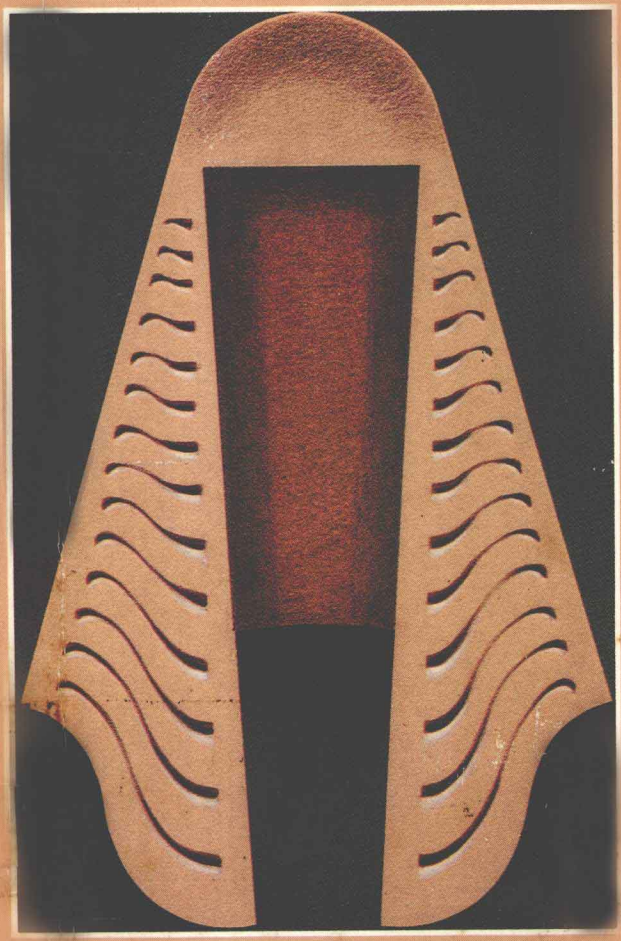
LAW
and Modern Society



P·S·ATIYAH

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Preface

This little book is designed for the non-lawyer who has some interest in the law, the legal profession, and the legal system in modern England. It is not intended as a systematic introduction for the serious law student: many topics are wholly omitted, and those which are dealt with no doubt reflect my own interests. But the book is not designed to skate superficially over well-trodden ground; although it does not claim to be a work of profound research it does raise a number of important issues about our established institutions in a way which I hope will be intelligible and interesting to the layman.

I am glad to express my thanks to Keith Thomas and Alan Ryan for a number of valuable comments and suggestions on the first draft.

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Courts and the legal system

When the ordinary man thinks of 'the law' he may tend to think of the police. It is often thought that in popular underworld parlance the police are actually spoken of as though they *were* the law ('Here comes the law'). But in other contexts, we often associate 'the law' more strongly with courts, judges, and magistrates. When we speak of the law's delays, or complain that the law is old-fashioned, we are often thinking of the courts and the legal system rather than of the rules of law themselves. This association between the law and the legal process, between the rules of law and the courts, is one which lawyers are particularly prone to make. To a lawyer, the courts are the very heart and centre of the law. A modern lawyer would find it impossible to conceive of a legal system which contained rules of law, but no courts. In fact he would probably find it less difficult to imagine a society which contained courts but no rules of law.

Why should this be so? It might seem that logically speaking laws come first, and that courts are merely secondary. After all, in modern society it is the primary function of the courts to apply and enforce the law which actually exists. And anyhow courts and judges are themselves creatures who owe their status, their authority, and in a sense their very existence to the law. It is the law itself which tells us that this elderly gentleman sitting on this dais in that Victorian building in the Strand known as the Royal Courts of Justice, is a judge of the High Court, and that while he sits there he actually *is* the court.

