

THE UNIVERSITY OF SYDNEY

OPEN DAY, SATURDAY 26 JULY 1980

LORD DENNING LECTURE

LORD DENNING AND JUDICIAL IMPERIALISM

The Hon Mr Justice M D Kirby
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JUDICIAL IMPERIALISM

In an important address to the Australian Institute of Political Science in 1978, Professor Gordon Reid, the Pro-Vice Chancellor of the University of Western Australia diagnosed what he feared was a new disease of the body politic.¹ The bacillus he labelled 'judicial imperialism'. The symptoms included the increasing use being made of judges throughout Australia for what he saw as essentially the functions of the Executive Government. He listed, amongst other things, the appointment of judges to head Royal Commissions, Committees of Inquiry, the Commonwealth Grants Commission, Australian Security and Intelligence Organisation, the Commonwealth Legal Aid Commission, the Law Reform Commission, the Administrative Appeals Tribunal and so on. He might have added to the list the appointment of a judge as an ambassador² and the extensive use made, in some States of Australia at least, of judges in extra curial activities. In Professor Reid's opinion this practice is 'fraught with dangers for a fearlessly independent judiciary'. After mentioning the establishment of a number of new Federal Courts, Professor Reid went on:

And as if this was not radical enough, we also have new statutes providing for a network of Legal Aid Commissions throughout Australia, a newly created and active federal Law Reform Commission and legislation is now before the Parliament for a Human Rights Commission ... The Federal Judiciary has made obvious territorial gains in the developments just explained.³

Professor Reid acknowledged that many, including judges, regard a strict division of judicial functions, completely divorced from other important public and policy making functions, as unnecessarily fundamentalist adherence to the notion of Montesquieu's injunction that liberty requires a separation of legislative, executive and judicial powers of government. Although, in Australia, the formal separation of judicial activities from those of the executive and legislature is required by the Constitution⁴ and has led to some odd and inconvenient results.⁵ Neither in Britain or Australia has there ever been a complete separation of powers. In Australia, the Executive (the Cabinet) actually sits in the Legislature. Judges, as personae designatae perform Executive functions. In the celebrated case of Brown and Fitzpatrick, Parliament even conducted a trial of sorts.⁶ English speaking countries have a tendency to defy grand political theory. So it is with the separation of powers. In England, without a written constitution, which enshrines the separation of powers, there is even less steady adherence to Montesquieu's grand design. Lord Denning put it well:

At one time the theorists said that there should be a complete separation between the legislative, the executive and the judicial powers. That theory in England has never been carried to its logical extent. There is here no rigid separation between the legislative and the executive powers. The Ministers who exercise the executive powers also direct a great deal of the legislative power of Parliament, but they are subject to many checks. And one of the most important checks is the independence of the judges.⁷

Lord Denning might have gone on to mention that the highest judicial officer of England, the Lord Chancellor, and the other members of the highest court of that country sit in Parliament in the House of Lords. Indeed, the Lord Chancellor is a member of the Executive Government and thus spans, in his person, the three arms of Government: legislative, executive and judicial.

Professor Gordon Reid's warning about 'judicial imperialism' caused a deal of heart burning, not least amongst the judiciary itself. Articles were written in the learned journals⁸ evidencing the spectrum of opinions held on the subject: ranging from the conservative view that judges should do nothing but judge to the mildly activist view that the judiciary should cautiously accept a wider range of functions, relevant to the problems of today's society. A distinguished Australian judge, Mr Justice Brennan, balanced the risks involved in extending the role of judges beyond the traditional function, against the peril that the judiciary might, if it were to stand still, frozen in the tasks of earlier times, become irrelevant to the community it serves.

There are no absolute or universal rules ... The answers depend upon where the balance is struck between the necessity to draw upon judicial skills in non traditional ways, and the risk of thereby diminishing confidence. An undue timorousness in drawing upon judicial skills leads to the development of problem solving machinery that is less satisfactory than it should be and to a sense that the judiciary is unduly irrelevant to many issues of community concern. Too adventurous an approach requires the judges to expose themselves to an assessment - political or otherwise controversial - and to a consequent loss of confidence in the judiciary and in judicial institutions.⁹

Where the function proposed is significantly different from the traditional function, the risk can be justified, but can only be justified, by the urgency of the community's needs to use the judges' skills ... Caution is needed in moving into the non traditional area, measuring the risks by the yardstick of the traditional function and there will be some unwished for controversy on the way. But the risks must be run, or the institution of the judiciary may lose its relevance or, at the least, fall short of discharging fully the functions which the community would commit to it.¹⁰

