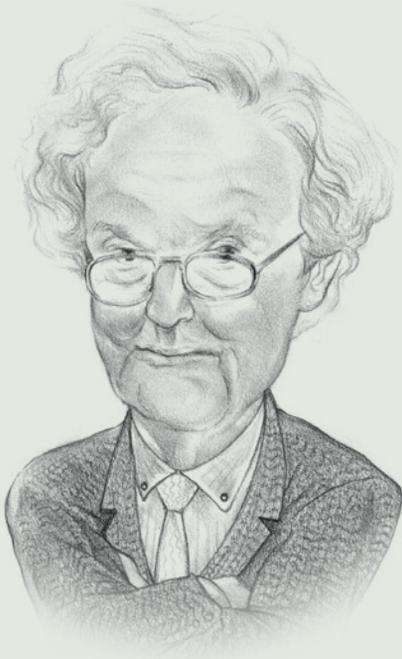




The Right Honourable Lord Slynn of Hadley

The Impact of Regionalism: The End of the Common Law?



Gordon Slynn
(b. 17 February 1930)

Educated at Sandbach School in Cheshire, Goldsmith's College of the University of London (where he took a degree in modern history) and Trinity College, Cambridge, Lord Slynn was called to the Bar, Gray's Inn, in 1956, and became a Bencher in 1970. Much of his early career was spent in public service, first as junior counsel at the Ministry of Labour and then at the Treasury as, first, junior and then leading counsel. He was appointed Queen's Counsel in 1974.

In 1976 Lord Slynn was appointed a Judge of the High Court of Justice, Queen's Bench Division, and, two years later, was made President of the Employment Appeals Tribunal.

He then moved from the Queen's Bench Division to the Court of Justice of the European Community in Luxembourg as an Advocate General. He was the first English judge to go there, where he



was one of six Advocates General. Subsequently, in 1988, he became a Judge at the European Court of Justice. On his return to the United Kingdom in 1992, he was appointed as a Lord of Appeal in Ordinary.

In all the many positions that Lord Slynn has held, the quality demanded above all else has been complete impartiality and independence, together with a meticulous (a word often applied to him) observance of the law. Regarded as a person of liberal inclination and someone of warm humanity, he has nonetheless sometimes placed his perception of the proper interpretation of the law before popularity and has been fearless in his interpretation of it.

Lord Slynn was Chairman of the House of Lords Select Sub-Committee on European Law and Institutions from 1992–1995; Chairman of the Executive Council, International Law Association since 1988; Honorary Vice-President, Union International Des Avocats since 1976; and a Fellow of the International Society of Barristers, USA.

More recently in May 2003, he was appointed Chairman by the House of Lords and House of Commons of the Joint Committee to consider the Draft Corruption Bill (Cm 5777) published by the Home Office on 24 March 2003.

In the world of academe, Lord Slynn held several visiting lecturerships at universities around the world, ranging as far as British Columbia, Sydney, Australia, Cornell University in the United States, the National Law School of India, as well as King's College, London and the University of Durham, where for seven years he was Visiting Professor of Law.

Lord Slynn retired as a Law Lord in October 2002.

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The Impact of Regionalism: The End of the Common Law?

Lord Slynn of Hadley
Lord of Appeal in Ordinary, House of Lords

Your Royal Highness and Chancellor; Your Excellencies; Dean, Professor Dato Visu Sinnadurai; ladies and gentlemen:

It is a great honour and privilege to be asked to give the Fourteenth Sultan Azlan Shah Lecture, a lecture seen both here and in England as of considerable prestige. It is not surprising that it should be so regarded since the tributes to His Royal Highness, when an honorary LLD was recently conferred on him by Her Royal Highness, The Princess Royal, as Chancellor of the University of London, recognised his great contribution to the law in Malaysia and to the high regard in which he is held as a jurist there and here.