Moreover, anyone who looks at the whole machinery of government in the broadest sense might find it odd that lawyers should place the courts at the centre of their legal universe. Isn't that a bit like pre-Copernican astronomy? Isn't Parliament the real sun round which the law revolves? Acts of Parliament after all are very real laws, as lawyers would unhesitatingly agree. And Acts of Parliament

have a very tangible 'existence'. They are often quite solid documents running to a hundred pages or more. You can buy them, and bind them into volumes, as lawyers do. In them you will find all sorts of rules which often say very little or nothing about the courts or judges who are to enforce them.

Then again, it must be admitted that there are some laws – sometimes extensive and complex bodies of law – which are rarely handled by ordinary courts and judges at all. This is particularly true of modern welfare state legislation, such as the law relating to social security. This enormous mass of law defines the conditions under which people are entitled to a wide variety of welfare benefits, and how these benefits are to be calculated in particular cases. There is a great deal of this law and it is complex and difficult to find. But the point is that it is not generally administered or applied by ordinary courts, judges, or magistrates. For the most part it is administered by civil servants working in the Department of Health and Social Security – the DHSS. People who want to claim benefits go to their local DHSS office and fill in a form. The form is processed by the officials. It is true that a special system of tribunals exists to which the citizen can appeal if he is not satisfied by the initial decisions of the officials. And these tribunals hear cases and decide them according to the law, in much the same way (though with far less formality) than ordinary courts. But lawyers rarely penetrate into these tribunals, and they certainly would not think of them, as they think of the ordinary courts, as being at the very centre of the legal system.

So it may seem curious that lawyers tend to identify 'the law' so heavily with courts and judges. But there are reasons for it, some historical, some practical, and others perhaps less easy to classify.

Among the historical reasons for the modern lawyer's pre-Copernican perception of the legal universe we can identify two factors in particular. The first is that it is not true, in a historical sense, to say that laws come before courts. The central court of the modern English legal system – the High Court of Justice – is the direct descendant of a number of old courts, some of them dating back to the twelfth century, which were never created by a deliberate act of law-making. These courts grew up gradually as offshoots of the authority of the King and, as the very word 'court' indicates, these courts of justice were originally a part of the Royal Court. They were not created by law in order to administer pre-existing laws. They were created, or grew up, in order to solve pressing practical ques-

tions – to dispose of arguments, to solve disputes, and to suppress violence and theft. As they developed into what we would today recognize as courts of law, they actually created the law as they went along. Eventually their decisions began to fall into regular and predictable patterns, people began to take notes of what the judges were deciding, and in due course there emerged the modern 'law reports'. A substantial body of English law was created in this way, and much of it remains in force to this day, modified and modernized in all sorts of respects both by more recent judicial decisions and by Acts of Parliament. This part of the law, usually known as the 'common law', was thus created by the courts in the very process of deciding cases before them.

So when the modern lawyer thinks of the common law it is not surprising if he still tends to think of the courts as in some sense primary, and the law as secondary, rather than the other way around. What is more, the old common law remains in a sense the more fundamental part even of modern English law. In sheer bulk modern legislation is no doubt outstripping the common law, but naturally enough the common law tended to deal with more essential and basic legal issues than much modern legislation. The common law was the *first* part of the law to be created, and the first part of the law in any society must necessarily deal with essentials. Naturally the common law evolved the basic principles of the criminal law – it was the common law which first prohibited murder, violence, theft, and rape. Similarly, much of our basic property law was first laid down by common law courts, and so was the law of civil liability. The law of contract and the law of torts (or civil wrongs) were very largely created by the courts out of the simplest of ideas – that it is wrong to harm or injure others. Although much of this law has been amended and qualified in all manner of ways in modern times, there is a sense in which the modern lawyer tends still to see the common law as the central repository of legal ideas and principles. Given the very basic values and interests recognized by the common law, this is hardly surprising, and this also helps to explain why courts are still so very central to the way lawyers think about law.