Even within the traditional functions, the 'fairy tale' that judges do not make the law, dies hard. In the age of the elected Parliament and the responsible Executive, it offends the political theory of many, that the judiciary should be anything more than an automaton, blindly and faithfully searching out pre-existing rules and then applying them remorselessly to the facts as found. Sometimes this is an apt description of the judicial role. Indeed generally this is what judges do and will continue to do as the law they apply becomes overwhelmingly statute law, made by Parliament. But there is still an area for judicial creativity. It is an area which should be openly acknowledged, without shame, deception or hypocrisy. It is this area which has been an essential ingredient of the success of the common law of England: a legal system whose pragmatic qualities have assured its triumph in the laws governing more than a quarter of mankind. Most judges have great professional skills in the application of statute and precedent. Some few have great creative talent in the development of old precedents and in their expansion and application to new situations. Probably no living judge of the common law is more famous as an exponent of its creativity, than Lord Denning. Resolutely, he has set his face against abject subservience of the judiciary to other law makers. His philosophy, he once described in a judgment thus:

What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both.¹¹

This banner of Lord Denning's was raised as long ago as 1954. Defiantly, it has been hoisted many times since. Of late, critics have begun to suggest that Lord Denning shows symptoms of another form of 'judicial imperialism', namely the assertion of a too creative role for the judiciary in the courts. Editorials in the Times complain 'Lord Denning bowls too wide'.¹² Upset by a ruling that the media are not immune from the obligation to disclose their sources to the courts, the normally sober Observer complained under a headline 'Why Denning is an Ass'.¹³

Plainly Lord Denning is a charismatic figure of the law, the more outstanding because his profession has a long tradition of avoiding public controversy and notoriety. Who is this famous man? What lessons do his views have for law reform in Australia?

LORD DENNING THE MAN

Alfred Thompson Denning was born in 1899, the son of a draper in the village of Whitchurch, where he still lives. He was one of five brothers. One became a General, another rose to be an Admiral. Lord Denning began life as a teacher but later returned to Oxford and a pursuit of the law.

Two of his brothers were killed in the first World War. One, Jack, the eldest son, died leading his men at Flanders. The other, Gordon, a sailor, was killed in the Battle of Jutland, aged 19. In his latest book The Due Process of Law, Lord Denning finishes with a personal epilogue, written in a special style of English prose of which he is a modern master:

I remember the telegram coming. Mother opened it with trembling fingers. 'Deeply regret ... died of wounds'. She fainted to the floor. A few days later came a letter which was found in his valise after his death. Mother and father - poor dears - they were to lose another son before that war was over. ... Reg is now a General - retired. Norman is now an Admiral - retired. But Jack and Gordon - they were the best of us... The poppies slipped from my hand to the floor. Eyes filled with tears. It was the eve of Remembrance Day.¹⁴

Lord Denning himself fought at Picardy. 'Only there for the last none months. Too young to go before. I came through unhurt'.¹⁵ He won scholarships and First Class Degrees in Mathematics and Jurisprudence. In 1923 he was called to the Bar. He soon learned that the law and justice were not always the same thing. Cases came to him for opinion. In accordance with the binding authority of the highest courts, they required conclusions that struck him as unjust. 'The House of Lords had decided it. That was the end of the matter' he later wrote.

Cases of apparent injustice disturbed Denning. He was later to describe binding principles as 'false idols which disfigured the temple of the law'. In the fullness of his career, he was to come to a position where he could do something about it.

In 1944 he was appointed a judge. Accordingly he has served in judicial office for 36 years. He was elevated to the English Court of Appeal in 1948 and to the House of Lords in 1957. In 1962 a vacancy occurred in the position of Master of the Rolls, the presiding judge of the Court of Appeal. Denning took this position. There he remains to this day. At the age of 81, he shows no diminution in intellectual vigour. If anything, he shows an increasing reformist zeal. His appeals to the 'broad rule of justice itself' becomes, if anything, more frequent and more insistent.

For a judge to take this course under our system is unusual. For the presiding judge of England's second highest court to do so, and frequently to carry his colleagues with him is nothing short of remarkable. He has his critics. They are not confined to the clubs where gather the judges and lawyers, or the boardrooms of newspapers' offices in Whitehall or other places where disappointed or disaffected litigants collect. But no one in the common law world can ignore the extraordinary impact of the intellect of this splendid man.

