder conviction in Jamaica. The three Law Lords could not have been more civil, but in spite of errors in the trial so obvious that even I could see them, leave was refused, as it practically always was at that time in criminal cases. I never had the nerve to find out

whether, by the time, a few months later, that all the prisoners on death row in Kingston were reprieved to mark a royal visit, Isaac Cornish had been hanged.

The elderly chambers clerk, Walter Berry, had been in the Temple since his boyhood in the 1890s, when the clerk was not a tout but a scribe. When our chambers typist was away Walter would get out his steel pen and inkwell and write out my pleadings in copperplate for me to sign. I must be the last barrister ever to send out his work like this. Despite reservations verging on despair about the respectability of the clients who started coming my way, Walter saw my practice into its modest orbit in return for the shillings on the guineas in the brief fees. For my part I had no ambition except to make a living without too nakedly selling out to the highest bidder, an ambition which, in the absence of any bids, was unproblematical.

III

The unanticipated gateway to writing about law as well as practising it was an invitation from Karl Miller, the editor of the BBC's periodical *The Listener*, to write a piece about the conviction and gaoling of the Cambridge students in the Garden House riot trial in 1970. I never knew, and he can no longer recall, why he decided to ask me; but the BBC's head of public affairs ordered him to publish an article in reply by Fenton Bresler, commissioned by the Home Office, which in those days considered the administration of justice to be its responsibility and the BBC to be its fief. Miller, who did not welcome the interference with his editorial independence, went on in 1979, with Mary-Kay Wilmers and Frank Kermode, to found the *London Review of Books*.

In 1977 my unrespectable practice had delivered to me a brief for the company publishing a weekly paper called the *Socialist Worker*, which had offended the trade union leader Clive Jenkins by carrying a spoof advertisement based on the Pan-Am 'Fly me' ads. The smiling air hostess was replaced by a grinning Jenkins inviting readers to join his union in order to qualify for holidays in Franco's Spain where, as readers were reminded, holidays were cheap because trade unions were banned and oppositionists were garrotted. Jenkins sued the publishing company and the editor for libel. The editor, Paul Foot, who was to become one of the great investigative and campaigning journalists of the century, conducted his own defence: the idea was that I would argue the law while Foot, with

Peter Cook in court to support him, would charm the jury. Naturally it didn't work.³

Later Foot, now freelance, took up the convictions of four men for the murder of the newspaper delivery boy Carl Bridgewater and, in a new book, argued convincingly, and it finally turned out rightly, that the police had got the wrong men. Never one to take avoidable risks, Foot first asked me if I'd be willing to review it and then persuaded Karl Miller, who was now editing the *London Review of Books*, to get me to do so. That was in 1986, by when I had been three years in silk, and I've had the anxious pleasure of writing for the *LRB* at intervals ever since.

Part of the pleasure of reviewing for the *LRB* is that they don't want articles which simply relieve the reader of the need to read the book. With a tolerant attitude to word limits and a merciless one to slack writing, they want an article on a topic. Much of the content of this volume comes either from these reviews or from lectures which I have given, many of which the *LRB* has published as think-pieces. It comes also from occasional Diary columns which I've written for them about some of the more egregious doings of the law. Other chapters have not been previously published. With time, inevitably, some of the issues will have faded like the Cheshire cat; but the grin, I hope, remains.

IV

Spanning as they do the better part of three decades, the essays collected in this volume look, sometimes from a barrister's and sometimes from a judge's standpoint, at issues which arise when power over the individual is exercised by one arm or another of the state. As a barrister, however, I was hardly ever asked to give a public lecture; only the occasional conference paper and, of course, the occasional article. As a judge, by contrast, one's views on the law evoke disproportionate interest. When, in a lecture I gave on evidence and truth at Leicester University in 2004, I included a cautious passage on the value of DNA in crime detection, the media took little initial notice. The bruising events which followed a few years later when the BBC picked it up are mentioned at the head of Chapter 21, where

³ The judge, the unlovable Mr Justice Melford Stevenson, spent the first morning of the trial undisguisedly deciding which party he detested more and, having decided it was Foot, summed up so one-sidedly for Jenkins that when the jury gave Jenkins £1,500 damages I unhesitatingly advised an appeal. But no appeal happened: the donations which rolled in from Jenkins's enemies were enough to cover all the damages and costs, with something over.

the full lecture – ‘Rarely pure and never simple’ – is published for the first time.