The second historical factor which helps to explain the lawyer's perspective on these matters is that until quite recent times the courts were, relatively speaking, a far more important part of the whole machinery of government than they are today. In modern times, the day-to-day administration of government lies in the hands

of vast armies of officials in central and local government, including in particular the police; and at the central level, the authority of Parliament is undisputed and can readily be used to overturn rules of law laid down by the courts which do not find favour with the government. So in one sense the courts are today a small, though important, part of a very extensive machine. But in historical terms, this is all a fairly recent development, Until the eighteenth century the machinery of government was very weak, at both central and local levels. Parliament's law-making activities were confined within fairly narrow limits in practice, and so the role of the courts was then relatively far more important than it is today. Indeed, it is widely thought by historians that the early common law courts were deliberately used as one of the main instruments by which royal authority was extended over the whole country in the twelfth century and onwards. It is from these, and perhaps even earlier days, that the custom began of sending judges out on assize, travelling from town to town, hearing cases, helping to create a body of uniform law across the country, and at the same time, showing the people that the authority of the King extended to every corner of his realm.

Now it may of course be said that all this is old history, and it is surely high time that lawyers recognized the Copernican revolution. The law does not revolve round the courts today, whatever may have been the position two hundred years ago or more. Why are lawyers so historically minded? Is this just another illustration of their conservatism? I shall later have something to say on these and similar issues, but for the present it will suffice to admit that lawyers do tend to be somewhat historically minded, at least in the sense that they often tend to perceive the world, the law, and the legal system in ways which other people would regard as old-fashioned or even obsolete. But this is hardly surprising. English law today is the product of continuous development extending over eight or nine hundred years, unbroken by revolutions or similar holocausts. Changes and modernizations of the law often take the form of imposing new layers of law over the old layers, but frequently in such a way that bits and pieces of the old layers survive; even when sweeping legal changes are introduced the new law is built on the foundations of the old. It is thus very difficult to learn, or teach, English law, without acquiring some understanding of its history. The system of precedent, about which I shall have to say something later, also tends to make the lawyer rather backward-looking, but enough has been said to show why it is

part of the historical culture which an English lawyer acquires to see courts as the centre-piece in the law.

There are, in addition, other very practical reasons why lawyers tend to have such a court-oriented view of law. One of them is the simple fact that the courts are where the lawyer goes, on behalf of his clients, when disputes arise which cannot be settled amicably. Just as the civil servant doubtless tends to have a government-oriented vision of law and regulation, because most disputes that he deals with tend to get settled within or by governments and government departments, so, for similar reasons, the lawyer sees the courts as the focus of the system of dispute settlement in which he is involved.

A related factor is that when disputes arise it is frequently the case that both the facts and the law applicable to those facts may be unclear. When this happens, a lawyer tends to take a severely practical approach to the question of legal rights and duties: he asks himself what a court is likely to decide if the case comes before it. Indeed, this can quite often be a necessary exercise even where the facts appear clear enough to the client and the lawyer, but there is great difficulty about proving them. To the lawyer, a fact is really a provable fact or it is nothing. Similarly, where the law is uncertain, or where its application is uncertain in particular cases, the lawyer's main concern is with the available lines of argument – he knows that some forms of legal argument are acceptable and others less so – and with the probable outcome. He is in fact interested in *predicting* what a court is likely to do. This does not, of course, mean that all law is nothing more than a series of predictions about how judges and other officials of the legal system are likely to behave in certain circumstances. It is absurd to suggest that the law prohibiting murder is really just a prediction that anybody who commits murder and is brought before the courts will be sent to gaol for life, or until the Home Secretary chooses to release him. But it is nevertheless a fact of life that practising lawyers, when faced with legal problems, habitually ask themselves: If I had to argue this in court, how would I present the case? How would the judge be likely to react? It is also a fact that making predictions of this kind is not always something that can easily be done by merely looking the law up in books. The lawyer needs a 'feel' for how a judge is likely to react to his case, and this is something which can normally only be acquired by actually practising in the courts and appearing regularly before the judges.

