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EDITORS' NOTE

The concluding part of Dr. Tay's article "Law in Communist China" was to have been published in this issue of the *Sydney Law Review*. In view of the many basic changes currently occurring in the P.R.C., Dr. Tay has decided not to write the conclusion to her series at this stage.

COMMENT

RENEWING THE LAW

THE HONOURABLE SIR JOHN KERR

I was much attracted by the heading of an editorial in the "Sydney Morning Herald" of 1st July, 1974. The usual description of what I want to discuss is simply "law reform" but the phrase "renewing the law" used in the editorial heading has more life to it, more zest. I adopt it as my title for this reason in place of the more familiar but less arresting phrase. Everyone believes in law reform but how do you get it done? How do you get a full, stimulating programme of law reform under way with momentum and real prospects of adoption? How, in other words, do you actually manage to renew the law—make it in real terms new, relevant and modern over a wide range of different legal fields?

I am accepting this task of preparing something for the Sydney Law Review as an opportunity to make some personal observations about law reform and my attitude to it. It has been convenient for me to put together what I have to say during that short period after leaving the Chief Justiceship and before going to other duties—a short period when, as the holder of no office, I may perhaps produce some random thoughts on law reform and reflect upon my recent attitudes to that important question and upon what is needed for a real movement for renewal of the law. This will accordingly not be in any sense an academic or disciplined treatment of the subject.

Everyone starts by referring to the vast and rapid changes occurring in society in technological, economic, social, environmental, demographic and other aspects of life. Many assume and say that what has already happened along these lines and what is predictably going to happen in the next short period of time makes new and urgent attacks upon the task of law reform—legal renewal—urgent and of great importance. We believe in law reform. Countries are all getting law reform commissions. New South Wales has one.

But how much actual law reform, how much legal renewal is really taking place, compared with the enormous untouched areas of the law? And how speedily is it all happening?

It is obvious enough that there are great problems of men, money and detailed research to be tackled and solved. Resources are necessary and the overall task is a very difficult one if it is to be properly done. I shall come back to this later. One cannot help but feel, however, that although a lot of words have been spoken and written on the subject, and some men and money found and research done, the real drive behind law reform, the real devoted energy applied to it by leaders is not great enough and that leaders will have to develop a real compelling and driving belief in legal renewal before a great deal can be done. I speak of professional, judicial, political, academic and departmental leaders as well as other leaders of interested groups. Many of us have proclaimed a devoted attachment to law reform and have spoken about it but have done too little to help create a real ideology, a real compelling belief in the idea of legal renewal, a real conviction spreading throughout the leadership in society, a genuine and widespread climate of opinion, through the ranks of society. The existence of such a climate of opinion would produce and ensure continuous action.

I realise that such an ideology, such a climate of opinion, is hardly likely to develop with sufficient enthusiasm merely as an élitist exercise of leaders unless there is a widespread acceptance that change is creating problems of such an order and extent that the law is standing as an obstacle or series of obstacles in its way. When society is changing rapidly, there will always be those who seek to resist the change by appealing to old values, including the established values of the law and the legal system, and those who are willing to sweep away the valuable as well as the anachronistic. Economic and other forces operate to require legal renewal but inertia and an uncritical conservatism stand in the way of ready adjustment. The striking of a proper balance between legal change and renewal, to meet and match the other processes of change, and the preservation of traditional values, is a difficult task. The role of a movement for legal change, articulate and informed by the old values whilst ready to respond to the demands of change could be very important in helping to ensure that the balance is struck in a realistic way which is acceptable to those who wish to conserve the best in our legal traditions.

