

JUSTICE AND PREDICTABILITY IN THE COMMON LAW

The 7th Wallace Wurth Memorial Lecture*

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I. INTRODUCTION

The English legal system has always had two related characteristics which make it rather different from many other legal systems, namely its extreme emphasis on predictability, and its extensive use of high formality. But for much of the present century predictability and formality have been under attack as ideals of the common law, especially perhaps in the United States, which has often been widely perceived as the trend-setter in the common-law world. From the 1920s onwards American lawyers, and especially academic lawyers, have been challenging these twin ideals, and their challenge has increasingly found an echo in other common law countries. The attack on predictability has taken the form of insisting that law is inherently uncertain and can never be wholly predictable, so the search for predictability often leads to the sacrifice of other values for a goal which can never be attained. So also legal formality is often attacked on the ground that it is irrational, that it leads to mechanical and wooden decision-making, and that it diverts attention from the importance of

* Delivered 10 March 1992. This lecture is reprinted with the kind permission of the University of New South Wales.

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doing justice in the immediate case. These trends in academic and scholarly thinking have begun to have very considerable influence on practising lawyers and judges in America, and other common law countries, including, I suspect, Australia. But so far their influence on the bar and judiciary in England itself have been limited, and for this reason many lawyers, especially perhaps academic lawyers, have taken to writing off the English legal system as old-fashioned and hidebound. In this lecture I want to explain why English practising lawyers and judges still place so much stress on predictability and formality, and I want to show why this does not necessarily make a legal system old-fashioned and out of date.

II.

I will begin by saying something in defence of a legal system, like the English, which makes such a virtue of the ideal of predictability that it becomes almost a fetish. It is really very surprising that any such defence is needed at all, because I do not think that any lawyer, English, American, or Australian, would have doubted the importance of predictability in the law in the nineteenth century; and even today I suspect it is academic lawyers rather than practising lawyers who tend to pour cold water on the ideal of predictability, and then it only happens in certain contexts. Many critics of the English legal system are perfectly well aware of the desirability of predictability in law. When we actually pause to ask why predictability should be such an important goal the answers are surely obvious and many, indeed so obvious and so many that I am going to deal with them briefly.

In the first place, predictability in law is an essential part of a free society. In a free democratic society we all accept that each of us is entitled to pursue his or her own way, within the general framework of the constitution and the law. Indeed, one of the chief functions of the constitution and the law is to protect us in pursuit of our own freely chosen goals. But that means that we must know how the law will impinge on our own activities. We must know where the lines of legality and illegality are drawn so that we can make rational decisions about our behaviour, and our plans for life. Do I need to remind you that it is always tyrannies whose laws contain vague and uncertain crimes such as "committing any act contrary to the interests of the State"? Of course laws of that kind are monstrous infringements of freedom not just because they prohibit many forms of conduct which we regard as desirable and healthy, such as, for instance, criticising the conduct of the government, but also because their effect is unpredictable. Even in the United States the need for predictability with regard to the boundaries of the criminal law is well understood and there is an established constitutional principle which forbids unduly vague criminal prohibitions for this very reason.

But the importance of predictability is not confined to the criminal law. The whole body of the law can impinge on our freedom in all sorts of ways if we do not have adequate warning of how it will operate in the future. Just to take one example, consider how important it is to be able to predict how we may be affected by legal liability in tort if we are to be able to sleep peacefully in our beds. Now it is true that this does not mean that each individual citizen necessarily needs to know much about the law of tort to enjoy the benefits of a free society. There are quite enough lawyers already, without any suggestion that you need a B⁺ in Torts in order to be able to be a free citizen. Fortunately it is possible for citizens to protect themselves against tort liability by buying insurance, but then this only pushes the need for predictability one step further back. Insurance companies need to be able to predict how the rules of tort law will operate if they are to remain solvent, let alone make a profit. Now it may be that the need for predictability operates rather differently where insurance companies are concerned, and that the margin for tolerable error is rather greater. But it would be a grotesque mistake to think that predictability does not matter at all because legal liability is insurable. Ask any insurance company how it fixes its premiums and you will soon learn that the whole business of insurance revolves around prediction. In the United States, the extreme unpredictability of the law is so great that insurance companies find their work far more difficult than it is in England; and indeed, American insurers often abandon certain types of insurance altogether. It may be no coincidence that although American manufacturing industry has nearly always been far more efficient than English industry, the American insurance industry is probably less efficient, and certainly less dominant in the world's markets than the English insurance industry.

