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Book Review: Lawyers and the Courts, a Socialogical Study of the English Legal System 1750-1965, by Brian Abel-Smith and Robert Stevens

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Book Reviews

LAWYERS AND THE COURTS, A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965, BY BRIAN ABEL-SMITH AND ROBERT STEVENS. HEINEMANN, LONDON, pp. xiv, 504, 1967.

Professors Smith and Stevens have written a book of great importance. They have made a lengthy survey of English legal services a task which has not been attempted before. Significantly, this task has fallen to a Professor of Social Administration and an English professor of law who has become Americanised. The present state of the judiciary, legal profession and legal education in England, which are meticulously described by the authors, is the reason why no English lawyer has critically examined his country's legal system.

In "The Anatomy of Britain", Anthony Sampson pointed out that, in the nineteenth century, the Church was above attack although the Monarchy was openly criticised while in the twentieth century the positions were reversed. The judiciary appears to be in the same position as the Monarchy. The judges of the modern High Court seem to be sacrosanct symbols of Authority who must be left inviolate. In the last fifty years, Their Lordships have made effective use of their contempt power in punishing any citizens who have had the temerity to question their dignified and peculiar position. The authors have taken on the whole legal system and have written a critical study with taste and understatement.

Lawyers and the Courts is a difficult book to review because it contains so much detail and yet, on the other hand, can be assessed on a few broad themes, including the attitude toward the judiciary. Other categories of discontent are the animosity between the solicitors and the barristers, the anomalous government of the profession and the strange state of legal education. All of these, including the role of the judiciary, have their roots in the English attitude toward the law. The authors believe that the English lawyers "have restricted their interests primarily to the 'law' which is concerned with courts" (at 2). This attitude, which I have no reason to dispute, explains many things; it shows the basis for the reverence in which the judiciary is held as well as the fact that the judges have been loath to decide new points of law or to usurp what they view as the function of the legislature. This has created a very mechanical attitude toward case-law and a desire to avoid statutory law wherever possible. One need hardly add that the training of the lawyers, particularly barristers, has been restricted so that advocacy, good breeding and a sound classical education have been more important than an academic education in the tax law, labour law or criminal law.

If "law" is meant to be a reflection of society as well as an "external" method of regulation, then perhaps the English are satis-

fied with this narrow attitude toward the law and the role of the legal profession. The lawyers and judges have imposed on themselves a false separation of powers (while operating under the control of the exceptional office of the Lord Chancellor). I have always been intrigued by the English "worship" of the common law (and I use the term "worship" advisedly). One day an American psychiatrist will make a study of the significance of the English lawyer's subconscious attitudes toward the common law. Surely there is some significance in the descriptions which are applied to the common law. Whenever a judge speaks at a bar dinner, he refers to Our Lady of the Common Law (meaning the blindfolded figure of Justice, presumably), the majesty of the common law, the mystery of the common law, the law being a hard mistress or, to quote Lord Simonds, who referred in *Shaw v. D.P.P.* to the "unravished remnants of the common law" (cited at 303). The sanctified position of the common law can hardly be exaggerated. Holdsworth in his *History of the English Law* says of Lord Mansfield's attempts to reform the law: "An attempt to rationalise the common law by the help of pure reason and foreign analogies could not succeed, because the principles founded on this basis could be proved to be contrary to ascertained principles of the common law." (cited at 18).

Professors Smith and Stevens trace the origins of these attitudes in an excellent historical chapter "The English Legal System, 1750-1825". The stability (or stagnation) of English legal institutions is incredible. The centralisation of the "royal" or senior courts in London has had many serious and permanent effects. It ensured the entrenched power of the Inns (and the resulting subjection of the solicitors), the hardships on litigants and defendants outside London who were deterred from going to law by the added cost and inconvenience, the continuing mediocrity (or worse) of local justice, particularly in criminal matters, and the senior courts' preoccupation with property law. These historical effects are still being felt. The delays and elaborate formalism of the High Court caused many disputes to be referred to quasi-judicial or administrative agencies. An 1874 Report of the Judicature Commission described the discontent of parties in commercial disputes who vainly wanted the courts to give them prompt settlement: (at 81) "Frequently litigation in the courts 'inflicts on the suitor a long-pending, worrying law-suit, the solicitors on either side pleading in their clients' interests every technical point, and thus engendering a bitterness which destroys all future confidence, and puts an end to further mercantile dealings'." The Inns of Court made second-class citizens out of the solicitors and in the barristers' opposition to the "junior" profession having a right to appear in county courts impeded the growth of those less costly and more expeditious courts. The powers of the Inns (and more recently the Bar Council) have caused delays in reforms some of which are still awaiting implementation, *e.g.*, the fusion of the profession, the tortious liability of barristers, the introduction of universal legal aid and the abolition of the "two-thirds" rule when a junior barrister

appears in court with a silk. These complaints are relatively minor compared with the stultifying climate which the profession (particularly its "senior" side) and the Bench have created by their adherence to meaningless tradition and smug self-preservation. The state of legal education, for instance, is still primitive because the priesthood of the bar and bench are satisfied with a system of "training" which accentuates form and rote learning and is openly antagonistic (or at least apathetic) toward academic legal education in the universities. Admittedly, the Inns have given some recognition to an academic legal education but it has even less significance than in the educational requirements for admission to the roll of solicitors. In a recent re-examination of legal education of solicitors, the Law Society has taken the retrograde step of formally recognising "Gibson and Weldon U". This development has occurred despite frequent attempts in the last one hundred and fifty years to establish a national School of Law. (In particular, see pp. 172-174 for one example of the Inns' indifference and lack of cooperation in attempts to regularize, and probably improve, legal education on a formal and semi-academic basis).