It is also for me a particular pleasure to be invited to visit Malaysia for the first time—though for the first time in fact, I have to say that through my encounters with Malaysian lawyers at International Law Association conferences and with Malaysian students at English universities (particularly at the University of Buckingham) and at Gray's Inn, I have always had the feeling that I had already been here. That feeling may be due partly to the warm relations between our two countries and the warmth which your people show to us.

*Text of the Fourteenth
Sultan Azlan Shah Law
Lecture delivered in on
7 December 1999 in the
presence of His Royal
Highness Sultan Azlan
Shah.*

Previous Sultan Azlan Shah Lectures have addressed various aspects of the common law, a topic which is plainly relevant and important to both our countries. As this millennium ends we should not overlook that one of its great achievements has been the creation and development of the common law—a system built on the decisions of the judges on a case-by-case basis from which principles slowly emerged and were refined, a system which produced the concept of the Rule of Law and the independence of the judiciary which, as one eminent Indian jurist wrote to me, has “given to India one of its greatest possessions”. Jurists of other countries may feel the same.

This so-called common law, beginning in England with the judgments of the King’s Courts, has had a profound influence on the development of many parts of the world—so much so that only 60 years ago Professor Norman Bentwich could write¹ that the Judicial Committee of the Privy Council heard appeals from 25% of the earth’s surface. It began as a one-way process. The House of Lords and the Judicial Committee of the Privy Council spoke and local courts applied the law as they declared it. But the common law is not static and over the years the process became not one-way but two-way. The courts of England, not least the House of Lords, and the Privy Council, looked at the judgments of the courts of other Commonwealth countries. These judgments—particularly of the supreme courts and appeals courts—together with the writings of academic lawyers throughout the Commonwealth have had and increasingly have an influence on the development of the common law. This reciprocal process, even when supreme courts diverge from the House of Lords to take account of local conditions, I know, has been of great importance in England. I believe it has been no less so elsewhere. There has been reciprocity but there has also been diversity. I was reminded last night by one of your colleagues of a striking example. The House of Lords in *Rookes v Barnard*² in 1964 imposed limits on the award of exemplary or punitive damages but in 1967 the Privy Council said that in Australia the principle of exemplary damages was so well-established that it would be wrong to interfere with an award of such damages in Australia.³

¹ Bentwich, Norman, *The Practice of the Privy Council in Judicial Matters*, 1937, Sweet & Maxwell, London.

² [1964] AC 1129; [1964] 1 All ER 367, HL.

³ *Australian Consolidated Press Ltd v Uren* [1967] 3 All ER 523, PC.

The common law, of course, has not stood alone and increasingly in this century, the last of the millennium, parliaments have regulated our lives, sometimes moving into new territory (taxation, social security, labour law, the environment), sometimes changing the rules established by the common law, sometimes starting new trails which it fell to common law judges to take forward as a matter of statutory interpretation and to develop on common lines.

But all this is domestic national law and, you may think, well-travelled ground. Thus it seemed to me that it was an appropriate time in this series of lectures to deal with a new factor on the English legal scene—what effect has the United Kingdom’s membership of a regional grouping, the European Community, had on the practice of the law and thereby on the lives of the people, on the affairs of men in finance, commerce and industry and on the work of the courts in England? What other international movements have begun to influence the common law?

This is not a parochial subject. We have already seen other endeavours at regional economic, even political, grouping: the Andean Pact; Nafta with the United States, Canada and Mexico; Mercosud in South America; Asean; and other discussions for economic cooperation in Southeast Asia and the Pacific. All of these have looked at the experience, the successes and indeed the mistakes of the European Community, not only in respect of economic and political matters but no less at the construction of a regional system of law for such an economic grouping.

Not only is this subject not parochial, it is not marginal or as lawyers in England still say, despite the contemporary discouragement of the use of Latin, *de minimis*.

The European Community

The Treaty of Rome setting up the European common market was adopted by the founding States in 1957. Like the European Convention

of Human Rights it was a reaction to the previous turmoil in Europe and the horrors of the Second World War. We in the United Kingdom did not join until 1973—partly because of our hesitation as to its effect on our links with the Commonwealth, partly because of doubts as to whether it was a good idea which would work, partly because of the intransigence of General de Gaulle who did not want us in.

