

THE DISCIPLINE OF LAW, by Lord Denning, Butterworths, Scarborough, 1979, 332 pp., \$12.35.

The Discipline of Law was, as Lord Denning describes it, his "holiday task", written over a short period of time in the hope that it would be published for his 80th birthday in January, 1979. A second and companion publication, *Due Process of Law*, was published in February, 1980.

Because of the haste in its preparation, Lord Denning admits that "there are bound to be imperfections", but any imperfections that may have crept into this work are minor when compared to the importance of the central issue running through it. That issue relates to the role of the judge in modern society. Lord Denning espouses a particular view of that role and it permeates his writing from beginning to end. Indeed, the book could be more suitably titled *My View as to the Role of the Judge in Modern Society*. I will say more about that central issue at a later point.

The format of the book consists of a discussion by Lord Denning of various aspects of the law, with generous quotations from his past decisions interwoven throughout the narrative. The topics under discussion are the construction of documents, the misuse of ministerial powers, *locus standi*, the abuse of "group" powers, the *High Trees* case, negligence and the doctrine of precedent.

It is important to emphasize that the book is very interesting. It should probably be read by every member of the legal profession, including judges, and by students of the law as well. At the same time, it does have the occasional "imperfection" referred to by Lord Denning. For example, there is an occasional grammatical error but it would be overly nitpicking to place any emphasis on that kind of concern. Rather, it is a well-written retrospect of a brilliant judicial career.

While it no doubt appeals to some, Lord Denning's casual or chatty approach to writing, evident in the quotations from his various decisions and in his narrative, gives rise to a style that is somewhat unusual, if not unique, for judicial writing. Without being critical of that style, it should be pointed out that Lord Denning can write effectively in a chatty sort of way. At the same time, I would hope that his style would not be considered the norm for legal and judicial writing because there is, indeed, only one Lord Denning; if his mode of writing were to be imitated by others, legal writing, in general, would suffer. In short, Lord Denning's writing style is not easy to imitate for the vast majority of us.

It is obvious from reading the book, or to anyone having heard Lord Denning speak, that the Master of the Rolls is a brilliant man, extremely articulate, and well versed in all aspects of law and life. It is equally obvious that he is very self-assured, self-confident and committed to the correctness of the many controversial views he espouses. It also appears that he enjoys being the chronic dissenter, or, if you will, a judicial maverick. But whether or not this is the case, he certainly has a great deal of courage and an honest sense of commitment to the various stances he has taken.

When reading any of the subjects under discussion, the central issue referred to earlier emerges: the formulation of the proper role of the judge in modern society. Lord Denning's view is that a judge, in response to changing social conditions, must abandon a strict constructionist

approach and apply the law to given circumstances in order to effect a fair and just result. No one could argue with that approach as such. But the issue inevitably becomes one regarding the extent to which a judge should conduct the above exercise and ignore the existing law, whether it be in the nature of established precedent or statutory law. Quebec Superior Court Chief Justice Jules Deschenes has remarked to the effect that a judge becomes a robot if he pays mechanical deference to precedent. That is a view consistent with Lord Denning and with many other progressive, forward-thinking judges and indeed, judges do have devices to circumvent existing precedent in order to effect just results. They can, of course, distinguish cases in various ways and, with respect to statutory provisions which invite unjust results, can interpret them widely so as to effect the desired just result.

But how far should a judge go in conducting such an exercise? Can a judge go too far to bring about justice in a given set of circumstances? Some say that a judge's duty is to his own conscience and to his own conception of justice. If that is the case, there are two dangers. The first is that the judicial function might be exercised in such a way so as to ignore, and if not ignore, distort the letter of the law as enacted by our legislators. That danger does not really concern me because we have always had in Canada a healthy tension between the judicial and legislative branches of government, and through the dynamics of that tension, our system of justice has managed to function quite smoothly. The real danger, however, is the consequence of a judge's over-reliance on his own sense or conception of justice. That conception, of course, is a very subjective matter and, to ignore precedent or to distort, through broad interpretation, the written word of our legislators in order to serve the interest of justice, is arguably going too far in exercising the judicial mandate. No doubt, Lord Denning advocates this approach. But he, himself, must realize that he is a unique individual and that not all judges possess the same righteous sense of justice with which he is blessed. If the Lord Denning approach were to be the general rule, there would always remain the possibility that among the hundreds of judges in our system, there is one who possesses a perverse sense of justice which is exactly the opposite of Lord Denning's. Probably the best course to follow is a middle-of-the-road policy between the Lord Denning approach and the sometimes unjust consequences of strict construction and narrow reasoning.

In any event, our Anglo-Canadian jurisprudence and, indeed, our whole legal tradition have benefited immeasurably from the contribution of Lord Denning. That contribution is neatly compacted and available for enjoyable and interesting reading in *The Discipline of Law*.

One final point should be emphasized relating to the practice of non-judicial writing by sitting judges. It is a happy development that our legal literature is expanding in that direction. Any strictures of the past which have deterred non-judicial writing by sitting judges ought to be further relaxed so that all of us can have the benefit of more books similar to *The Discipline of Law*. In Canada, Quebec Superior Court Chief Justice Jules Deschenes has recently published a volume entitled *The Sword and the Scales* and it too is a valuable and important contribution to the literature. Both books are must readings for all persons in our profession, and, indeed, for all persons who have an interest in justice and the process by which it is achieved through judicial decision-making.

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