It is this which gives some truth to the aphorism, 'The law is what

the court says it is'. Snappy sayings like this can be misleading if pressed too far (for instance, judges themselves do not think the law is merely what they say it is) but there is undoubtedly some truth in them. In the last analysis it doesn't matter what is in the books, the law reports, even Acts of Parliament. If a judge sentences someone to gaol, then to gaol he will assuredly go. The judge may have got it wrong, he may even be perverse, but the immediate result is the same. Of course there may be the possibility of an appeal. But the decision of the appeal court may be equally wrong or perverse. Then what *that* court decides is what matters. Perhaps it is wrong to suggest that this is what counts 'in the last analysis'. Because obviously if judges habitually flouted Acts of Parliament or established precedents, they would be removed. But that is to enter the realms of fantasy. It is because judges don't behave in these extreme ways that one can safely assert that in the last analysis what they decide is the law.

Finally, there are other factors of a less readily identifiable nature which tend to make the lawyer think of courts as the centre of the law. In particular, the leaders of the legal profession tend to be seen, both by the public and also by the profession, as the judges, particularly the High Court and appeal court judges. Most able barristers see judicial appointment as the apex of a successful career at the Bar. Judges actually decide cases over which lawyers have pondered and argued. So naturally lawyers are encouraged in their tendency to think of the law as something almost wholly associated with, or even dependent upon, the courts.

The superior courts

The English legal system has certain élitist characteristics. One of its most striking features is that it has only a few superior courts, presided over by senior judges of great authority and prestige, who hear a very small number of cases; and a lot of lower courts, presided over by less senior judges or magistrates, who hear a very large number of cases. Of course, the superior courts tend to deal with the more important cases, while the lower courts deal with the less important. But the distinction between important and less important cases is not necessarily an uncontentious one. Many small cases may be desperately important to those involved in them; lower courts have the power to send offenders to gaol for periods of (normally) up to twelve months, which is no light matter for the accused. And

some cases which go on appeal to superior courts are only important because of their potential public repercussions rather than because they raise crucially important issues between the actual litigants themselves. For example, a decision in a tax case may involve a few hundred pounds for the particular taxpayer, but if the decision turns upon the interpretation to be given to an important section of a taxing Act, the result may determine thousands of similar cases in which many millions of pounds may be involved.

We cannot here set out in detail a full account of all the courts and the relationships between them. A thumb-nail sketch of the system will suffice, though rather more will then be said about the professionals who operate it. Of the superior civil courts, the central court is the High Court of Justice. The High Court is based in the Royal Courts of Justice in the Strand, and most of its work is done there. But a small number of High Court cases are heard by judges in twenty-four provincial centres distributed throughout the country.

The High Court is divided into three divisions – the Queen's Bench Division, the Chancery Division, and the Family Division, and each judge on appointment to the High Court is allocated to one of the three divisions. The High Court is a civil court which hears no criminal cases at all, though the *judges* of the High Court may and often do hear the most important criminal cases, but they do that in the capacity of judges of the Crown Court.

The different divisions of the High Court deal with all the civil litigation in the country which involves claims of more than £5,000, as well as other litigation which is important because of the issues rather than the amount which is at stake. The largest division is the Queen's Bench Division which deals with the great bulk of ordinary civil cases which find their way to the High Court – for example, claims for damages for serious personal injuries, commercial claims, say on insurance policies, or arising out of international contracts between business men, shipping claims arising out of collisions at sea, or claims by cargo owners for damage to goods at sea, and so forth. This division also deals with many claims against governmental and other public authorities where it is alleged that they have acted beyond their powers or in some other unauthorized or illegal manner. The Chancery Division is the descendant of a distinct court formerly called the Court of Chancery which was in its earliest days a one-judge court in which the Lord Chancellor sat. Today this division deals mainly with claims arising out of trusts, the administration

of estates of deceased persons, and actions arising out of contracts relating to land; it also exercises certain supervisory powers over companies. The Family Division, as its name implies (and it alone is a very new creation), deals with applications for divorce, maintenance, and custody and guardianship matters. The old Probate, Divorce and Admiralty Division was abolished in 1971 and its work transferred to the present three divisions named above.