Left to journalists, commentary on the law and the legal system is sometimes excellent but frequently jejune⁴ and agenda-driven. Among the latter kind, the mantra that judges are out of touch – with what and with whom it would be helpful to know, compared with, say, a housewife or a plumber – does service for informed criticism. The almost universal belief that judges are soft on crime is a classic artefact of media disinformation: Home Office research has found that the majority of people who believe this would give lighter sentences, on a given set of facts, than the courts do. But neither this nor any other evidence makes a ha’p’orth of difference to what gets written and believed.

The corresponding difficulty for anyone in the legal profession who tries to write informatively about what goes on in the law is to escape the reactive impulse to deny, to excuse, to bite back, but never to admit or to regret. Everything I’ve written about the law has, I suppose, been a grappling both with this difficulty and with the issues which provoke it. Like judgments, these articles and lectures will either stand on their own feet or topple over. They may also occasionally be pushed over, but it’s been a relief over the years that the *LRB*’s feared correspondence column, which has sent more than one review to the seabed, has treated me reasonably gently.

V

I began by apologising for being unable to present a worked-out theory of law or of justice. The nearest I have come to it has been in the Hamlyn Lectures, *Freedom, Law and Justice*, which I gave in 1998, and in the earlier series of Radcliffe Lectures at Warwick University which I gave with Lord Nolan, *The Making and Remaking of the British Constitution*. Both of these already exist in book form.

Reviewing the Hamlyn volume, Anthony Lester QC⁵ located me as a liberal republican. One Christmas, as we chained our respective bicycles

⁴ Nothing so far has surpassed the *Evening Standard* for 25 June 2010. I had started a judgment on the paying-off of a hospital trust’s chief executive: ‘As a bystander at the execution of Admiral Byng explained to Candide: “*Dans ce pays-ci, il est bon de tuer un amiral de temps en temps pour encourager les autres*”.’ The *Evening Standard* reported: ‘Lord Justice Sedley quoted the words of Admiral Byng to the French writer Candide that public executions were useful from time to time “*Pour encourager les autres*”.’

⁵ *Law Quarterly Review*, 116 (2000), 318.

to the lamppost outside the LRB's offices on our way to their party, I met Alan Bennett. "Ah," he said with his perennial air of mild surprise, "You're the liberal judge." I'm happy with that, though some of my colleagues might have preferred him to use the indefinite article. Others believe they have identified me as a revolutionary. The sobriquet gives no offence; but I have not been among those judges who have suggested that a point could come at which it became a judicial duty to override or annul laws passed by Parliament. The essay 'Everything and nothing' (Chapter 10) looks at this question as it stood at the moment when the Blair government's major constitutional reforms were coming into operation. There is everything to be said for avoiding confrontation between Parliament and the courts, and nothing to be gained by seeking it; and I have been encouraged to find that Tom Bingham, in his book *The Rule of Law*, takes a similar view.

Although politics have no place in adjudication, it seemed clear enough to me in my years at the Bar that my political trajectory had been sufficiently radical to put judicial office out of the question. So I was caught on the hop when, having summoned me to explain why I had yet again not completed my twenty days' annual sittings as an assistant recorder, the Lord Chancellor's head of judicial appointments asked me whether I was serious about becoming a judge. Surprised, I said I was much too left wing to be considered. 'No,' he said; 'you have quite a lot of support among the Law Lords, and if people are straight and competent we're not interested in their politics.'

He was as good as his word. Not long afterwards Lord Mackay offered me a seat on the High Court bench. Next day I went into court to take what was to be my last judgment. It was delivered by Lord Justice Roger Parker who, it turned out, was giving *his* last judgment and who took advantage of his valediction to deliver to the assembled press a parting diatribe on the Major government's refusal to implement the Top Salaries Review Board's recommendation of a sizeable pay increase for the judiciary. Judicial pay, Parker announced, was now so poor that only second-rate practitioners were accepting appointment to the bench.