Although there are some reasons for not being smug about Canadian legal education, the improvements made in this country in the last ten years make comparison with the English situation nothing short of pitiful. In describing the vain attempts to improve legal education the authors state:

> "Law teachers were regarded as a 'very inferior set of people who mainly teach because they cannot make a success of the bar'. Far from trying to teach law in the light of developments in political science and economics, their teaching consisted of encouraging their students to memorize legal rules uncritically and without reference to their social utility or practical operation; and the writings of such academics were restricted to analysing doctrines within the verbal framework used by the judges." (at 183-184)

In the nineteen-thirties, the law schools of the United States were one hundred years ahead of English legal education. The authors believe that low regard for academic law created such a depressing atmosphere that the great early teachers at Oxford (Holland, Dicey, Anson and Maitland) failed to reproduce themselves in the twentieth century. Obviously something was wrong when Holdsworth could express the view to a 1929 Committee that no enquiry into legal education was needed as it "could hardly be improved". (at 185). A barrister also told Laski, who had been impressed by American legal education, that "when I balance a law school against Grand Night at the Inner Temple, my stomach rebels against scholarship". Although a progressive judge in Lord Atkin advocated the case method of teaching, another judge told Laski that "the student who studied disconnected cases lost sight of principles". (at 184). It also seems incredible that as late as 1948 Dr. Stallybrass of Oxford could state, in a Presidential Address to the Society of the Public Teachers of Law, that he was "sure that the Oxford Law School 'has been wise in excluding from its course those branches of the Law which

depend on Statute and not on precedent'." Nor did his concept of a liberal education include speculation about the law, "with what ought to be and not what is." Such a radical departure as criticizing the existing law and thinking about what it ought to be

> ". . . gets us near to the field of sociology. My own profound conviction at the present day is that the first essential of University teaching is that it should be objective and objectivity is difficult when you come to Sociology. I feel that that is one of the great dangers of the increasing development of social studies in the University." (at 366)

The situation has improved to some extent but the authors are still able to describe the legal education in English universities in the following terms:

> "Legal philosophy continued to be concerned primarily with the linguistic problems involved in the analysis of doctrinal issues; books about precedent and evidence still tended to be collections of rules about precedent and evidence. The same was true for statutory interpretation. There was little attempt to discover the fundamental bases of precedent, evidence or statutory interpretation or the role they played in the legal process. It was still not regarded as the task of academics to formulate new doctrines for meeting changing conditions. International law was still generally taught independently from international relations and diplomatic history. Constitutional law was still divorced from politics and political science; and administrative lawyers still regarded themselves as having little concern with the problems of civil service or public administration. Meanwhile, in widely studied subjects like tort and contract, there was still remarkably little research in practical problems—whether it was the scope of arbitration, the development of commercial practices, the growth of contract law outside the courts, or the impact of insurance on the law of torts." (at 372)

This "Conservation Triumphant" was not limited to legal education. Junior members of the Inns had objected to the autocracy of the benchers but their attempts to inject democratic principles into these legal fraternities failed again and again. A 1958 enquiry into the operations of the Chancery Division, which uncovered an "intolerable" state of affairs, made mild suggestions for reform which had already been made in 1926 and 1874 and were again ignored. While the judges were unable to see themselves in a reforming role, there is a certain irony in the fact that they were able to leave the lofty heights of the bench and play a constructive role as heads of Royal Commissions and Departmental Enquiries. This state of affairs has its parallel in Canada. The situation was not totally bleak because in the last decade the Evershed Committee, which approved of the establishment of a Law Reform Committee, "felt that this was not the whole answer and that there was still an important law-making role for the judges":

> "We do not think that this method of clarifying the law fully meets the public need. Legislation is a slow and cumbersome process. Parliamentary time is in modern conditions notoriously limited, and may well become in the future even more precious. Clarification of the law by judicial decision is a swifter and surer process, which can go forward at all times without regard to Parliamentary time and quite independently of political considerations." (at 295)

Perhaps these views and the publication of this book provide some hope for the future. The authors have performed a valuable

service to English law. Let us hope that their constructive criticisms are heeded.

The authors did not set out to write a crusading book. They are historical and sociological reporters who, with subtlety, allow the record of wrongheadedness, unenlightened self-interest and rigidity to speak for itself. Only in the short Preface and Epilogue do they state their own views with any directness. Because I agree with their aims, I wish that they had given the reader a longer Preface and Epilogue but, as I have said, this was not their task. I found that the long descriptions of innumerable committee reports rather heavy going at times, but the authors obviously felt the need to document their case beyond dispute.

I would like to add one note as to the format of the book. I have no quarrel with the typography or lay-out but surely it is time that English publishers emulated their American competitors and applied some first class British craftsmanship to the exterior of their books. The book cover is dull and lacking in imagination.

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