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Simon Lee, Judging Judges, Faber & Faber, London, 1988

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Simon Lee, Judging Judges, Faber & Faber, London, 1988 i-x, 1-208, further reading 209, 216, index 217-218, Hardback $40.

The cover jacket of this book promises something rather different from the usual deferential English reverence for the judiciary. Immortalized on it is the front page of the London Daily Mirror during the Spycatcher litigation. It bears the banner headline "You Fools". Lords Ackner, Brandon and Templeman - with their ages and military service duly noted - are portrayed upside down: like hapless prisoners once were at the Tyburn, after a hanging. With such a cover, what impertinence can be expected inside?

The thesis of the book by London law lecturer Simon Lee is simple. Judges make law. They should recognise this themselves. The community should understand the opportunities for, and limitations on, judge-made law. The somewhat belated recognition of such reality has significant implication for the methodology of judges - particularly in the higher courts. It is time to explore its implications.

To illustrate the impact of leading judges on the development of the law, Lee takes a series of ten important cases in England. He starts with the House of Lords decision in 1979 concerning the prosecution for blasphemy of Gay News (which now has a new relevance following the outcry over

Salman Rushdie's Satanic Verses). He proceeds through other "high profile" decisions of their Lordships, arriving at the Spycatcher litigation shortly before publication. He then turns the spotlight on five leading English judges - Lords Denning, Devlin, Hailsham, Mackay and Scarman. Next, he turns to the contrasting judicial scene across the Atlantic. He examines what he suggests was the "supreme injustice" done to the former Judge Robert Bork in his quest for confirmation of his appointment to the Supreme Court of the United States. The introduction and conclusion to the book are voiced in the context of an examination of the competing theories about the legitimate role of judicial lawmaking. These he catalogues basically as the "noble dream" of Ronald Dworkin expressed in his book "Law's Empire" and the "nightmare" of unrestrained judicial lawmaking, a charge which he attributes to "that man Griffith" (Professor John Griffith wrote The Politics of the Judiciary). His obvious sympathy is for Lord Reid's assertion in 1972 that the traditional view that a judge merely "found" the hidden common law is a "fairytale". He is for an end to myths.

The value of the book is that it brings to a general audience an appreciation of the proper function of judges in developing the common law. Inevitably this sometimes means lopping off a branch or two. There can be little doubt that many members of the public - and some lawyers - cling to the old fairytale. They believe that a judge has no business at all making law. That is for Parliament. Yet the whole point

of the common law system, as Lee demonstrates, is that judges do develop the common law. Furthermore, giving meaning to ambiguous language in Acts of Parliament, they frequently have to make choices. This obvious fact immediately raises the question of the standards and principles (as well as the techniques) by which such choices will be made.

The first thing to be said about the book is that, unlike much writing in jurisprudence, this book is light, easy to read and even entertaining. With its close attention to "personalities" of the law, it adopts a kind of Time magazine approach to issues. Discussion of judicial creativity is illustrated by reference to the doings of the great and good. For some of more scholarly mien, the style will be offputting. For example, the suggestion that Law's Empire by Dworkin should be seen as a sequel to The Last Emperor will seem to some a trifle facetious. To call the United States Supreme Court Judges "The Supremes" is positively cheeky. To parody Lord Denning thus "Lord Denning wrote short sentences. Like this." would probably not offend that charisma-conscious jurist. Nor, I suspect, would he have been upset with the statement that he is "to the judiciary what Mountbatten was for the royals". Quite often, Lee uses his penchant for humour to telling effect. Thus, in discussing the way in which barristers become judges with an overnight change of function, he suggests that it is like "asking Botham to become the umpire". The analogy to cricket - another popular English invention - is endearing.

And it highlights the question of how it is that such a system has worked so well for so long.

Similarly, there is a sting from Lee for Lord Hailsham in the statement that "in Opposition he criticised the elected dictatorship" of the Parliamentary system. But then rejoined it" in 1979 when Mrs Thatcher regained the Treasury Benches for the Tories. Lee's criticism of the trivialization of the confirmation hearing for Federal Judges in the United States is neatly epitomised in his reminder that Judge Bork was even asked to explain his beard! "The mind boggles" writes Lee, "at Lord Goff being asked to justify his moustache".

So Lee is racy and readable. He declares in his foreword that he is not aiming at an élite but a general audience. So much the better. Certainly the subject of his book is terribly important for the modern democratic community - whether in England or the United States (upon which it focuses) or Australia (which does not even rate a mention).