But I cheered up on my first day as a judge, when the clerk of the lists, the ever-helpful Terry Rayson who had spent years accommodating my eccentric practice, looked into my room. 'I think I've got just the case to start you off, sir,' he said. "The plaintiff's a one-legged gipsy who's in prison.'

VI

All this said, I would not, I think, object to being classed in matters of philosophy as a post-Marxist or, like the late philosopher G. A. Cohen (another thinker whom I admire but could not hope to emulate) as an ex-Marxist. While I have never been much at home with a cyclical view of history – the return to a lost state of human equality luminously imagined by William Morris in *News from Nowhere* – nor with any notion that the course of history is inexorable, much less predictable, it has seemed to me that Marx's understanding of the interactivity of events, and of the human mind, both acting and acted upon, as part of those events, remains a major methodological resource.

In particular it acknowledges the constant intrusion of the unexpected, a subject to which I think the culture of the law, with its perennial search for certainty, is insufficiently sensitive. The essay 'Rarely pure and never simple' (Chapter 21), which addresses this problem, does not recount the early lesson I learned when I went along to a county court with a brief that simply instructed me to do my best for a middle-aged woman who had no legal answer to her landlord's claim for possession of her flat.

At court I asked for her authority to get the best terms I could for giving up possession.

'No,' she said. 'We're going to win.'

'No,' I said, 'You haven't got a defence. We're going to lose.'

'No,' she said, 'I've been to the fortune teller. We're going to win.'

In court, the landlord's solicitor, whose only task was to formally prove that a notice to quit had been served, took the oath and (this was in the era of typewriters) produced the top copy of the notice from his file. For want of anything else to ask him, I asked him whether he normally served the carbon copy and filed the top copy.

The solicitor fainted. When he came to he withdrew the claim.

'I told you so,' said my client.

For this and rather larger reasons I am uneasy with platonic notions of the good state and universal theories of justice. Nor do I share Ronald Dworkin's view that the law bears in its entrails a single right answer to every issue. Although I have in several places found Dworkin's influential ideas a helpful sounding board, I am in greater sympathy with Amartya Sen's enterprise of constructing a philosophical basis for minimising injustice.

But theories are one thing; principles are another; and I have become willing to trust principle, temporary and territorial though it is, as the nearest a society can come to finding a golden thread in the maze. Among other essays in this volume, Chapter 36, 'Are human rights universal and does it matter?' tries to grapple with aspects of this problem. But no amount of theory, and no single principle, will answer the recurrent judicial question, which is only rarely 'On which side does justice lie?' and far more often 'Which is the least unjust solution?' Here, at least, macro-justice and micro-justice face similar dilemmas and are called upon to acknowledge and adjust competing claims.

VII

Thus, apart from the three broad headings under which they are grouped, these essays follow no more than a broad highway to an uncertain destination. A reader may spot certain contours and some signposts, but let me point out a few.

The one which strikes me most forcefully is the change in tone at the point, in late 1992, when after twenty-eight years I ceased to be a barrister and went on the bench. There is, I am afraid, a perceptible shift from a critical to a defensive tone about how the law is made and administered. Although the chapters are organised by subject matter, not chronologically, the changes in tone are probably quite audible.

The other principal shift, which has perhaps been subtler, concerns human rights. I embarked on the 1990s with the view that what were most needed were not grand statements of principle which the rich and powerful would pick up and run off with but detailed judge-proof provisions to stop things happening to people which ought not to happen. The 1992 essay on the human rights project, 'Human rights – who needs them?' (Chapter 29), displays this scepticism.

To an extent I was right: one of the quiet revolutions of my lifetime had been the translation of the amorphous human right to a fair trial into the detailed prescriptions under the Police and Criminal Evidence Act 1984 which have made a striking contribution both to the protection of suspects and to the effective prosecution of crime. But by the mid 1990s the tide was turning. In the Sieghart Lecture which I gave in 1995, 'Human rights: a twenty-first century agenda' (Chapter 35), I found myself looking at what now with growing probability lay in store.

It was in 1998, as the Human Rights Act became law, that I was catapulted across the Rubicon. Trying to carry a bowl of very hot soup to the

lunch table in the Inner Temple, I was confronted by the chairman of the Judicial Studies Board, Lord Justice Henry.