One of the main objectives was to ensure peace between the member states. But it had other and wider aims which I doubt if many people fully appreciated at the time. Indeed it was said during a debate in the House of Lords by a Government minister that he doubted if joining the Community would “affect the lives of ordinary people”.

How different that has proved.

True it began as an economic community, an economic regional grouping; and a *common market* was the emphasis. We would trade freely without barriers between the States with the objective of expanding trade, improving the economy and increasing people’s standard of living. But we should have realised that the Treaty went much further. It said so. There was to be a *closer union* of the peoples of Europe—these were not only economic but social and political aims.

As a result, the effect of Community law on the lives of the people, the affairs of commercial men and the work of judges and lawyers has been considerable. This came, firstly, from the Treaty as amended from time to time and subordinate legislation made by the Institutions of the Community. Secondly, it came from decisions of the European Court of Justice.

As to the first, the Treaty provided for what are called the four freedoms:

1. Free movement of goods with no quantitative restrictions on imports or exports inside the Community;

2. Free movement of workers with allied rights of movement for families coupled with social security rights;
3. Freedom of establishment for professionals and businesses including related rules breaking down barriers, eg, for lawyers, doctors, architects and accountants to practise in a host State under their home State title and rules;
4. Free movement of capital—the slowest to develop but which has become increasingly important with monetary union and, for some States, a common currency soon to be in operation.

But this is only the beginning. There are ancillary provisions: an effective anti-trust competition code; a common external commercial policy; a social policy to improve working conditions; an emphasis on environmental protection; and now cooperation in police procedures on home affairs and justice.

As to the second, the European Court of Justice in addition to ensuring that all these freedoms and ancillary provisions are effectively interpreted and applied has laid down general principles of Community law which national courts must apply in a Community law context. So English judges have a dual role: they are common

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law judges in a domestic law situation; they are Community law judges in a Community law situation. When they apply Community law they must give effect to those Community law general principles.

Those general principles began with the answers to two obvious questions. The first question was: What happens if the two branches of law—Community and national—are not the same? What if there is a conflict? The European Court had no doubt as to the answer. To



achieve a uniform application of the law in all States, national law had to give way to Community law. Community law took precedence and national judges had to give effect to it at the expense of national law—in our case the common law and United Kingdom statute law. The second obvious question was: Can the citizen or the trading company go direct to the judge in his own State and insist that the national judge applies Community law even if local parliaments have not legislated or if that law was in conflict with national law? The European Court said that if Articles of the Treaty and generally applicable regulations made under it were sufficiently clear and precise, they could be enforced directly in the national court. Decisions of the European Court itself also must have direct effect in national courts. In England that principle was incorporated into an Act of Parliament but even without that it was an essential part of European Community law as developed by the European Court of Justice.

The European Court has equally laid down general principles to protect the legitimate expectations of business men who have arranged their affairs on a particular basis, and to prevent executive and administrative powers in the Community being disproportionate or used in an unreasonable or unnecessary way.

The extent of all this in its effect on the substantive law has been remarkable. Huge volumes have been written about it and I can only illustrate briefly. The Community rules on equal pay and the European Court's judgments have produced a dramatic effect on equal pay for men and women doing the same job and jobs rated of equal value. They have had a similar effect on the equal treatment of men and women in employment, appointment, promotion and dismissal. Discrimination on the grounds of sex is out unless for extremely limited reasons. Where mergers or takeovers happen in industry or commerce the workers' rights are protected. A Directive on product liability has given rights (still to be worked out in detail) which it would have taken national legislatures and courts dealing with claims in negligence years to achieve. The laws governing

insurance, banking, financial dealings and companies which have been laid down have had considerable effect on the work of the courts and the regulatory bodies. The rules on agriculture and the Common Fisheries Policy have led to many decisions of courts throughout the Community and there has been a great body of regulatory material.

