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BOOK REVIEW

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The end of the 70s saw the publication of a number of books which, in differing ways, submit the judiciary to new scrutiny. In the United States, a major controversy followed the publication of "The Brethren" (B. Woodward and S. Armstrong, (Simon and Schuster : 1979). In England, Lord Denning's book "The Discipline of Law" (Butterworths: London: 1979) repeats the by now familiar themes of its author, celebrating his 80th year : with his reformist, activist view of the role of the judge not diminished in the slightest. The publication of Lord Devlin's "The Judge" is not likely to cause the same public fuss. But in many ways its content is more important. Lord Denning in his book gives good advice to the lawyer as writer: "As a pianist practises the piano, so the lawyer should practise the use of words, both in writing and by word of mouth" (p.7). Lord Devlin's book is eminently readable, its author obviously subscribing, at least in this particular, to the same philosophy as the Master of the Rolls. In fact, at times Devlin's prose is riveting. It is because he emerges as a conservative in most matters affecting the administration of English justice that his severe criticism of the adversary trial as the sole available method of resolving disputes, must command the careful attention of lawyers and law makers. It is the chief interest of this book.

"The Judge" is Devlin's first book on a legal theme in more than a decade. It comprises six chapters, each a public lecture which he delivered between 1975 and 1978. There is a short preface which points to the common theme running through his lectures, namely an examination of the part played by the judge in the political life and government of England, those words understood in their widest sense. The chapters are

respectively "The Judge as Law Maker", "The Judge as Sentencer", "The Judge in the Adversary System", "The Judge and the Aequum et Bonum", "The Judge and the Jury" and "The Judge and Case Law".

In the first two chapters, Devlin demonstrates his caution. His views on the judge as a law reformer accord closely with those expressed by the majority of the High Court of Australia in State Government Insurance Commission (S.A.) v. Trigwell and Others (unreported decision of High Court of Australia, Full Court, 19 September, 1979). The judge is not equipped, as law reform bodies are, to adopt a dynamic and creative role. Furthermore, it is undemocratic of him to do so. Moreover, reformers must accept the "fact of nature" that judges "like any other body of elderly men who have lived, on the whole, unadventurous lives, tend to be oldfashioned in their ideas". A few instances of Devlin's style will illustrate how readable this book is. "The ordinary Englishman", he declares "is against reform. He accepts it only when he is confronted with a situation in which he can perceive unfairness in the existing order and he perceives that more easily when it affects himself than when it affects others". "The English have a low opinion of lawyers until they become judges". "The English judiciary is popularly treated as a national institution, like the navy and tends to be be admired to excess". "There is an ecology for the legal organism as for others. In the English system judges feed off the Bar". "All legal procedure attracts barnacles and should be regularly scraped". Devlin's orthodoxy leads him to opposition to the compulsory training of judges in sentencing and penology, although he concedes that most judges come to sentencing without much experience in the criminal law. He dubs the motion of compulsory instruction as an aspect of "the unacceptable face of socialism". He is dubious about the value of criminology, suspicious about "half-baked expertise" and believes that the judiciary should reflect, in the business of sentencing, a popular rather than any official outlook.

Against this background of orthodoxy and support for present institutions (Devlin opposes what he sees as the "sapping and undermining" of the jury system), the chapter on the

adversary system comes as something of a shock. Devlin compares the adversary trial with the Continental inquisitorial system. On many criteria he finds that the latter is to be preferred. Devlin describes the two systems. It must be said that legal education is such that most lawyers of the common law tradition are brought up in blissful ignorance of the Continental procedures. They have a fierce confidence in the merits of the adversary trial which is unblemished by any real knowledge of the inquisitorial alternatives. Devlin describes the two methods of resolving litigious disputes. He concedes that, in the end, most cases probably lead to much the same result. He also concedes that the adversary system of "verbal pugilism" has a number of advantages. Amongst these he lists the emphasis which the open, continuous oral trial gives the doing justice in public; the presentation of a public tableau which leads to a reasoned decision that can be judged on the evidence called; the tendency of the adversary trial to give satisfaction to the parties who have their dispute openly ventilated and the incentive it generally gives to the combatants to do their best to "win the prize" in the courtroom arena.

As against these arguments, Devlin lists a number of disadvantages of the adversary system. First, there is the waste of time involved for parties, witnesses and lawyers in waiting for courts to become available and for cases to start. The inability to rely on written material often involves a busy witness waiting around for days until he can be called for ten minutes of evidence. Devlin lists the indignities to which witnesses are often put, needlessly, by the processes of cross-examination. He chastises the artificial rules of evidence, many of which were devised in earlier times to protect the "ignorant" jury and are quite inadequate in large scale or technical litigation. He questions what he sees as a misplaced confidence of legal practitioners in their ability to evaluate the truth of witnesses from their appearance in court. Finally, he is intensely critical of the tactical manoeuvring of the adversary trial which can result in neither party daring to call a vital witness and the judge constrained by convention from himself doing so.

Devlin concludes that the inquisitorial system, as a search for the truth of the matter, rather than the winner of verbal combat, may be, in principle, to be preferred. More to the point, he suggests that its far greater reliance on written material on the file, obviates the expensive procedures of the English trial and thereby provides a less expensive and more accessible system of justice. He points out that law suits between oridinary citizens of limited means are uncommon under our system because of the costs involved. In the result, he urges that court procedures should be modified so that an alternative system of trial, modelled on the inquisitorial system, should be available. This would not displace entirely the adversary system but would be an option which could be used, particularly in cases where the issues at stake did not warrant the considerable expense of the adversary system.

Just as radical are Devlin's proposals for changes in the system of criminal procedure. He describes what he sees as a "slide" since the establishment of the modern police service into the inquisitorial system. But he points out that in this "slide" we have not adopted the various procedures governing the examining magistrate on the Continent and designed to protect the accused. He instances "dazzling" cases of injustice, including the Timothy Evans and the Virag cases. He suggest the adoption of a "judicial intermediary" to whom police could present their evidence and who would decide whether or not more evidence was needed and whether charges should be brought. Such an independent officer could protect the system of criminal justice from the tendency which arises from the adversary mode of trial for prosecutors to reject hypotheses consistent with innocence, once they are convinced that they had "got their man".

These are fascinating suggestions. Because they are made in a book otherwise devoted to sustaining our institutions, they are compelling. The adversary mode of trial is the "centrepiece" of our system of administering justice. We who are brought up in its ways tend to look at it, all too often, uncritically. This latest book from one of

England's most profound legal thinkers should promote fresh scrutiny of the system. It is to be hoped that it will also encourage an interest in comparative law as a necessary antidote to complacent self-satisfaction with common law procedures, all too often fortified by ignorance of alternative ways of doing things.

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