STABILITY IN REFORM

Lord Denning illustrates the difficulty facing all law reformers whether judicial or otherwise. The law is a force for stability and predictability in society. People need to know what the law is so that they can live peacefully together without resort to violence or expensive litigation. But times change. The inventions of science and technology present challenges to the law which often speaks in the language of a previous time. Moral and social attitudes change rendering previously accepted values suspect or unpalatable. Well established principles which may have endured for centuries can lead to results that strike the modern judge as unjust but the law, nonetheless.

The original genius of the common law was the capacity to adapt rules to meet differing social conditions. The advent of the representative Parliament has tended to make judges, including appeal judges, reticent about inventing new principles of law or overturning decisions that have stood the test of time. 'We do not make heresy more attractive because it is dignified by the name of reform', declared Viscount Simonds, one of Lord Denning's critics. 'It is even possible that we are not wiser than our ancestors. It is for Parliament to determine whether there should be a change in the law and what the change should be'.

Denning suffers no tongue-tied inhibitions just because Parliament can change the law. The fact is that Parliaments, have generally showed little interest in the reform of wide areas of the law. Individual, small injustices may not amount to many votes or much public interest. Repeatedly in his thirty three years as a judge, Denning has expressed impatience with the notion that the judge's duty is blindly to follow precedents or, if there is none, to do nothing, leaving it to the legislators to act.

His views in 1954, I have already cited. More recently in October 1979 addressing the National Conference of the English Law Society he against took his stand for the judicial role in law making:

Law reform ... should not be left solely to the Law Commissions. There is a great movement today which says that judges should not do anything to reform the law, that they should treat their old cases as binding upon themselves and do nothing. I give you an example ... [in a recent case] I said there should be a radical reappraisal of our system of assessing damages for personal injuries and, in the House of Lords, Lord Scarman giving the one judgement said:

'Yes I agree with Lord Denning there ought to be a radical ~~was of~~ reappraisal.'

But he went on to say that we will not ^{do} it. We will leave it to other bodies. The ^{Commission} Law/can do all this and eventually report. How long will it take, will it ever take place? I would suggest that there is still a field for judge-made law in our land. Of course, I do not get my own way as a rule. ¹⁶

Certainly, an aspect of the original common law system was constant law reform: judges and lawmakers working together to mould principles to fit the new circumstances of the case before them. Such inventiveness is not now common, whether in England or in Australia. Lord Denning again:

Writing in the Times of 5 January 1977, Sir Leslie Scarman said: 'the past 25 years will not be forgotten in our legal history. They are the age of legal aid, law reform and Lord Denning'. I am gratified by the tribute but I feel that many of my endeavours have failed - at any rate so far. The strict constructionists still hold their fortress. The officious bystander still dominates the field. The Court of Appeal is still bound hand and foot. The powerful still abuse their powers without restraint. ¹⁷

This is not to say that Denning has not tried. Certainly, he has never been prepared to leave it to law reform commissions and bureaucrats to improve laws which in his view judges could perfectly well attend to. In one case, for example, he found that courts should imply into a tenancy agreement, which said nothing about the subject, an obligation upon the landlord to take care that lifts and staircases were reasonably fit for the use of tenants and their visitors.

I am confirmed in this view by the fact that the Law Commission in their codification of the law of landlord and tenant, recommend that some such terms should be implied by statute. But I do not think we need to wait for a statute. We are well able to imply it now in the same way as judges have implied terms for centuries. Some people seem to think that now there is a Law Commission, the judges should leave it to them to put right any defect and to make any new development. The judges must no longer play a constructive role. They must be automatons applying the existing rule. Just think what this means. The law must stand still until the Law Commission has reported and Parliament passed an Act on it; and, meanwhile, every litigant must have his case decided by the dead hand of the past. I decline to reduce the judges to such a sterile role so I hold here that there is clearly to be implied some such term as the Law Commission recommends¹⁸.

This passage gives the flavour and texture of this extraordinary judge's style. Short sentences. Pungent phrases. Headings in his judgments to guide the reader through his reasoning. Even his critics and enemies acknowledge his skill in handling the legal techniques and in presenting them in prose which is startling because of its contrast to the normal style in which judgments are written.