'Stephen,' he said, 'I'd like you to chair our working party on human rights.'

'I just need to put this down, Denis.'

'No need,' he said, still blocking my way. 'Just say yes.'

My fingers were starting to smoke. 'Yes,' I said. 'Now please can I get to the table?'

So I found myself chairing the working party which planned and delivered an obligatory seminar to the entire judiciary of England and Wales on the European Convention on Human Rights and on the Human Rights Act which was about to make the Convention part of our law. By the time I had chaired thirty of the sixty-two seminars I had become tolerably sure that this was a worthwhile enterprise.

And so it has turned out to be, despite an agenda-driven assault on it by a segment of the press, acquiesced in by some of the politicians who brought it into being. As Tom Bingham has asked, would such critics prefer to live in a country where these rights do not exist? Much of the Convention reflects the common law; some of it in fact has less to offer than the common law does; but most of it has deepened our own jurisprudence and sharpened our judicial standards.

VIII

The groups into which the chapters of this book are gathered reflect my three broad concerns.

History – how we got to where we are – seems to me not only intrinsically interesting but necessary to any useful discussion of where we are to go from here. It is written, I hope consistently, from the outside looking in.

The chapters on law are written, by contrast, from the inside looking out. They are attempts of one kind or another to worry out – or to worry about – what the law does and what it might be doing.

The chapters in the final group attempt to stand once again outside the judicial process and to think creatively about the constitutional role of law in the search for social and individual justice.

All are reproduced as they were, except that some infelicities of language have been ironed out, one or two passages which no longer mean much have been excised, and one or two factual errors have been corrected. But

it has seemed wiser to date the essays and let them be seen in that context than to try to rewrite or annotate them as if they had been composed yesterday. If this leaves things in print which on reflection I would prefer not to have said, it is no more than I deserve. And if the attentive reader notices that I have said or quoted some things more than once over these years, I apologise.

IX

Of the many debts I owe, I will single out three.

One is to Mary-Kay Wilmers, the present editor of the *London Review of Books*, who over two decades and more has encouraged me to write and to keep writing, but has never flinched from telling me when a piece is not good enough.

The second is to Finola O'Sullivan of Cambridge University Press who with skill and patience has brought this anthology from conception to delivery. To her I owe the decision to commission the jacket design from the *LRB*'s distinguished illustrator and art critic Peter Campbell – for, like most other people, I doggedly judge a book by its cover.

The third is to my successive judicial clerks, Margaret Tothill, Chalmers Hardie and Kevin Kilbane, whose management of my workload has enabled me to find the time and breath to combine a full-time judge's job with an extracurricular activity which, I admit, has brought me as much fulfilment as trying to get the law straight and do justice from case to case.

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Chapter 23 was first published in *Judicial Review* (vol. 1, 1996, 37).

Chapter 24 was written for a festschrift for Sir David Williams QC, *Freedom of Expression and Freedom of Information* (Oxford University Press, 2000).

Chapter 25 was written for a volume, *Frontiers of Legal Scholarship*, ed. Geoffrey P. Wilson (Wiley, 1995), marking Warwick University Law School's 25th anniversary.

Chapter 26 was written for a festschrift for Lord Slynn of Hadley, *Judicial Review in International Perspective*, ed. Mads Andenas and Duncan Fairgrieve (Kluwer, 2000).

Chapter 27 was delivered as a conference paper and subsequently published in *The New Brain Sciences: Perils and Prospects*, ed. Dai Rees and Steven Rose (Cambridge University Press, 2004).

Chapter 28 was delivered as a lecture and later published in a festschrift for Sir William Wade QC, *The Golden Metwand and the Crooked Cord* (Oxford University Press, 1998).

Chapter 34 was delivered as a lecture and subsequently published in the *Modern Law Review* (vol. 53, 1989, 469).

Chapter 35 was delivered as a lecture and subsequently published in *Public Law* [1995] 386 and in *Human Rights for the Twenty-First Century*, ed. Robert Blackburn and James J. Busuttil (Pinter, 1997)

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The text of each essay is reproduced substantially unchanged. Some subsequent developments are footnoted or are mentioned in the headnote which sets each chapter in context.

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