

THE DENNING LECTURE
1981

**The State
of the
Legal Profession**

by
THE RT. HON. THE LORD JUSTICE TEMPLEMAN

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THE STATE OF THE LEGAL PROFESSION

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1. These lectures which were instituted by the Bar Association for Commerce, Finance and Industry have produced interesting and provocative contributions. Now and henceforth the lectures are to be known as "The Denning Lectures" in honour of our most interesting and provocative Master of the Rolls. He has always been concerned about the state of the profession and is a supporter of the Association whose members help to ensure that the training, discipline and ethics of the Bar are fully maintained outside the narrow confines of advocacy and litigation.

2. I agreed to talk about the state of the legal profession because as player and umpire I have been concerned with the problems of the profession at different times as a member of the Bar Council, as a member and President of the Senate of the Inns of Court and the Bar, as a member of the Advisory Committee on Legal Education and finally as a member of the Royal Commission on Legal Services. At the Bar and on the Bench I have seen at close quarters the work of both branches of the profession in operation for upwards of 30 years.

3. I propose firstly to consider the tasks of the profession, secondly its performance, thirdly its morale and fourthly its future.

Tasks

4. The legal profession operates in a society which is pervaded and riddled by laws. A birth must be registered by law, the child must be educated by law, the adult must pay taxes by law, must not cause foreseeable damage to his neighbour by law, must abide by his contract, by law and equity, and finally his corpse and his possessions must be disposed of according to law.

5. Until this century the law and the legal profession were concerned mainly with crime, with individual freedoms and with property rights. But new laws and new adaptations of old laws produced for a changed society, new rights, including the right of the homeless to housing, the right of the occupier to security of tenure, the right of the poor to social security benefits, the right of the employee to redundancy payments, and to protection against unfair dismissal, and the right of the citizen to protection against discrimination. At the

same time the courts themselves narrowed the scope of old immunities from the law such as Crown Privilege and extended their control of the excess and abuse of power.

6. Wherever the law impinges the task of the legal profession is to provide the public with advice and representation. This task has increased in scope and burden and complexity because of the increasing density of population and because of the increasingly sophisticated rights and obligations of that population. The legal profession must deal in England and Wales with the legal problems of 48,000,000 inhabitants and with a situation in which, in Greater London for example, there are 7,000,000 inhabitants occupying 400,000 acres of space.

7. In any one year there are over 2,000,000 criminal proceedings though most of them are only motoring offences, and 2,000,000 civil actions though most of these are debt collecting exercises. In addition there may be over 1,000,000 conveyancing transactions and uncounted millions of contracts which require to be negotiated, many torts which are committed but which never result in litigation and countless other events and occasions when legal advice is desirable. If the task of the legal profession in providing advice and representation is to be fulfilled in a manner which will maintain the smooth functioning of our present complex and crowded society based on a mixed economy, the law must be certain, the legal profession must be adequate in numbers and in competence and the public must have confidence in the advice which is tendered to them. I turn then from tasks to performance to see if these criteria are met.

Performance

8. To cope with the legal problems which afflict the community there are in round terms 4,500 barristers in private practice, 35,000 solicitors in private practice, and 10,000 barristers and solicitors in employment. There are 300 Circuit Judges, 75 High Court Judges, 19 members of the Court of Appeal and 9 Lords of Appeal in Ordinary.

9. There are liable to appear before the Magistrates in any one year 500,000 defendants and before the Crown Court some 80,000. Intolerable delay is only avoided because between 60 and 70% of defendants plead guilty. The Court of Appeal Criminal Division deals with only 6,000 appeals and the House of Lords with 10 to 20.

10. There are liable to be 2,000,000 civil actions of which 1.5 million are begun in the County Court and 500,000 are begun in the High Court. Of the actions which are begun only 3% come to trial. 1,500 appeals are set down in the Court of Appeal and 50 reach the

House of Lords. Although as I have indicated a good many of the civil actions which are begun are purely debt collecting exercises, intolerable delay is only avoided because litigants accept the advice of their lawyers.

11. These statistics do not include the countless occasions when the advice of a lawyer is successful in avoiding the possibility of a crime or in avoiding the necessity for a civil action. Nor do they include the countless occasions when a cause of action arises but is disposed of by negotiation without the issue of a Writ.

12. The statistics suggest that the law is sufficiently certain, that the outcome of most disputes is predictable and that the behaviour of judges and lawyers is consistent. They indicate that the public have confidence in and accept the advice of lawyers. Were it otherwise many more criminal and civil proceedings would be fought to the bitter end and many more appeals would be pursued.

13. The indication from the statistics that the performance of the legal profession is generally satisfactory was supported by the evidence received by the Royal Commission. The evidence of members of the business community who dealt with lawyers at home and abroad, and the evidence from lawyers and others from different jurisdictions proves testimony that in respect of certainty, competence, speed and cost, the legal profession in England as at present constituted and organised provides a service which compares favourably with other legal professions. The reasons for differences between the legal profession of different countries were largely historical and geographical and there was no case for forcing major changes on the English legal profession.