Of course not everybody approves his very special way of writing English. A confessedly 'carping' review of his 1979 book 'The Discipline of the Law' is rather severe:

The style is unmistakable. And unmemorable. Judicial staccato. Not a cadence in sight. I wonder if that is the unfortunate consequence of writing all those longhand notes in the early days on the Bench while those below waited for the pen to be laid down, for the 'ye-es', for the raised eyes.²⁰

To show that these matters are simply matters of taste, another reviewer of the same book asserts 'the book is intensely readable'.²¹ There is little doubt that elegant or not, it is a prose style which is powerful for its simplicity and directness. It is the pose style of an evangelist and propagandist: appellations which Lord Denning would not shun.

DENNING THE REFORMER

Needless to say Lord Denning's view of his role has frequently driven him into dissent from other more orthodox judges. Even where, in the Court of Appeal, he has carried the day, he has sometimes been reversed in the House of Lords in chilling language. One of his abiding concerns has been to reform the law of contract. He has waged a battle over a quarter of a century against the unfair exclusion of claims by written terms, sometimes disguised on the back of a ticket or form. But to his 1951 plea for the law to look at the reality of contracting relationships, the Lords answered menacingly. 'Phrases occur', said Lord Simon 'which give us some concern'. Lord Simonds added 'It is no doubt essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs. But I respectfully demur to saying that there has been or need be any change in the well known principles of construction of contracts'.

Undeterred, Denning has gone on to effect important changes in contract law, always guided by justice and commercial morality, as he saw it. But his enthusiasm has not been limited to contract cases. He has helped to dispose of the principle that a hospital was not liable for the negligence of its professional staff. He decided the first of many cases in which a deserted wife was held entitled to remain to the matrimonial home. In 1951 he wrote a famous dissenting judgment lamenting the calamitous exception from the law of negligence which relieved many, including professional advisors, from actions for damages for loss caused by negligent as distinct from fraudulent misrepresentations. He did not hesitate to dissent, although he was then but recently added to the Court of Appeal. The language he used was typical:

This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law. In each of these cases the judges were divided in opinion. On the one side there were timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.²²

Although in 1951 the progressive view did not prevail, in 1963 the House of Lords introduced a limited duty to care for persons who take upon themselves to supply information or advice to people whom they know will place reliance on it.²³ Denning's dissent of 1951 became the rule in 1963 and has now been substantially adopted in Australia.²⁴

In Australia in the recent past our High Court has demonstrated a most un-Denning like resistance to the notion that the courts should modernise old common law rules. Four cases come 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. Dugan v. Mirror Newspapers Ltd (1979) 22 ALR 439.
- . 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. State Government Insurance Com. v. Trigwell (1979) 25 ALR 67.
- . 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. McInnis v. The Queen (1979-80) 27 ALR 449. (1980) 54 ALJR 122.
- * 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 enforceable 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. Australian Conservation Foundation v. Commonwealth (1980) 28 ALR 257.

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.

DENNING AND HIS CRITICS

Lord Denning takes quite a different view. But a man who turns the law so often on its head is bound to attract criticism. In 1971 some thought he went too far when he held that decisions of the House of Lords not only did not bind the Lords themselves but might not bind the Court of Appeal. He could not abide a decision of the Lords which had abolished punitive damages. He saw it as having 'knocked down the common law as it had existed for centuries'. Taking two colleagues with him, he held that this rule of the Lords 'should not be followed because the common law of England on this subject so well settled before 1964 that it was not open to the House of Lords to overthrow it'.

It remained for Lord Chancellor Hailsham to deliver a sharp rebuke. 'It is necessary' said the Lord Chancellor, 'for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers'. But it is not only Denning's judicial and more conservative legal critics who express astonishment at his views. Some believe that Denning is excessively teleological in his approach. He is charged with thinking of the result he wants before he considers the legal reasoning on which it has to be founded. This process is all very well if there is agreement on the first principles that are guiding him. But should a judge, near to the apex of the legal system, be able to give vent to his personal value system, thereby disrupting settled principles and creating confusion and uncertainty in the law?

During the 1960s Denning took a leading part in the assault on Ministerial and Executive authority. He leapt to the defence of the little man taking on the bureaucracy. He appealed to the old Bill of Rights.²⁵ In January 1977 he took part in the decision by which the Court of Appeal granted an injunction on the application of a private citizen directed at a union which, contrary to law, had announced a ban on postal services to South Africa.²⁶ He rejected the claim that the Attorney-General's fiat was necessary to permit a private citizen to bring the case.