Recently in England I read in the London "Times" of 13th June, 1974, two articles, one a review of a report by "Justice"—"Going to Law—a Critique of English Civil Procedure"—and one an account of a debate the previous day in the House of Lords on Prison Reform. I was impressed, as I always am, by the thorough and imaginative work done in the United Kingdom in this field of law reform. Having recently read and thought about the report and the Hansard of the debate, I was led in my farewell address in the Banco Court to say:—

> I have been here only two years, and I have mentioned that those two years are the last two of the first 150 years of this Court's story. Having experienced those two years, I myself feel, not because of my occupancy of the office of Chief Justice but because of the forces at work in society, that these last couple of years may be seen to be something of a watershed in the story of the Court when history delivers its judgments. This has made it a very great privilege to be here at this time. I have often said that they are times of very great change, and though it is true that I shall have occupied the office of Chief Justice for the shortest time of any of the Chief Justices who have worked here in this office, it has been a time

during which much has been happening both here and in society—things which have set in process changes which will be accelerated as the years pass.

I shall not attempt to summarise my views and opinions about the times now unfolding and their impact upon this Court and upon the judicial branch of government. Those views and opinions are well known enough, I think, to most people here. To those who are interested in the details they can be seen in my four term reports to the judges and in some occasional papers and addresses I have prepared during the last couple of years.

Perhaps, however, I may be permitted one or two generalisations. I see the years immediately ahead as years of great change in society—years of great pressure on the Court and upon the court system, years of large population growth, increasing legal aid, increasing demand for a legal social service to protect and ensure the enforcement of the rights, including the rights to advice and representation of all citizens with problems at law. The courts will have to respond, as will governments, to the ferment of change which is now entirely predictable. During my period here I have endeavoured to assist this Court to prepare itself and the judicial branch to prepare itself to play their proper roles in the period ahead and to provide proper and relevant advice to government about the problems of the court and the legal system.

I have given a lot of thought to the relationship between conservatism and the law reforms demanded by change. I say 'conservatism' because the legal profession and the courts are conservative, not necessarily in a political sense but in the sense of having a deep desire to preserve and conserve the judicial and legal institutions which have served democracy so well. As our recent anniversary celebrations reminded us, we have inherited our system from England. One thing we must always remember is that in the United Kingdom, whose courts and judges are equally or more conservative in this sense in which I am using the word, the government and the legal profession including the judges constantly keep their legal system, their courts and other legal institutions and the law under review. They have many difficulties, of course, as we have. But changes originate there which are designed to conserve the essential value and real foundation of their law and legal institutions, by gradually adapting them to changed circumstances. There is, I think, much more creative work of conservation done in the United Kingdom than is done here. Indeed, we are still in a sense imitative of them and follow in their footsteps as they make their law reforms and their changes, though of course we too have already begun to do things of significance on our own initiative. Nevertheless, we do avail ourselves constantly of what is done there. But to conserve our system here, a system needing adaptation in a society gradually diverging in many ways from its English counterpart, we must be creative here—creative but determined to preserve the essential qualities of our system.

That form of conservatism which resists all change in legal or judicial matters can be an enemy of what I call true conservatism, especially in times of rapid social change, by ensuring the continuance of increasingly irrelevant features of the system. We must have important legal changes, active law reform, procedural reform and other reforms designed not to abandon or fundamentally alter the system but to preserve it in this modern setting, to prevent it from becoming moribund in the cause of uncritical and non-creative resistance to change of any really significant kind.

The phrase "creative conservatism" used in this address was in a sense a tactical one. It appears to be more and more necessary for there to be a genuine ideology of law reform not only for the profession but for government. A system of beliefs is necessary which will justify, rationalise and give impetus to a movement for legal renewal and this was a small, not very significant, attempt to build for this purpose upon established beliefs and habits. There was nothing very original about it.

If we look back over the period of 150 years during which the Supreme Court has carried on its work and direct our attention to what has happened in society and in the law, to the changed nature of law and life in Australia over that period, we can immediately see that the law has accommodated itself gradually to the more complex world which has evolved. There is a temptation to think that the body of law which has come into existence in all its complexity, and often obscurity, over this period of time, must have been, by and large, suitable to our needs and though it may need to be touched up here and there, to have obscurities removed and to have attention given to some special problems, it is tested by time and experience and is going to be substantially speaking good enough without fundamental reshaping for the next 50 or so years as it has come to be over the previous 150 years.