Sometimes the cases have involved sensitive areas. Nations do not like their habits being interfered with, even habits of food and drink. Thus in one case the European Court was called upon to declare and did declare that German rules prohibiting the importation of beer from other countries and its sale were contrary to the free movement of goods. It was a case which caused great resentment in Germany where they had followed for centuries restrictive rules as to the manufacture and sale of beer. The European Court declared that this rule was contrary to the whole notion of a common market and that it must be possible for other countries to sell their beer in Germany and to call it beer without necessarily complying with the German statute so long as the imported goods were not harmful to health.

But these measures taken by the Community have also had a profound effect on the procedures of the national courts.

The Treaty of Rome established a new procedure with which we were unfamiliar. There had to be some way, as I have already said, in which Community law would be interpreted and applied consistently throughout the Community. It would have been possible to set up a system of appeals which would allow the European Court to reconsider the decisions both in fact and in law of national courts. For administrative and no doubt political reasons this was not adopted since it was not attractive for the decisions of national supreme courts to be reversed or reviewed by an intra-national court. And so the Treaty provided that when a judge in a national court found that it was necessary to decide questions on the meaning of the Treaty or the meaning and validity of subordinate legislation in order for the judge to give judgment in the case then he might refer the question of law

to the national supreme court. A supreme court is obliged, except in cases where the answer has already been indicated by the European Court or is absolutely obvious, to refer the question to the European Court. The European Court answers the question and the national judge applies their answer to the facts of the case. So he still gives judgment but his decision has to be in compliance with the European Court's ruling.

In a sense this is a surrender of sovereignty but it is one that has certainly not caused resentment in the House of Lords even if there has been disagreement as to the scope of this procedure between the European Court on the one hand and the German Constitutional Court, the Italian Constitutional Court and the *Conseil d'Etat* on the other. This is a procedure which national judges in England now apply regularly and without conflict with the European Court.

Initially the European Court held that the national judge must, when he decided a question of Community law, adopt remedies and procedures similar to those which he applied in domestic law. But in time it was held that these legal remedies had not only to be similar but they had also to be effective to achieve the result intended by Community law. That meant that the British courts had to adopt procedures which they would not have applied in domestic law. Thus it was held that the certificate of the Secretary of State, conclusive in domestic law before the national judge, might not be conclusive in a Community law situation. It was necessary that there should be some judicial review of the procedure adopted by the Secretary of State and of the law which he had applied, even if the European Court should not interfere with the discretion of the judge as to matters which fell only for him to decide. The European Court held that where a State was in breach of its Treaty obligations there may be a remedy in damages which national courts must recognise even if damages would not have been available in domestic law taken alone. Perhaps most significant of all, the European Court held that if a judge found that an Act of Parliament was contrary to Community law, the judge must refuse to apply it and if necessary have the power

to grant interlocutory relief. This was a great change since hitherto the courts had accepted that Parliamentary sovereignty prevented them from declaring an Act of Parliament to be void or unlawful. When the European Court said that this was the law, the House of Lords accepted and applied it without further question.

The two systems of law—domestic law, ie, the common law, and Community law—are thus in one sense distinct. Can they remain so or will the common law and the procedure of our courts in domestic situations absorb ideas from Community law and procedure just as

If a judge found that an Act of Parliament was contrary to Community law, the judge must refuse to apply it. This was a great change since hitherto the courts had accepted that Parliamentary sovereignty prevented them from declaring an Act of Parliament to be void or unlawful.

Community law has absorbed its general principles and procedures from the various domestic laws of the Member States? I think it likely that the national law systems such as the common law will begin to absorb ideas from European Community law since judges are applying both and they have to give precedence to Community law. Already “the principle of proportionality”, which guides the European Court in deciding whether administrative action is excessive and unnecessary, has been referred to in the national courts. We have as your

lawyers know well, the principle called “*Wednesbury* reasonableness” which essentially asks whether a reasonable minister acting reasonably would have done what the minister has done to achieve his executive purpose. There is a difference between these two approaches as applied by the European Court, but it is in my view far less great than is sometimes supposed. I notice that English judges now frequently refer to proportionality and I think in time proportionality should replace “*Wednesbury* reasonableness”.