14. The same indications regarding the performance of the legal profession are to be derived from the survey carried out by the independent Social and Community Planning Research at the request of the Royal Commission — a survey spread over 125 parliamentary constituencies in England and Wales and comprehending households of those who used and of those who had never had occasion to use the services of lawyers. It was found that the majority of adults, namely 57% had professional help or advice from a lawyer at some time in their lives. Whether they had used lawyers' services or not, almost all of them knew how to go about choosing a lawyer. Of those who consulted lawyers 94% went to solicitors in private practice and a majority chose a solicitor as a result of personal recommendations or connections or because the solicitors' office was conveniently situated. The verdict was in effect a verdict on solicitors and for the present purposes the most important findings were as follows:-

"8.210 More than 9 out of 10 of those who consulted solicitors during 1977 said they had found them easy to deal with. The numbers who said they were completely satisfied in the way the solicitor had handled their affairs were however rather smaller - 2 in 3. One in 8 clients expressed some dissatisfaction. One in 16 expressed strong dissatisfaction.

8.211 The most common reasons given for dissatisfaction were that the solicitor appeared not to show enough interest in the client's problem or appeared not to do enough about it, that the matter took too long to complete or that the client was not kept informed of progress. It was much less common for people to suggest that the solicitor made any actual mistake in the advice he gave or the action he took or to say that it cost too much.

8.212 There was very little difference in the levels of satisfaction expressed by clients of different sex or of different age groups or social groups. Nor were there great differences in level of satisfaction by the type of matter about which the solicitor was consulted or the nature of the consultation."

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Thus speaks the survey which exploded a number of cultivated myths about the relationship between solicitors and their clients.

15. The failure of communication to which the survey draws attention is I think due partly to the fact that most solicitors these days are overworked and partly to the very real difficulty of explaining to clients why they are getting advice which is unpalatable but still have to pay for it.

All the indications are therefore clear-the legal profession performs its tasks adequately. The morale of the profession is more volatile.

16. The morale of the profession has always been an odd mixture of pride and depression.

17. Most members of the profession are happy with the nature of their work. They comfort themselves with the knowledge that in practice they do not give bad advice, or take longer than is necessary or charge more than is appropriate. They know that they do not favour the rich or fail to conciliate. In addition to knowing that they do not cause harm, they also have the satisfaction of knowing, once in a while, that they are able to do a great deal of good although their effort may not be recognised or appreciated even by their own clients. They all know and admit that the work is absorbing. Most of them

know but only some of them admit that the work is reasonably well rewarded.

18. On the other hand many members of the profession are depressed and were even more depressed before the report of the Royal Commission by the nature of the complaints made against the profession and the difficulty of mounting defences in public. A lawyer can rarely answer back.

19. Part of the criticism of the legal profession stems inevitably from the fact that lawyers like doctors must frequently give unpalatable advice and may not be able to save patients from their own follies. Part of the criticism is due to the fact that the vast majority of disputes are settled and those which remain to be fought out are those in which the truth is well concealed or the law is doubtful. Cases which come to trial are those which are difficult to decide, difficult to understand, difficult to explain to those who do not fully participate throughout the trial and difficult to summarise. They are also cases which require time and involve expense. One of the most difficult tasks for a judge is to explain his decision in terms which will enable the unsuccessful litigant to appreciate why he has lost while remaining steadfastly of the opinion that he ought to have won. It is highly likely that in any case, civil or criminal, which is fought out, someone will conceive a complaint or criticism, justified or unjustified, directed against lawyer or judge or both.

20. The second reason for criticism of the legal profession lies in the inevitability of human error. Judges and lawyers like surgeons, engineers, architects, accountants and even bishops may make mistakes. The mistakes rightly receive publicity. A judge once in a while errs on the side of leniency or harshness or unguardedly says something which causes offence. A solicitor who signs thousands of letters a year may be cross-examined for two hours concerning one sentence which he wrote but did not intend in a letter which he had no reason to expect would figure in litigation.

21. The third reason for complaint is to be found in the postmortem examinations carried out by professors and teachers of law. When the patient is dead it is less difficult to classify the disease and to prescribe treatment.

22. The fourth reason is political. Some critics of the legal profession are inspired by a fundamental objection to the nature and organisation of English society and its constitution as a parliamentary democracy operating in a mixed but predominantly capitalist economy. An advance to a Marxist State would be accelerated if public confidence

in the legal profession were destroyed, if an independent private legal profession were replaced or dominated by a state service and if the rule of law were wholly replaced by the principle of social justice. That is why in the eyes of some critics everything is wrong. The judges' decisions and the activities of the legal profession are always wrong, barristers should be abolished, solicitors should be deprived of their sole right to carry out conveyancing, and a new civil service of public prosecutors and public defenders should deprive solicitors of their legal aid work.