This misses the point of the very great rapidity and dimension of change in our society. We should not take it for granted that our law and legal system, proud as we have been of them, have stood the test of time and need only a little patching here and there. What is really needed is a basic review of the wide area of the law—a review which does not start by assuming that everything is probably satisfactory enough.

The whole business of attitudes to law reform has to cease being more or less a matter of paying lip service to a fashionable notion whilst not actively believing in it. I find myself adopting this approach because, as I reflect upon my own attitudes over the past two years, and indeed during my professional and judicial life, I feel that I have rested more or less satisfied with the existing state of affairs though here and there helping to achieve minor changes. Only recently have I adopted an attitude of real concern as to our readiness to meet the rapidly unfolding future. In the law and in relation to all its institutions there seems to be an inertia gripping all concerned. We make gestures about change but achieve little. We know that we ought to plan, to foresee, to get ready to cope with predictable future problems but, by and large, we do not.

It is in this mood that, if I may do so in this rather personal statement, I call upon another piece of very recent newspaper reading. In an article in the issue of "The National Times" of July 1-6, 1974, which I was reading whilst thinking about what to say in these reflections, a most interesting observation was made by Professor Encel. The article was headlined "Governments; they look into the future, eyes on past disasters". I do not know whether this heading was Professor Encel's or not.

It is not the heading that matters. In the course of the article a reference was made to the views of Donald Schon who visited Australia early this year to address the Annual Summer School of the Australian Institute of Political Science. Professor Encel referred to some remarks of Schon's—penetrating observations, he calls them—in his B.B.C. Reith lectures: "Beyond the Stable State". I quote now from Professor Encel's article:—

> Government and society, he (Schon) remarks, are characterised by the built-in incapacity to recognise the need for innovation, and a consequent reluctance to contemplate changes in established institutions. Consequently

> society is tending to become a cluster of threatened institutions caught in the grip of an unstable world whose instability is poorly understood. The structure of government is a series of memorials to old problems and our organisational map is 'perfectly mismatched to the problems that we think are worth solving.'

This passage caught my eye and suited the mood in which I found myself. Schon is, of course, talking about governments and societies in general at this time, and not about any particular government or society, and especially not about any particular political party or philosophy. His lectures were delivered in the United Kingdom.

Although I had started with the belief that the British were rather better at law reform than we are, what Encel had to say reminded me how vast their problem is and how much innovation and renewal their legal system probably needs by comparison with what it is getting—however good the latter may be in the small areas upon which it touches.

The "built-in incapacity to recognise the need for innovation", the "consequent reluctance to contemplate changes in established institutions" seems to be particularly relevant to the institutions of the law and ineed to the law itself.

Schon's proposition about the structure of government being a series of memorials to old problems appears to be directly applicable to the judicial branch of government, changes in which are sorely needed. I say something about this later but should immediately mention that the memorials to old problems in the judicial branch, though themselves very old indeed may, if we may be optimistic for a moment, be about to be demolished and new memorials built to present and future problems. This possible break through and other law reform achievements already made, nevertheless leave the Schon theory still more or less intact and with much room to operate. So far as law reform in general is concerned, there seems to be a built-in incapacity all around to recognise the need for innovation and a reluctance to contemplate changes in established institutions. I hope that somehow we shall manage to get out of the grip of these principles of Schon and that the law and the legal profession will not finish up as threatened institutions in the grip of an unstable world.

In an article in the "New Statesman" of 21st June—another journalistic source of inspiration for these thoughts—Paul Johnson was writing on "The Road to 1984". In the course of doing so he discussed the great problem of the growth of violence in society and what should be done about terrorism and similar examples of violence. It is not necessary here to mention and certainly not necessary to agree with his precise suggestions on how to handle this terrible problem but in the course of his argument he said:—

> The successful use of violence has increased, is increasing, and ought to be diminished; . . . I do not think that we can even contain, let alone reverse the steady drift to anarchy, within our existing legal framework. And, to quote Bacon . . . 'He that will not apply new remedies must expect new evils; for time is the greatest innovator.'