Every individual in the land has an interest in the channels of communication being kept open. The law shall be obeyed. Even by the powerful. Even by the Trade Unions. We sit here to carry out the law. To see that the law is obeyed. And that we will do. A subject cannot disregard the law with impunity. To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over three hundred years ago 'Be you never so high, the law is above you.'²⁷

Subsequently the House of Lords reversed this decision holding in effect that the courts could not question the long established rule that it was for the Attorney-General not the courts to decide whether such actions should be brought. This very question is now under study in the Law Reform commission in Australia. There are some who say that

Lord Denning's view though not perhaps good law, may yet be right in principle and become the law. Others assert that he is too concerned with the 'little man' and forgets that, in the modern state, the elected government represents the mass of 'little people' and is no longer the Crown exerting selfish overweening power.

Other critics point to Denning's concern to uphold valiantly Christian principles of morality and to impose them on all members of society. In one famous case, he denied relief to a young girl, Gillian Ward, who had been expelled from a Teachers' College after being found with a man in her room at night.

I do not think she has been treated unfairly or unjustly. She had broken the rules most flagrantly. I say nothing about her morals. She claims that they are her own affair. So be it . . . But instead of going into lodgings, she had this man with her, night after night. That is a fine example to set to others! And she is a girl training to be a teacher! She would never make a teacher. No parent would knowingly entrust their child to her care.²⁸

The same strong language came out in his well known report on the 'Profumo Affair' in 1963. He did not baulk at laying responsibility squarely on the Prime Minister and his colleagues. The report bears the mark of his moral outrage and its impact was the more electrifying because of this.

Those who do not complain about his 'blind spot' where matters of morality are involved, assert that he is just a conservative member of the English ruling class who reflects the attitudes of a Britain in which he grew up and which was then still a great Imperial power. Wherever an international element is involved in the case, it is said, Denning has always come down in favour of English law and English courts to the exclusion of applying foreign law to the parties' transactions, although recently he has faced realistically the 'incoming tide' of the law of Europe as it impacts the United Kingdom.

What most exasperates Lord Denning's critics is what is seen to be an idiosyncratic claim to plain talking morality:

Lord Denning uses history as if it were a box of goodies from which it is possible to extract all sorts of useful arguments. Whether they meant then what they can be interpreted as meaning now worries him not at all. He must know that the 19th Century was not like that. But if it were, so much the better for his analysis of what characterises the 20th. So let's pretend. For all his private searching in his books Lord Denning is the most unhistorical of reformers. . . . My view of where the line should be drawn between judicial power and Ministerial power will not necessarily be that of the next man. But it is likely that he and I

will agree that the line is political. I wish Lord Denning would. He plays not only the Ace of Trumps but all his 52 cards as if God had dealt them to him. There are other players who also have a view of justice, different though that view may be from Lord Denning's ...²⁹

According to this critic, Denning's value as an innovator cannot be denied. And when his sympathy is aroused he can be a most formidable champion.

But his view of justice is too personal, too idiosyncratic, too lacking in principle for greatness. He may instruct us as he claims to do, in the principles of the law. But the grasp of political principle, the insight into the nature of the change that society is currently undergoing, for these he shows he shows no special flair, no particular understanding.³⁰

The controversies that have surrounded Denning, the law reformer in the courts, persist into his 80th and 81st years. Not only have his views on the scope of the privilege of journalists given rise to comment. His observations in the jury vetting case³¹ also draw a dissenting voice from the Times editorialist. This was a case where Lord Denning sought to strike a blow for a cause he has long championed: a new approach to statutory interpretation. The editorialist cried caution:

What Lord Denning is trying to do is to import into the interpretation of statutory provisions the same degree of judicial creativity as is normally applied to developing the common law. The tradition of English law does not support that approach. It may be acceptable to introduce a qualifying element of equity into the harsh rules of statutory construction. [But] this would be, under his formula, for the majority of judges to determine a sensible result. That would be to usurp Parliament's function and give judges a power which the vast majority of them neither seek nor are capable of exercising.³²

The same editorialist two months later in May of this year returned to his theme in comments on Lord Denning's ruling about journalists' privilege:

Lord Denning, this time, is on the wrong side. ... What Lord Denning has done is to lay down a new test, based on whether a court thinks the journalist or his employer has acted properly and responsibly: 'If a newspaper should act irresponsibly, than it forfeits its claim to protect its sources of information'. That is neither a logical nor a necessary criterion. It would mean that a potential source, even one who revealed a relatively innocuous piece of information, would be at risk of having his identity divulged because his contact was adjudged to have acted irresponsibly. The courts are far from

being the best judges of what is responsible journalism. Their task should be to determine the balance of public interest, not to judge journalistic ethics. The Court of Appeal has done a disservice to the cause of press freedom.³³

To this very day, Lord Denning is followed by adulation and calumny, praise and blame and always controversy. Why should this be so? Because he is one of the chief proponents of the reformist role of the English judge. He suffers the approbation of those who agree with his decisions. He must endure the attack of those who do not. Each he accepts with equal fortitude.

DENNING AND PARLIAMENT

There are some judges of our tradition who, for fear of being accused of 'judicial imperialism', would not even venture to criticise a statutory provision which they felt, in a case coming before them, worked an injustice, though it had to be applied. An English Attorney-General told the House of Commons that 'it is a most important principle of our constitutional practice that judges do not comment on the policy of Parliament, but administer the law, good or bad as they find it'. 'It is a point of doctrine', he declared 'on which the independence of the judiciary rests'.³⁴

In 1950, Lord Denning cautioned against taking this view too far. He pointed out that the judges had often called attention to laws being in need of reform. He quoted Lord Justice Scrutton who, after wrestling with a very troublesome provision under the Rents Acts said that he was sorry that he could not order 'the costs to be paid by the draftsman of the Rent Restrictions Acts and the members of the Legislature who passed them and are responsible for the obscurity of the Acts'.³⁵ Obviously, Denning shared this view:

I do not myself see why responsible comments or suggestions on the way in which Acts work, intended only in the public interest should be regarded as an infringement of the sovereignty of Parliament. This applies not only in respect of law laid down by Judges or enactments of Parliament in ancient times, but also in respect of enactments in modern times, subject to the qualification that the Judges must never comment in disparaging terms on the policy of Parliament, for that would be to cast reflection upon the wisdom of Parliament and that would be inconsistent with the confidence and respect which should subsist between Parliament and the Judges. Just as members of Parliament must not cast reflections on the conduct of Judges, so Judges must not cast reflections on the conduct of Parliament. If everyone observes these rules, there will be no conflict.³⁶

In Australia many have been the cases where judges have called to notice particular provision. Yet these provisions have remained unreformed, sometimes for decades. Judges have complained about the lack of attention shown to their curial pronouncements about the defects and injustices in Parliament's legislation.³⁷ The special service which an experienced judge can perform in calling the need for reform to official notice was recently described by the Chief Justice of Australia, Sir Garfield Barwick, addressing a judicial conference in Sydney:

If the judicial function is concerned, as I would think it is, intensely concerned with the attainment of justice, it may not be enough that defects and inadequacies in the law which custom or the legislature has provided are seen and publicly observed upon, perhaps only in litigation inter partes. The pressing need for change is so often only disclosed by the circumstances of a particular case in the experience of the judge. That he should be alert to observe and identify that need is part of his pursuit of justice. Merely to call attention to the deficiencies in the course of delivered judgment may be felt to be insufficient. What is the desirable course for the judge who has perceived the need for ameliorating change? May it not be that some means or formalised apparatus should be available to the initiative of the judiciary whereby the legislature can directly be apprised of the observed defects and inadequacies of the substantive law or of the procedural law and perhaps the executive be furnished by the judge with ideas as to the likely ways of its amendment.³⁸

The Australian Law Reform Commission in its successive Annual Reports has called attention to the need for a centralised collection of judicial, academic, parliamentary and citizen suggestions for reform of the law. A Ministerial statement tabled in Parliament by Senator Durack the Commonwealth Attorney-General has given initial approval to this project.³⁹ In the first instance it will be limited to Commonwealth and Territory legal concerns though it may in due course be extended to the States. The first report will be contained in the 1980 Annual Report of the Law Reform Commission. We hope that succeeding annual reports can collect suggestions and bring them effectively to the notice of the lawmakers. With a growing perception of the utility of suggesting improvements to the law, it may be hoped that more will feel a responsibility to take a part in this important function. I feel sure that Lord Denning would embrace with enthusiasm this bold and novel idea; whilst not abandoning for a moment his claim (where appropriate) not to trouble Parliament with the suggestion: but to set to, and reform the law himself.