Neither the High Court nor the separate divisions of the High Court actually sit as courts in the ordinary sense. Nearly all their work is done by single High Court judges, sitting alone. A judge who sits as a judge of any of the divisions of the High Court is in law *the* High Court while he sits, and has the full powers of the High Court. In a few cases only, two or three judges sit together as a 'divisional court' of one or other of the divisions. In the Queen's Bench Division, the most important sort of cases heard in this way are petitions for a review of the legality of governmental acts of various kinds.

From a decision of the High Court it is possible to appeal to the Court of Appeal. This court also sits in divisions, but there is no formal separation between the divisions, so they would be more appropriately called panels. Usually three judges sit in one panel. In rare cases it is possible to carry a further appeal to the House of Lords which is the apex of the judicial system, not only of England and Wales (with which alone this book is strictly concerned) but also of Scotland and Northern Ireland which in all other respects have their own legal systems and judges. Historically, of course, the House of Lords which was the final Court of Appeal of the English legal system was the ordinary House of Lords which is still part of the legislature – though it is now the House of Lords of the whole United Kingdom. But today, when sitting as a court, the House of Lords bears very little relationship to the legislative body of the same name. Only senior judges, known as Lords of Appeal, sit when the House of Lords deals with legal appeals, though they are also sometimes joined by other senior judges such as the Lord Chancellor and former Lord Chancellors. Usually five judges sit in appeals to the House of Lords.

As I have previously mentioned, these great courts only deal with a relatively small number of cases – indeed, a tiny number of cases compared to the total volume of litigation, or measured against the country's population. In 1979, for instance, the total number of cases

heard in the High Court (excluding matrimonial and family cases) was under 2,000, the total number of appeals disposed of by the Court of Appeal was 1,323, and the number of appeals heard in the House of Lords was a minuscule 71. But despite this, most lawyers tend to think of these courts as the 'ordinary' courts, and much law teaching concentrates on them at the expense of the lower courts. There are several reasons for this.

First, and obviously, these courts do deal with most of the big litigation where really large sums, or vital issues, are at stake. Secondly, the appeal courts hear appeals (though not in all cases) from the lower courts as well as from the High Court, so that they do have the final say in the small numbers of cases they deal with. Thirdly, the High Court is the only court of *general* jurisdiction as opposed to courts of limited or special jurisdiction; so cases which raise novel points or which do not fall within the competence of other special bodies or lower courts – residuary cases, in other words – must go before the High Court. Fourthly, the peculiar prestige and status of the judges of the High Court and above tends to make them and their decisions of more interest and importance both to the legal profession and the public at large; and finally, it is only these judges whose decisions create 'precedents' which are reported and so help to make new law. I shall enlarge briefly on these last two points.

The élitist characteristics of the English legal system are most apparent in its different treatment of the judges of its courts. Judges of the High Court and above have immense prestige and status. They are invariably knighted on appointment to the Bench (ladies are made Dames of the British Empire). In Court they are addressed as 'my lord' or 'your lordship' even though they are not lords; officially they become Mr Justice Smith or Lord Justice Brown. They are paid more than Cabinet Ministers. They always become (if not already) members of the governing body of their Inns of Court – benchers. The most senior of all – the Lord Chief Justice, the Master of the Rolls (who is President of the Court of Appeal), the Lords of Appeal – are nearly always made life peers; indeed, the Lords of Appeal have to be, in order to sit in the House of Lords. Socially and even politically, much deference is paid to them. The press is ready to report almost any comment they make and (for example) criticism of a government department or other public body made by a High Court judge in the course of a case before him would nearly always produce a flurry of activity in the appropriate quarters.