Listening to some of the submissions made to the Royal Commission on Legal Services I was reminded of two of the wise sayings of the ancient Chinese philosopher.

First: Do not remove the fly from the forehead of your friend with a hatchet.

Second: Whenever I hear the words "public interest" I know that some unfortunate profession is about to be clobbered.

There is a distinction between a reformer and a wrecker. It is easy for the wrecker to clamber on the band-wagon of the reformer. It is easy for the conservative to be frightened away from reform. But the bias of some critics does not mean that we can afford to ignore or reject out of hand all criticisms and suggestions. Each proposal from any quarter must be considered on its merits. That was the approach of the Royal Commission on Legal Services and should be the approach of those members of the legal profession who are responsible for its present and must take heed for its future.

23. Some of the criticisms of the legal profession have been stifled, if only temporarily, by the report of the Royal Commission, with the consequent rise in the morale of the legal profession. The Royal Commission was led by a dedicated Chairman, Lord Benson who placed the profession under a microscope and studied it with an accountant's eye for efficiency for seven days a week for three years. The Commission Secretariat was headed by a civil servant of outstanding organisational ability, Mr. John Heritage, who assembled 49 file boxes of evidence and compiled two volumes of surveys and reports which were issued with the Commission's report. The Commission itself consisted of 15 members with varied talents and experience, no practising barrister and only one establishment solicitor. That Commission found no fundamental fault with the legal profession. The excuse of the unpersuadable critics namely that 3 years was not long enough to spend and that a few more years and a few more avenues of research might have produced a different result does not bear examination.

So much for the tasks, the performance and the morale of the legal profession. Over the future there hangs a cloud, a danger which by threatening the assumptions upon which our society is based, threatens the legal profession which administers the law which is based on the same assumptions. The danger is that as a society we may become morally unprincipled, constitutionally ungovernable and economically unmanageable. The danger cannot be averted unless there are improvements in employment, in standards of living, in standards of education and in standards of behaviour. In the final analysis the rule of law cannot work properly without social justice and individual discipline.

So far as lawyers are concerned our difficulties as citizens are reflected by an increase in the incidence and burden of legal proceedings consequential on crime and divorce.

In any one year there are 2.5m indictable offences less than half of which are cleared up. These crimes over burden the police, those that come to trial over burden the legal profession and those that lead to prison sentences over burden the prison service. That burden cannot be automatically lightened by an increase in staff.

Crime requires from the legal profession speed, application and sympathy in performance. The increase in crime threatens those very standards of performance which have been attained and threatens the confidence of the public in the administration of justice.

It is a vicious circle. Crime requires perfection and more crime leads to imperfections. An increase in the crime rate must increase the chances that somewhere an innocent is convicted and that more of the guilty are acquitted.

The same is true of divorce. One marriage in 4 will end in the divorce court and 60% of divorced couples have children under 16 at the date of divorce. Thus every year parents of 100,000 children agree, or the Court must decide how a child who only wishes to live with both parents is to be shuffled around between them. Every injury inflicted on a child may ultimately produce anti social behaviour by the child who has been wronged. Every year the Court must decide how hundreds of earnings ought to be apportioned between warring family factions, whether and when hundreds of houses shall be sold and how hundreds of family assets shall be divided. Fundamentally these are not legal problems and they do not admit of classification or certainty. The legal principle that the welfare of the child is paramount does not solve the problem of where that welfare is best to be found. The guide lines which have been summarised by the Law Commission for the assessment and duration of maintenance payments and for the division of matrimonial property are of little assistance when applied

to the health and wealth and circumstances of a particular case. The principles cannot relieve the Court of a wide discretion made necessary because husband and wife are unable to agree. That is why the Courts should only be the last resort in matrimonial matters when all measures for conciliation and advice have failed. The justification, the only justification, but the very real justification for involving the legal profession in matrimonial disputes is that there is no other machinery for laying bare all the relevant facts which must be considered in order that a decision may be obtained after everyone else has failed to reach a decision by any other means. With divorce as with crime the burden which falls on the Courts can only be adequately discharged if the legal profession maintains high standards of performance and its reputation in the eyes of the public. And with divorce as with crime the legal profession has no influence over the amount of work. With divorce as with crime the legal profession struggles with the symptoms, has no influence over the disease and is liable to be blamed for the consequences.

Society creaks and the law creaks in sympathy. The future of the citizen and the future of the lawyer depend on the same factors. The legal profession must not depart from the highest standards of efficiency and integrity. The reputation of the legal profession in the eyes of the public should not be overwhelmed with abuse. For these reasons I shall continue to debate those criticisms and reforms with which the legal profession is struggling to improve but on this occasion I make no apology for turning aside to consider, explain and defend the present state and role of the legal profession.