The Community law principle of “legitimate expectations” is also referred to in domestic cases. The principle was already there in a slightly different form but legitimate expectations are now said to be expectations which should be protected by the courts against excessive



administrative action in domestic as well as Community law. As I have said, the European Court held that there should be a power for national courts to grant interim injunctions to protect the position in Community law, pending a decision of the European Court. That was never available against the Crown in domestic proceedings but since the European Court's decision the English courts have accepted that an interim injunction may be granted against the Crown in a purely domestic law case.

I think thus that European Court procedures will have effect on our domestic procedures. There is already more emphasis on written arguments and on summaries of argument; there is a tendency to encourage shorter hearings, particularly in appellate procedures where the written pleadings and statements of case should virtually indicate what the case is all about and in which direction the parties are going. I think too that the English courts will increasingly adopt a system of purposive interpretation of domestic statutes very similar to that adopted by the European Court so that “black letter law” is not literally followed. I do not think that the literal approach was followed strictly during recent years but the emphasis now undoubtedly is on the purposive approach.

The English courts will increasingly adopt a system of purposive interpretation of domestic statutes very similar to that adopted by the European Court so that “black letter law” is not literally followed.

What is happening in the English courts has of course no direct effect on the common law as applied in other countries but if the common law changes and common law procedures change in England in ways which are seen to be sensible, it is not impossible that the effect of these changes will spread to other common law countries. Modern methods of communication—by scholars travelling, lawyers attending the multitude of conferences which we now have (not least in the Commonwealth as was seen by the recent Commonwealth Law Conference so successfully held here)—lead to a cross-fertilisation of ideas. We have seen it, not only in the Commonwealth but in our

study of other systems of law dealing with administrative law (the French), anti-trust law (the German and the American) and in other ways. A new law series of textbooks on the law in various Member States of the Community encourages this kind of comparison and cross-fertilisation.

Other external influences

What I have dealt with so far is not of course the only external influence on English law. The United Kingdom's accession to the European Convention on Human Rights has meant that decisions of the European courts against the United Kingdom have had to be complied with by the Government and by Parliament. This has sometimes meant that our laws have had to be changed. This was so even though the Convention was not and will not until October 2000 be enforceable directly in our courts. But from then, all United Kingdom national courts will have to apply the Human Rights Act 1998 which incorporates the Convention. They must interpret, as far as possible, national legislation so that it is read as being in compliance with the rights set out in the European Convention. Where there is a violation by legislation or executive action, courts will have the power to make a declaration to that effect and in appropriate cases to award compensation. Governments will have the power to introduce fast-track legislation to remedy violations where they think it appropriate.

There will still in some cases be a right to go to the European Court of Human Rights where the alleged victim claims that a domestic court has not given him the rights to which he is entitled under the Convention but it is hoped that decisions of the English courts will substantially reduce the number of such cases going to the Court of the European Convention in Strasbourg.

This, it is thought, will have a tremendous effect on the work of our courts and we shall have to re-examine many of our rules and procedures. It seems to me that the most likely areas are those relating

to access to justice—a fair trial with all its procedures—to freedom of expression and assembly, and to non-discrimination on the ground of race, sex and religion.

It is, however, curious that though national courts can disapply legislation contrary to Community law, because Community law says the European Court must have that power, they cannot disapply or annul legislation which is contrary to the Convention of Human Rights.

We shall in due course be affected, as all legal systems will be affected, by the rules of the World Trade Organisation and the decisions under the Disputes Settlement Procedures. It is remarkable that in the first three years, as many decisions were given by that body as judgments were given by the International Court in the first 50 years of its history.

