THE LAW HAS LONG EARS

BY P.H.N. OPAS, OBE, QC

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

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We live in an age when the law journals are turning for authority to the experiences and utterances of fictional barristers. Audiences of millions in the English-speaking countries and beyond have followed with fascination the imaginary adventures of Horace Rumpole. Now his doings are being cited in the law books.[1]

Rumpole and 'She Who Must be Obeyed' are the creatures of the mind of an English Silk, John Mortimer. This little book collects a miscellany of anecdotes, vignettes and personal reflections of a Melbourne Silk whose life and times have already been chronicled in Patrick Tennison's 'Defence Counsel'.[2] The book ranges widely. Certainly it is no dull legal text. Readers will come away with the mixture of admiration, infuriation and bemusement which is the inevitable product of acquaintance with any legal system that traces its roots as ours does to the Common Law of England.

There is a good deal of fascinating legal history in these pages. For example, the first chapter recounts how the black robes worn in the four corners of the world by barristers of our tradition were first donned in December 1684 in mourning for the death of Queen Mary. They replaced robes of scarlet, minever and green. No-one ever got round to returning to the old garments.

Between these pages are the tales of the triumphs and defeats of the author's predecessors over 800 years during which the traditions of the courts and of the Bar have been nurtured. From the case of the Admiral's court which had to be reminded that, like Neptune, its powers are limited to the sea[3] to the ancient trials by combat out of which grew the modern jury, from the strange case of 'Queen Emma' of the Mortlock Island off New Guinea to the attempts to deport the ill-starred Dr. Soblen[4]; from the Shark Arm Murder to the case which involves a Russian Princess and the 'malicious and lustful satyr' Rasputin[5]; from the triumph of Edward Carson KC in the Archer Shee inquiry to the sad end of Ronald Ryan on a hangman's noose, this book traverses the ups and downs of the law. It gives a notion of its infinite variety and of the robust band who make up its practitioners and Judges.

Amongst the works rescued from oblivion here is the 'Epistle Dedicatory' by which Sir Bulstrode Whitlocke, Knight, one of the Lords Commissioners of His Highnesse Treasury, prefaced the reports of Edward Bulstrode. Sir Bulstrode asserted that desires for knowledge were fivefold: for curiosity, for vanity, to self profit, to instruct others and to build on it and establish truth. Of only the last two was the good Lord Commissioner prepared to concede any commendable value. Although this book contains little to pander to the second motivation, there is much in it that will contribute to the others.

Sir Bulstrode wrote in 1657 and here we are in 1981; in an age of the microchip, of organ transplants, of nuclear technology. Yet the continuity of the legal system which we share with others, and which is portrayed in this book, remains and through all its foibles, there is much to admire. Whether it is the good sense of the criminal jury which in Melbourne acquitted the rebels of Eureka, whose trials are recounted here; the wit and elegant style of Sir Robert Megarry, now Vice-Chancellor, recounting the matrimonial and testamentary problems of Errol Flynn or the numerous examples of the vigorous reproach by the independent Judicial arm of Government against the oppression of authorities, illustrated in these pages, one cannot but read this book, for all its critical passages, without the realisation of the strengths as well as of the weaknesses of our system.

Sir Owen Dixon, a past Chief Justice of Australia, once said that it was vital, in approaching the task of law reform, thoroughly to understand legal history. Although this book is written for the general reader and does not set out to be a text either of legal history or law reform, its contents illustrate Sir Owen Dixon's remark. Out of an understanding of what has gone before and what is, we can perceive the needs for reform. Change not for its own sake, change for the better.

There is hardly a chapter in this book which does not raise questions of law reform of current debate in the Australian legal community. The first chapter, dealing with the court dress of the legal profession, calls to mind the present inquiry of the New South Wales Law Reform Commission into the organisation, discipline and functions of lawyers of that State. Though legal dress is one of the least pressing of the problems of reform of the profession, there are some who see the persistence of anachronistic apparel as a symbol of adherence to other more important outmoded ways.

The discussion of common law precedent in the second chapter raises the whole question of the extent to which Judges today should make laws when cases before them disclose the unsuitability of an old precedent. In Australia, a series of cases in the High Court has lately exposed this controversy to public view and discussion.[6] Lord Denning, in the English Court of Appeal, is cited as an innovator; and that he surely is. But for every lawyer who admires his actions and style, there is another who is exasperated by him. One recently declared that Lord Denning 'plays not only the ace of trumps, but all his 52 cards as if God had dealt them to him'.[7] As this book will disclose, Lord Denning would not be the first Judge of our tradition who believed in divine inspiration.