Lee's insights into judicial lawmaking are not particularly remarkable. There is no single theory which will explain the approach of all judges. They differ amongst themselves, in different cases and in time and place. Just the same, few serious commentators now claim that judges are not involved in lawmaking. In Britain (and Australia) they may not be "super legislators" like the United States Federal Judges. But, according to Lee, the search is now on for the

real definition of the limits which judges accept for themselves in the extent to which they feel entitled develop the common law. Obviously, they are not completely at large as the English Parliament is. To an extent not always realised, they are hostages to the arguments of the barristers before them. Perceptively, Lee calls attention to the records of argument in leading cases. He shows how busy judges often have little time to go beyond the ideas presented to them. It is this reality that gives leading barristers a key role of their own in legal development.

Lee criticises the stereotyping of judges as "conservatives" (being single-mindedly devoted to past principles) or "liberals" (being attentive to the future impact of their decisions on society). He says that the real issue is the extent to which judges, in a particular case, see their role as implementing previously stated law or as considering the present and future consequences of options which they regard as open to them. The key question, according to Lee, for the resolution of the competing pressures involved in this dilemma, is is it appropriate for the judge to allow concern about present and future consequences to outweigh past statutes, precedents and principles given this area of the law and the alternatives for lawmaking by other institutions?

Lee believes that there is no universally correct response to this question. The problem is the lawyer's equivalent to the Monet paintings of Rouen Cathedral in

different lights, from different angles, at different times. The value of Monet was in the presentation of the cathedral from different perspectives. Lee does the cause of jurisprudence a service by demonstrating, by reference to a few cases studies and individuals, the intensely human aspect of judging. Irritatingly enough, human judges resist neat classifications. Even the one judge, in different circumstances, may react unpredictably: accepting or rejecting a proffered opportunity to develop the law or to squeeze a new problem into the bottle of an old solution.

The common thread which runs through the techniques of the judicial institution is the lawyerly commitment to argument. Whether largely done on paper (as in the United States) or orally (as in England and Australia) the exposure of illogicality, inconsistency of principle and absurd or unfortunate consequences rescues the judicial decision-maker from the worst excesses of adherence to dogma. Perhaps that is why, as Lee points out, the "Left" does not lose all arguments in court, even when it loses all votes in Parliament in Mrs Thatcher's Britain. The curial process tends to be somewhat more rational and more principled than the ultimate brute force of transient parliamentary majorities.

A number of critical comments might be made about the book. For Australian readers, the concentration on English judges and cases seems increasingly less relevant to our concerns. The criticisms of the United States' procedures

that led to the vote of 58 to 42 against Judge Bork's confirmation are well told. But they leave unanswered the checks which exist in our own political system for the appointment of judges whose attitude to lawmaking may have a large impact on their society. Elsewhere, Lee admits that the realization of the legitimate role of judicial lawmaking has significant implications for judicial selection and technique. Once the "fairytale" is abandoned, it follows that judges should be helped to reach, within the law, desirable conclusions - or at least to be alerted to the policy implications of alternative possibilities. In this context, Lee provides a checklist for the modern policy conscious judge. Drawing particularly on features of the United States judiciary, he mentions the provisions of an amicus brief, a Brandeis brief on social and economic implications, law clerks to do research, press conferences to announce extremely important decisions and - horrors - even nonlawyers taking part with judges in the process of judicial lawmaking. Not much chance of that here, I would think.

The front cover, previously mentioned, is a symbol of the changing times through which judges of today are living and working. It was so much more genteel in the "good old days". As the myths fall away, the need to face the actualities of judging, and to provide a coherent new theory in place of the "fairytale", is what this book is all about.

An Australian supplement to the book would certainly mention the way in which Deane J in the High Court of

Australia explored the principled approach to changing an old rule of the common law. He did this in Oceanic Sun Line Shipping Co Inc v Fay (1988) 62 ALJR 389, 413. It might also refer to the recent judgments of the Court of Appeal of New South Wales in Halabi v Westpac Banking Corporation, unreported, 8 February 1989. The Court there had to consider whether the felony tort rule was still part of the common law. In reaching their conclusions, the Judges had to explore the limits on a court's entitlement to "abolish" such a rule. Books like that of Lee help to prepare society to come to terms with the creative actuality of the judicial function in a country such as Australia. But for the provision of a coherent theory, if one exists, a deeper and longer book will be needed. I hope that, when it is written, it is as readable as Mr Lee's book. For then a few lawyers who have long since put away their books of jurisprudence will be tempted to dip into the pages for a modern reflection upon their role. And that would be no bad thing.