I quote this because it reminds us that law reform is not only a matter of response to rational and acceptable changes in society produced by technological, economic and other forces but also of response to irrational and terrible changes such as the growth of violence. Legal renewal involves both kinds of response. But of course my main reason for doing so is to use the quotation from Bacon and to put it alongside what Schon has said. It adds something to Schon by reminding us that we cannot really avoid innovation

because if we do not consciously innovate—"apply new remedies"—we shall nevertheless get innovation—"new evils". Even as long ago as Bacon's time when change came more slowly, it could be seen that "time is the greatest innovator". If we are to prevent time from producing new evils we must be willing to apply new remedies. To put it Schon's way, if we do not, society will become a cluster of threatened institutions caught in the grip of an unstable world. Schon is pessimistic about society's capacity to recognise the need for innovation. Bacon, who sees that we shall get it one way or another, seems to hold out a little hope that it is possible for us "to apply new remedies".

The Law Reform Commission in New South Wales has worked very hard, has prepared a number of working papers and has some important achievements to its credit. Since its inception its Chairman has been a Supreme Court Judge and its members and staff have done well within the limits of their brief. Nothing I say in this paper is meant to operate as a criticism of the Commission but rather as an attempt to get others to support the Commission with enthusiasm, to widen its brief and to give serious thought to its work. It operates, of course, only in limited and specified areas of the law. Nor do I mean to criticise governments and political parties which reflect society's interest in law reform. What has been done is a beginning, but inevitable changes in society will show that it is not enough and we shall be faced—indeed, are being faced—by the need to tolerate innovation and changes in established institutions or pay a price of the kind referred to by Bacon and Schon.

I have re-examined my own activities in law reform to see how they stand the test of genuine active interest as opposed to speech making and lip service to a fashionable idea. There were three areas directly concerning the courts which especially occupied my mind during my Chief Justiceship—one had to do with the structure of the judicial branch, the second with the reform of procedure in the courts and the third with reform of penal policy.

As to the first, a matter upon which I have already touched, I delivered an address to the Royal Institute of Public Administration, New South Wales Branch, on 7th March, 1974, under the title "The Modern Task of Judicial Administration in New South Wales". This was, I think, a crusading kind of address—so far as a Chief Justice can permit himself to be a crusader. I hope it has had an effect in helping to persuade all concerned that there should be a real, energetic attack upon the structure of the court hierarchy with a view to its reform and a tearing down of its memorials to old problems. It is not possible here to restate the arguments.

The Government has already announced an intention to rearrange the relations between the Supreme Court and the District Court, but it doubtless recognises that the problem is a far bigger one than this. It requires careful study in order to evolve recommendations for a renewed court system suitable for the rest of this pressing century. There is, as I understand the position, some reason to hope that such an urgent and important study may be undertaken. We may be able to get our own New South Wales version of the United Kingdom Beeching Report—indeed a more fundamental set of recommendations than emerged in that most constructive document. In this area of law reform, then, I am happy that we did tackle the matter of the structure of the judicial branch in a practical and constructive way and may produce action which will make possible a real renewal of the court system.

As to the second matter of procedure in the courts, I am by no means so happy about our achievements so far. This is a field requiring enormous effort. All I can say is that I have fully supported the New South Wales Law

Reform Commission which has a term of reference to permit it to make recommendations as to procedural reforms. The Honourable Mr. Justice C. L. D. Meares, who is Chairman of the N.S.W. Law Reform Commission, and his Commission are most enthusiastically engaged in an attack upon this problem. Clearly enough, all concerned have got to get into this task of dealing with the procedural monuments of the past. Drift and acquiescence in long-standing, indeed age-old, procedural techniques and practices must go. This is a matter in which I did not get sufficiently involved, as I realise after reading the "Justice" report. It is in capable and enthusiastic hands. I commend the "Justice" report to those working on procedural reform and hope that they will be able to produce long needed innovations.