The third chapter, on Jury Trial, comes at a time when this method of resolution of civil trials is on the wane in most parts of Australia. Even in criminal trials, the jury is now questioned. The Chief Commissioner of the Victoria Police recently declared that it was 'about time' we investigated what goes on behind the closed doors of the jury room.[8] The chapter on Conquerers, the Conquered and the Under-privileged calls to attention the inquiry committed by the Federal Attorney-General to the Australian Law Reform Commission to advise on whether the tribal laws of Aboriginal people in Australia should in some way be recognised: either in the general courts or in special courts. The cases of Tuckier and Stuart referred to have modern parallels, leading to proposals that a new legal compact should be struck with the indigenous people of the Australian continent.[9] In the chapter on Refugees and Fugitives comes the interesting vignette of the way in which the Privy Council and Sir Stafford Cripps almost certainly rescued Ho Chi Minh from extradition to French Indo-China and a rebel's death. This is but one of the many instances of a legal case changing the course of history. Had the rebels of Eureka been convicted by the Melbourne juries who tried them for treason, and had they been 'hanged, drawn and quartered' or even simply hanged, one can readily speculate that the constitutional history of Australia might have taken quite a different turn.

In the chapter on the Under-privileged, there is mention of the dangers of relying on confessions to police. These dangers have been referred to in reports of one inquiry after another. Judicial and other suggestions that confessions to police should be tape recorded or otherwise verified may at last be followed in Australia.[10] One of the most significant law reforms of recent years in Australia is illustrated in the chapter 'Is There a Proctor in the House?' The Family Law Act has revolutionised the laws and procedures of our divorce courts. But the process of reform continues. But there are few lawyers who were ever involved in the old law of adultery, snoops and raids, described in this book, who would wish to go back to the old ways.

The chapter on the Archer Shee case illustrates a major problem of our century: the difficulties in which the individual finds himself when authority goes wrong. In that case a brilliant and courageous barrister, Edward Carson KC, fought on as a matter of principle and vindicated his young client. A more routine method of dealing with such problems must be found. Hence the development in Australia of the Ombudsmen, of the Administrative Appeals Tribunal and of other reforms of administration designed to make the impersonal state more answerable and responsive to the individual. This process of reform is also continuing. Freedom of information laws, privacy laws and other improvements are needed and can be expected.

The chapter on Capital Punishment and Sentencing deals with the perennial problems of the punishment of those who offend against society's criminal laws. The author was the barrister who represented Ronald Ryan: the last prisoner hanged in Australia. He was galvanised into a dedicated opposition to capital punishment by what he went through in that case. His passion and commitment are clear. The problem of finding alternative punishments which are effective remains. It too is a problem that has been given to the Australian Law Reform Commission[11] and to other bodies in Australia and overseas: dedicated to the discovery of ways to make criminal punishment more uniform, consistent, effective and humane.

The last chapter looks, fittingly enough, to the future: new means of bringing cases to court. Arbitration and class actions are but two instances cited. The problems of each are measured. There is a due sprinkling of anecdotes and the voice of the author's common sense: born of many years of representing ordinary folk in the resolution of their problems.

Despite a lifetime in the law, Philip Opas retains a healthy critical spirit. Yet he has an obvious affection for the law and its ways. There is on occasional irreverence in these pages, as when the author suggests that 'Judges are generally regarded as a bunch of old fogies'. Naturally I question this particular judgment. But if I can turn to the 'Epistle Dedicatory' written by Sir Bulstrode Whitlocke in 1657, I would judge that in putting together these pieces, Philip Opas has 'worthily and wisely imploy[ed his] labours and industry in the augmentation and propagation of those things which are for the good of the common-wealth'. It can only be for the good of the Commonwealth that its people get to know more about the law and lawyers: warts and all.

SYDNEY
28 January 1981

M.D. KIRBY

FOOTNOTES

1. See (1980) 130 New Law Journal 895.

2. Melbourne, 1975.

3. Lord Chief Justice Coke, in Don Degoe (Spanish Ambassador) v. Buntish and Points, cited in Chapter 2, 1657 Edward Bulstrode Reports, Part II, 322.

4. R v. Brixton Prison (Governor); ex parte Soblen [1963] 2 QB 243.

5. Youssoupoff v. Metro-Goldwyn Mayer (1934) 1 TLR 581.

6. See for example Dugan v. Mirror Newspapers (1979) 53 ALJR 166; Australian Conservation Foundation v. The Commonwealth (1980) 54 ALJR 176; Commissioner of Taxation (Cwlth) v. Westraders Pty. Ltd. (1980) 54 ALJR 460; The Queen v. O'Connor (1980) 54 ALJR 349; State Government Insurance v. Trigwell (1979) 26 ALR 67.

7. J.A.G. Griffith, (1979) 42 Modern Law Review 348.

8. The Age, 5 November 1980.

9. Australian Law Reform Commission, Discussion Paper No. 17, Aboriginal Customary Laws - Recognition? 1980.

10. ibid, Criminal Investigation (Report No. 2 - Interim), 1975 and Criminal Investigation Bill 1977 (Cwlth).

11. ibid, Sentencing of Federal Offenders (Report No. 15), 1980.