THE WAY OF THE ICONOCLAST

Whether lawyers are scandalised by Denning or admire his persistence, courage and reforming zeal, he is not a man who can be ignored. Even today, at 81, he continues to have an influence on the life of the common law. We live in a time of change and people expect judges to meet the challenges of change. Leaving every reform to Parliament will simply not do. Denning reminds us of the original genius of the common law: adapting the law's reasonable predictability and certainly to the new times.

'What then is the way of an iconoclast?' he once asked an Oxford audience. 'It is the way of one who is not content to accept cherished beliefs simply because they have been long accepted. If he finds that they are not suited to the times or that they work injustice, he will see whether there is not some competing principle which can be applied in the case in hand. He will search the old cases, and the writers old and new, until he finds it. Only in this way can the law be saved from stagnation and decay'.

Reformer or Mischief-maker? Revolutionary judge or maverick? Iconoclast or harsh moralist? One thing is certain, Lord Denning is a towering figure of the common law today. His passion for justice and reform has lessons for us all.

FOOTNOTES

1. See G. Reid 'The Changing Political Framework', now published in Quadrant (January/February 1980) 5. See also (1978) Reform 23; [1979] Reform 16 and [1980] Reform 45.
2. This is a reference to His Excellency the Hon Mr Justice R.E. Fox, Ambassador-At-Large for Nuclear Affairs.
3. Reid, *id.*
4. R. v. Kirby; ex parte Boiler Makers' Society of Australia (1956) 94 CLR 254.
5. See C. Howard, 'Australian Federal Constitutional Law' (2nd ed.) 1972, 135ff.
6. R. v. Richards; ex parte Fitzpatrick and Browne (1955) 92 CLR 157.
7. Lord Justice Denning, 'The Independence of the Judges' in D.W. Harvey (ed.), 'The Lawyer and Justice' (Holdsworth Lecture 1950) 53, 58.
8. F.X. Connor, 'The Use of Judges in Non-Judicial Roles' (1978) 52 ALJ 482; Sir Murray McInerney, 'The Appointment of Judges to Commissions of Inquiry and Other Extra-judicial Activities' (1978) 52 ALJ 540 and F.G. Brennan, 'Limits on the Use of Judges' (1978) 9 Fed. Law Rev. 1. See also [1979] Reform 17.
9. Brennan, 3.
10. Brennan, 14.
11. Lord Justice Denning in Parker v. Parker [1954] P.15, 22.
12. The Times (London) 3 March 1980.
13. As reported in Newsweek, 26 May 1980, 23.
14. Lord Denning, The Due Process of Law, (1980) 250-1.
15. *ibid*, 249.
16. Lord Denning, Address to the Law Society's National Conference, Jersey, October 1979, (1979) 76 Guardian Gazette, 1057.

17. Lord Denning, The Discipline of Law, 1979, 315.
18. Liverpool City Council v. Irwin [1976] 1 QB 319 at 332.
20. J.A.G. Griffith, Book Review ('The Discipline of the Law') in (1979) 42 Mod. L. Rev. 348.
21. C.H. Gage, Book Review, (1980) 39 Cambridge LJ 194. See also review by T. Harper (1979) 129 New LJ 83.
22. Candler v. Crane, Christmas & Co. [1951] 2 KB 164 at 178.
23. Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465.
24. Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt [1971] AC 793.
25. Attorney-General v. Independent Broadcasting Authority [1973] QB 629.
26. Gouriet v. Union of Post Office Workers [1977] 2 WLR 310.
27. id., at 317.
28. Ward v. Bradford Corporation (1972) 70 LGR 27.
29. Griffith, 349.
30. ibid., 350.
31. R. v. Sheffield Crown Court; ex parte Brownlow, unreported, Times Law Reports, 3 March 1980.
32. The Times (London) 3 March 1980.
33. The Times (London) 8 May 1980.
34. Cited by Lord Denning in his Holdsworth Lecture, 63.
35. ibid., 66.
36. id., 66.

37. Mr Justice Fox (1974) 48 ALJ 416. See also (1948) 64 LQR 171 and the Australian Law Reform Commission, Annual Report 1976 (ALRC 5) 33.
38. Sir Garfield Barwick, Speech to the Opening of the Second Conference of Appellate Judges, Sydney, May 1980 reported in [1980] Reform 76.
39. P.D. Durack, Ministerial statement Commonwealth Parliament Debates (Senate) 15 May 1980 2295.