It might even lead to an inquiry, and it would at the least often produce apologies or ministerial statements. These superior court judges are also much in demand for non-judicial tasks. Governments frequently turn to them to head Royal Commissions, and other inquiries of all kinds. They have even been used as arbitrators to settle major industrial disputes.

The superior court judges also enjoy many statutory protections designed to guarantee their independence and immunity from governmental pressure. Thus they are virtually irremovable (except by the almost unprecedented procedure of an address to the Crown by a vote of both Houses of Parliament); and their salaries are 'charged on the consolidated fund' which means that they do not have to be voted every year by Parliament like ordinary departmental budgets, and so are not exposed to the risk of annual criticism.

It must, however, be admitted that there have been recently a few disquieting signs of developments which appear to show (perhaps wrongly) some nibbling away at the long tradition of sturdy judicial independence of government. For example, the ready use of senior judges to chair committees of inquiry into politically sensitive issues has sometimes placed judges in the position of appearing to be identified too much with establishment or governmental positions. Another development which may be thought objectionable by some is the hardening of the practice of many government departments of appointing standing junior counsel from the Bar as their regular counsel, with a very strong probability that the counsel will eventually be promoted to the Bench. This may raise doubts at least about the appearance of impartiality of judges who have been regularly identified with a particular government department – for example those who were formerly counsel to the Inland Revenue. It may also mean that these judges have rarely appeared for litigants opposed to that government department, and that could be a serious break with a valuable tradition. Nothing strengthens the tradition of judicial impartiality more than having regularly appeared for different sides in situations of recurrent conflict.

There are other respects in which the position of superior court judges does not differ markedly from that of some of the lower court judges. For example, they are expected to refrain from open political partisanship. They are not allowed to stand for parliament. They are not expected to resign their judicial positions in order to take up other paid employment, although one such case has occurred in

modern times. And within their own court rooms, county court and circuit judges enjoy nearly (though not quite) as much power and deference as superior court judges. In their background, and traditions too, there is little difference between superior and lower court judges. Superior court judges are, without exception, appointed from the ranks of practising barristers, and it would be rare for a person to be made a High Court judge unless he had at least fifteen years experience at the Bar. Most have had much more. Nowadays, it is unusual for anybody to be appointed to the Court of Appeal who has not previously served a stint as a High Court judge and, similarly, Lords of Appeal are usually appointed from the ranks of the Court of Appeal judges. All this means that judges tend to be middle-aged to elderly, and the more senior the judges, the older the average age tends to be. Few High Court judges are under 50, few judges in the Court of Appeal under 55, and few Lords of Appeal under 60. Many, in all three courts, are much older than this.

Judges also tend to come overwhelmingly from the professional and managerial classes. It is still the case that a high proportion of them (probably over three-quarters) have been to public schools and thereafter to Oxford or Cambridge. Very few judges come from working-class backgrounds. Politically, it is probable (though judges do not parade their political views) that the overwhelming majority of judges are somewhat conservative. However, too much can be made of these facts. Senior barristers and judges lead a more 'ordinary' life than would have been common fifty or a hundred years ago. Undoubtedly they are among the wealthier sections of the community, but they are not all aristocrats who have no contact with the 'common man'. Certainly, there is no reason why judges today should not have a pretty clear idea of how the 'common man' thinks and works and lives, even if it is going a little far to claim, as Lord Devlin has done, that judges think of themselves, in some sense, as representing the common man. On the other hand it probably is true, as Lord Devlin has also said, that the problem (if it is a problem) of the 'politics of the judges' is common to nearly all those in senior positions in our society. In all institutions – the civil service, the political parties, the armed forces – those who reach the top posts are usually 'mature, safe and orthodox men'.

In many of these respects, the position of the superior judges probably differs little from that of the lower court judges. They too are nearly all drawn from the Bar, although there are now a few circuit