As to the third area of my special interest—penal reform—I have done my best to adopt a liberal approach to penal policy, so far as this lies within the province of a judge, as the judgments in *R.* v. *Portolesi*[1] and *R.* v. *Sloane*[2] show. Whether these judgments be right or wrong only time will tell, but they are certainly in line with the general philosophy of the House of Lords debate to which I earlier referred. It is not so much that we have in the past shown a built-in incapacity to recognise the need for innovation in penal policy. The need has certainly been seen and important reforms have been made but the forces opposed to change and the strength of older theories of punishment produce a continual struggle between old and new in penal theory and the battle to demolish old memorials to old problems has to be waged strongly.

As to law reform generally, I have recently reviewed what I said, early in my Chief Justiceship, in an address which I gave to The Local Government Clerks of New South Wales on 7th September, 1972. It then seemed to me that the demand for law reform must remain unsatisfied unless the instruments for its achievements are at hand, to be used and directed by policy makers. My emphasis was upon an examination of the mechanical side of the problem, the adequacy of the technique of resorting to a Law Reform Commission.

There undoubtedly should be a Law Reform Commission in a society such as ours. This is now widely accepted. It needs resources to do the job that needs to be done. This has already been mentioned. It must be composed of and staffed by good lawyers. Such an institution is not needed to decide whether such laws as those on homosexuality or abortion should be changed. These are social and political questions and, when the policy is settled, parliamentary draftsmen can put the law in proper form. A Law Reform Commission is necessary to look at the complex body of the existing general law for the purpose of recommending changes to it where they are necessary to meet modern needs or to remove obscurity. This extensive and necessary task cannot in these days be done by Parliament, nor by the ordinary departments of State, nor by the courts. What is needed has been characterised as a kind of fourth branch of government, with the whole range of the law to examine and with the task of proposing alterations to it. It should not have the power actually to change the law, which should remain with Parliament and hence, substantially with the Government. This is the classic doctrine.

But it is possible to set up a Law Reform Commission and to give it real resources to undertake law reform but no real initiative and only a limited task. The task of deciding what laws need renewal is itself to a very great extent a legal problem—one for lawyers with research tools at their disposal. The arranging of an order of priorities is also largely a legal question. Both

[1] (1973) 1 N.S.W.L.R. 105.
[2] (1973) 1 N.S.W.L.R. 202.

have a political dimension but those making political decisions on these matters would presumably be helped by advice from a Law Reform Commission based on sound legal research and investigation which would expose the policy decisions which need to be made.

Among those who subscribe fully to the general idea that much law reform is needed, there is often nervousness about letting a Law Reform Commission make recommendations about what it is that needs reform and a tendency to be parsimonious in handing out tasks to a Commission. This nervousness is due to a desire to keep the control of policy in government and parliamentary hands including the policy of deciding whether a particular area of the law should be the subject of investigation to see whether it needs reform. If the initiative and arranging of priorities is given on too wide a basis to a Commission, the Commission may ferret out an area for investigation and publicly propose detailed investigation when a government may not wish that area, once it knows about it, to be investigated at all, or may fear that, if it is, proposed reforms made public may so alter its policy options as to make it difficult to resist a change when it actually wishes to do so.

This question of policy control and fears about the handling of as yet unknown future policy questions lead to the limitation of the law reform task in the interest of preservation of government and parliamentary power. This is understandable enough and it could be justified if the position were that the great range of the law needs little or no change and that all that is necessary is to pick out the few areas which by common consent need change and allot them to the Commission for study and recommendation. But this is probably not the position and there could be a wider power to enquire as to what areas may need change. It is at this point that the matter of philosophy or ideology of law reform comes into view. A hard-line conservative approach proceeds on the basis that little really needs change and sleeping dogs should be left to lie undisturbed.