And there are many other international conventions introduced in the domestic law by legislation which have far-reaching implications for our common law and statute law. Indeed it is a rule of the common law that where legislation is introduced pursuant to an international convention, it is to be assumed that Parliament intended to give effect to the convention and that the legislation should be interpreted to achieve the object and purpose of the convention.

It is a rule of the common law that where legislation is introduced pursuant to an international convention, it is to be assumed that Parliament intended to give effect to the convention and that the legislation should be interpreted to achieve the object and purpose of the convention.

But there is yet another factor to be taken into account. I believe that our courts and other courts are beginning to be more aware of, and to be influenced by, rules of international law both public and private. This process is only just beginning but it seems to me to merit encouragement. It is very desirable that our rules of private

international law should be harmonised—the common law, the civil law and other legal systems need common rules as to the recognition and enforcement of judgments, as to *forum conveniens*, as to State and other immunity. In the field of public international law, principles may be recognised by treaties or by customary international law which deserve incorporation in some way or another into domestic law. I think in the House of Lords we reflected this trend when we were asked to grant an injunction to prevent the relatives of people killed in the Bangalore Airbus crash from suing in Texas on the ground that Texas had no connection with the accident or the parties. While recognising the force of the defendant’s arguments that they ought not to have to go to Texas to defend the claim, we equally recognised that if the plaintiffs could not have the benefit of the American practice of contingency fees they would not be able to have legal representation anywhere. In the end we cut through all the technical arguments. We said that the comity of nations required that we should not prohibit persons within our jurisdiction from suing in another State, however little connection there was with that State, unless there were special reasons for thinking that a fair and proper trial could not be possible there.

End of the common law?

So to revert to the European Community, there are two systems of law in operation, with one taking precedence. Does that mean the end of the common law? A recent article of Professor Beatson, “English Contract Law—A Rich Past and Uncertain Future”,⁴ appears to take a somewhat pessimistic view. In my opinion Europe is not at all the end of the common law. There are still whole areas where Community law plays no or very little part and even in areas in part covered by Community law there is still scope for the application of common law rules. In the courts most cases are thus still decided solely on the basis of our national, common or statute law. Moreover, it is to be remembered that statute law, national statute law, already occupies much of the field which was or in time would have been developed by

⁴ Beatson, J, *Has the Common Law a Future?*, 1997, Cambridge University Press.

the common law. You will find many cases in the law reports which have been of importance but in which Community law has played no part. Thus, as to the measure of damages for a failed sterilisation of a man where various different results were contended for by the parties; the liability of a local authority for failure properly to place or check on the progress of a child in care; the right of the press to comment on the private rights of a public figure; judicial review to cover a failure to produce evidence; in these areas the common law is still flourishing.

Moreover it has a role in developing European Community law. As a judge I found that when we sat down to work out the Rule of Law most appropriate for the European Community we put side by side the civil law and the common law ideas (and those in between). It was important that the common law should play its part in developing this regional law. It did so for example in developing the law of legal professional privilege and in recognising that *audi alterem partem* was a principle of Community law as understood in the English courts.

It is equally important that the common law approach and common law procedures should have full impact on the drafting of international conventions, be it in relation to arbitration, to commercial contract, to carriage of goods, or to the enforcement and recognition of judgments.

The common law springs from a case-by-case approach that will continue and in large measure has had its influence on and is followed by the European Court of Justice.

We shall continue to recruit our judges from those experienced in practice rather than adopting a career judiciary and many civil lawyers and judges regret that they do not have a parallel system. There will be harmonisation both internally and internationally through, for example, the Uncitral Model Arbitration Law and contract law, but the common law is far from being abandoned whatever the external influence is.

The common law is still vigorous and developing. It remains the strongest link which binds the Commonwealth together.

Lord Scarman in 1983 said,

The common law is delightful but it is now of marginal importance.

I agree with the first part but the second part of his sentence in my view goes much too far. The common law is still vigorous and developing. Moreover it remains, apart from the personal role of the present Queen, the strongest link which binds the Commonwealth together. 