159

AUSTRALIAN LIBERAL STUDENTS' FEDERATION

33RD FEDERAL COUNCIL

HOBART, TASMANIA,

14 MAY 1980

THE DECLINE AND FALL OF THE COMMON LAW?

CAN OUR INSTITUTIONS COPE?

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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OF 'BOLD SPIRITS' AND 'TIMOROUS SOULS'

The High Court of Australia is the guardian of the common law in Australia. This rude plant of a legal system, brought to the four corners of the world by the English navigators, is the basis of the Australian law. It is a collection of the rules made by judges over 800 years to solve the day to day problems of citizen and society.

Nowadays much of the business of the courts is confined to the interpretation of what Parliament meant by the legislation it enacted. Lord Diplock recently estimated that two thirds of the work of the House of Lords involved disputed questions of interpretation of statutes. It was a tedious task, he declared and one 'which I am bound to say, I dislike'.

Our High Court is not simply a constitutional court. It is a general court of appeal, busily at work construing statutes, Federal and state, and declaring the common law as it applies in Australia.

It used to be part of the mythology of our legal system that judges, including High Court judges, did not 'make' the law. They simply 'declared' what the law was and had always been, if only some-one had found it. It is surprising to see how long this myth survived. One of the greatest judges of our century, Lord Reid, denounced the myth in 1971. He declared it was a 'fairytale' that the law was 'some known and defined entity, secreted in Aladdin's cave and revealed if one uses the right password'. He said no one believed in Aladdin anymore. We should frankly acknowledge, at long last, that the judges do make the law.

Lord Reid's 'fairytale' may be dead. But there is no rush by the judges of the common law, least of all in Australia, openly to acknowledge judicial law making or to work out the new requirements, judicial talents and court room procedures that may be appropriate to a realistic view of the role of the appeal judge. In the business of 'making the law', and developing it to meet new circumstances for modern conditions, questions of judicial temperament and personal philosophy inevitably play a part. Lord Denning has declared that judges, like generals, divide into 'bold spirits' and 'timorous souls'. Naturally, he sees himself as a 'bold spirit'. Those who are averse to the frank development of the common law, he condemns as 'timorous souls'.

THE 'GENIUS' OF OUR LAW

It used to be said that the 'genius' of our common law system was in its dual capacity:

* Stability, predictability and certainty were provided by the doctrine of precedent. The Judicial hierarchy would faithfully follow old legal principles, authoritatively laid down in earlier cases.
* adaptability, development, progress and modernisation were secured, under the guise of 'declaring the law' by a healthy innovative spirit: moulding, stretching and reworking old decisions to meet changing times and new social needs.

Since the advent of the elected Parliament representative, by universal suffrage, of the whole people, the judges of the common law have tended to be less bold. They are more self conscious in their development of the law. They are less ready to overrule long established legal principles, even when it is plain that these were developed for earlier times and different social conditions.

JUDICIAL LOCKJAW?

Symptoms of this judicial lockjaw may be seen in our own High Court. They may be read in the language of the High Court Justices, both in judgments and statements out of court.

Four recent cases in the High Court spring to mind.

* In 1979 it was held that a person convicted of a capital felony in N.S.W. (Darcy Dugan) could not sue in court for an alleged libel. He was 'attainted' or 'corrupted of the blood'. He had lost his civil rights to approach the courts. This rule, developed when such felons were invariably hanged would not be modified for today's society and modern perceptions of civil rights and prisoners' rights.

* In 1979 the Court refused to disturb the principle that owners of straying cattle and sheep adjoining the highway are under no duty to fence their property. A car driver of a fast moving vehicle on a motor highway near Adelaide was killed when she collided with straying sheep. The rule of law established originally in village England (where the fastest vehicle was the squire's trap) would not be disturbed for a nation of great distances, motor highways and the internal combustion engine.
* In 1979 it was held that a prisoner, McInnis, forced to defend himself in a rape trial, was not entitled to legal representation as of right. He was merely privileged to apply for legal aid. His barrister had dropped the case the afternoon before the trial when legal assistance was refused. McInnes was convicted. Most civilized countries insist on legal representation as the price of a fair trial in serious criminal cases. It was felt that this was not a requirement of Australian law and would not be made so.
* In 1980 the Court declined to extend the law as to the 'standing' of a party to challenge the operation of the Iwasaki tourist resort in Queensland. The Australian Conservation Foundation challenged the legality of the Reserve Bank and other approvals. Although deciding which litigants it will hear is very much the business of a court, it was held that the duties imposed under the relevant Federal legislation were owed to the whole community but were not enforcable by private individuals or groups. Two Justices pointed out that revision of the law of standing had been specifically referred to the Australian Law Reform Commission.

Through the refusals to develop and modernise the common law in the cases mentioned (and other cases) runs a common theme. It is expressed in the majority Judgments (Justice Murphy dissented in each of the above cases). It is that well established legal rules should not be unmade by unelected Judges; but only by Parliament. Chief Justice Barwick said it specifically:

> 'Where the law has been declared by a court of high authority, this Court, if it agrees that the declaration was correct when made, cannot alter the common law because the Court may think that changes in society make ... that declaration of the common law inappropriate to the times'.

Justice Mason conceded that there might be some cases in which an ultimate court of appeal (such as the High Court) 'can and should vary or modify what has been thought to be a settled rule or principle of the common law of the ground that it is ill adapted to modern conditions'. However, he thought those cases would be few because of the existence of an elected legislature and the limitations of the court as a law reforming machinery. The court is not able to conduct the intensive consultations possible in a Law Reform Commission. Under present procedures, it is limited to the parties before it.

THE CRISIS IN OUR INSTITUTIONS

Coinciding with the disinclination of the judges to develop and modernise the law, as their forebears did, are tremendous pressures for change in the law. Everywhere we are surrounded by bigger Government, transnational business corporations, a myriad of scientific and technological developments and rapidly changing moral convictions and social attitudes. According to another Reid, Professor Gordon Reid, the modern Australian Parliament is a 'weak and weakening institution'. The judges may turn over to the Parliament such issues as prisoners rights, fencing sheep, legal aid and standing. But all too often, Parliament pays no heed. There is no regular, routine machinery to catch the ear of Parliament and government. Law reform bodies are ill funded and under-manned. Pressures for change are enormous. The institutions of effecting change are puny.

The issue before us is whether our law making institutions can cope. Deprived of the second aspect of its 'genius', the common law system is leaving to others the minutiae once resolutely attended to by the judges. But others are frankly not interested. Or they are too busy, uncaring, distracted by political events or under the harassment of

recurring elections. Alvin Toffler, the author of 'Future Shock' has written another book called 'The Third Wave'. It has just been published in Australia. It asserts that the computerised, mass educated society is facing a crisis of its institutions. 'It isn't a matter of corrupt politicians or manipulations from companies', he declares. It is the 'structure of Government itself' which is incapable of keeping pace with the challenges of change today Toffler complains that no-one is addressing this basic and dangerous problem. The High Court of Australia, at the apex of the Australian judicial and legal system is not only the defender of the Constitution. Is also the crucible of the common law. For the health of our country's institutions and of the Rule of Law itself, all citizens of good will should hope that in its new permanent home, the court will prove itself alert to the unprecedented challenges of change in today's world, and the need to develop the law so that it can cope.