A more creative conservatism would assume that certain basic features of our society, its general character and quality, need conservation but that inspection will probably show that innovation is necessary to ensure their conservation. Conservatism could be directed more to ascertaining what innovations are needed to conserve the heritage of our laws and legal system and to ensure that they will be passed on in as relevant and modern a form as possible.

We should, I think, be courageous about law reform, providing not merely instruments and techniques but also enthusiasm and drive and a broadly stated task.

Much legal renewal could occur which would probably raise no serious policy questions at all. We should not allow the fear of possible unknown policy problems to cause us to refrain from a wide range of reform investigation which may well in many cases raise no difficult policy matters for decision.

On the other hand, it is undoubtedly the case that a properly organised Law Reform Commission will bring to the surface in many areas of the law difficult policy problems for governments to solve. In many instances, what is required actually is a new policy. Legal renewal demands that the need for a new policy be faced up to. Even in this area once the policy question is discovered and a proposed solution brought forward, it may be seen to be one about which substantial agreement will be found to exist. Many such important policy matters, once we know what they are, may be found to produce, in the political field, general approval.

If the political aspect and political judgment could be brought to bear at an earlier point in time, it should be possible to sort out the policy renewals

which are not really controversial from those that are. One possibility would be for this to be done on a bipartisan political basis, for example by a Parliamentary Committee, but there may be preferable techniques based upon government control of the issues involved.

However, we must, as realists, face up to the fact that if a competent, well staffed law reform commission is given a reasonably wide brief it will bring up difficult and controversial issues even in technical legal fields. What governments fear is that if a wide brief is given they may get a law reform report stating the nature of a policy problem which they did not appreciate existed, together with a proposed solution set out in meticulous detail with the precise form of a proposed Bill to be enacted. They would fear that with this being done by a statutory commission which makes its detailed report public before a government can consider it, developments in the inevitable controversy may close off the government's options precisely because of the detailed proposals and their public exposition.

What governments tend to want is a private policy proposal to be considered before detailed work is done—work that may be wasted if the proposal is turned down. If the government accepts the proposed policy, then the acceptance can be made public and the detailed work authorised. This is the ideal system, so it is thought, for a government, whatever its political persuasion.

It runs into the criticism that proposals which are turned down are not necessarily publicised at all and exponents of more open government object to this. There may be an analogy here with the reports of Royal Commissions and Committees of Inquiry generally.

I see no reason for the problems of legal renewal to be treated differently from other problems which have been made the subject of technical professional study resulting in reports which have been paid for by and disclosed to the public. A government can always decide its policy in the light of the report and the public debate. There may be exceptions to this principle, but I can see no reason why in the field of legal renewal there should be many exceptions. Such debates will help the movement for legal renewal to gain impetus and enthusiasm. Creativity could be encouraged and a spirit of conservative innovation developed.

All this having been said, there is still a real point which governments are entitled to make. Given that the brief for a law commission is wide and that its proposals are generally made public, given that some technique such as the establishment of a Parliamentary Committee is adopted to get as much bipartisan agreement as possible, there is still the point about going ahead, before policy decisions are made, with detailed schemes and meticulously drafted bills for Parliament. It would, I believe, be an improvement if this system were adopted only in clearly non-political cases or cases likely to have bipartisan support. In other cases a report could be more helpful and less wasteful in its production if it propounded in appropriate detail the problem and its suggested solution. Policy decisions can then be made after public discussion and any needed legislation can be drafted, in the light of policy decisions.

These thoughts and reflections, stimulated by my departure from the office of Chief Justice, by some random journalistic reading and by two law renewal exercises I recently came upon in London, represent no more than material for thought. I hope that I can find a non-controversial way to remain interested in law reform and in any movement for legal renewal which may develop strength in our society.

9th July, 1974