But apart from the criminal law and the law of torts there are, we must never forget, huge bodies of law which are designed to *assist* the citizen in making future plans and carrying them out. A large part of commercial law, for instance, contract law, corporations law, the law of wills, the law of trusts, and many other parts of the law, operate quite differently from the criminal law and tort law. These bodies of law will leave us alone if we leave them alone. They are there for us to use if we want to use them, but that makes it all the more important that their operation is predictable. A law of wills which did not make it easy to predict what would be treated as a valid will, for instance, would be worse than useless.

Then there is the whole economic dimension. Our economic systems depend on the ability to invest money in ways which will probably produce profit. So every investment decision requires predictability. Of course the law is only one aspect and not necessarily the most important aspect, of predictability for these decisions; but it remains a vital part of the total picture. Who would lend money, construct a building, buy plant or machinery, charter a vessel or make one of a million other commonplace commercial decisions if he or she was not reasonably confident in predicting the law's impact on his or her activities?

Now I do not say that none of these commercial decisions would be made where the impact of law is less predictable. Some exchanges will nearly always be made, no matter how difficult the circumstances and no matter how unpredictable the legal protection may be (indeed, some exchanges are regularly made which are prohibited by the law) but the costs involved in such exchanges are much higher where the impact of the law is less predictable. There is plenty of empirical evidence to prove this, both from history, and from the experience of countries whose legal systems are less dependable and more unpredictable than those of modern Western societies.

All this may seem almost too obvious to stress, but I must also mention one other aspect of predictability. It is almost certain that, other things being equal, less predictability in the law means more litigation. When the outcome of legal cases are more predictable, the scope for dispute and for delay is much reduced. There is not usually much point in throwing away legal costs by fighting a case, whether as plaintiff or as defendant, if you know from the outset that you are bound to lose.

III.

The more I say about the desirability of predictability in the law, the more it seems I am merely stating the obvious. Yet for a long time, as I began by saying, some lawyers, especially American lawyers have been pouring cold water on the ideal of predictability. Why has this happened? How has it come about that such an obviously desirable ideal has been so neglected in recent years? There are, it seems to me, a number of reasons for this strange development.

The first reason is that it tended to be forgotten that predictability is an ideal, an aspiration, not a fact, and closely related to this is the second reason, which is that predictability is a matter of degree. In the nineteenth century, and to some extent even today, lawyers who favoured the ideal of predictability often referred to it, especially in England, as the requirement of 'certainty' in the law. Now that was an easy target to attack. As we all know, there are few certainties in life; wasn't it Mark Twain who said that the only certain things in life are taxes and death? A third related reason was that, under the influence of many American legal writers of the 1920s and 1930s, the emphasis on much legal scholarship shifted from the law itself to litigation. And the outcome of litigation, especially in America, is rarely certain. Furthermore, legal scholarship, like legal education, has always been fascinated by difficult appellate cases, and by definition these cases tend to be in areas of the law or on facts where predictability is more difficult.

But once again, it seems to me almost too obvious to need stating that these reasons for challenging the importance of predictability in law are absurdly weak. Of course the law cannot always be certain, and of course predictability

is a matter of degree. But how does that in any way weaken the desirability of making the law more predictable rather than less predictable? The fact that we can never make the law 100% predictable or certain is hardly a good reason for making it so uncertain that we might as well toss a coin to decide a legal argument. The fact that *some* areas of the law will always be reduced in their effectiveness by unpredictability is no argument for making *all* the law unpredictable. The fact that many cases which go to appellate courts raise difficult legal or factual issues, and that their result is hard to predict in no way proves that there are not vast numbers of disputes which never reach appellate or even trial courts because their result is indeed very predictable.

So far I have not differentiated significantly between England and other legal systems. Although I don't think that judges and the practising profession in England have ever abandoned the ideal of predictability in the law, the general trend to downgrade its importance has certainly been a commonplace of much academic writing for at least a generation, and this has been beginning to have some practical results. But I come now to a number of factors on which the English legal system does differ markedly from many other systems. I don't think there can be any doubt that the English legal system is more *formal* than many other legal systems, and that this greater formality contributes to the greater predictability of law in England.

Legal formality is today often called, or identified with, 'formalism', a concept which has acquired a strongly pejorative meaning in the common law world. But I want to suggest that, although it may sometimes be carried to excessive lengths which deserve criticism, legal formality cannot just be condemned out of hand.

Let me start by saying a little more about what I mean by legal formality. Essentially, legal formality seems to me to be a type of decision-making, or a method of legal reasoning in which certain substantive considerations are excluded from consideration, or not given the full weight they would deserve in a different type of decision-making. A simple example occurs where a judge (or indeed anyone else) applies a rule just because it is the rule, without taking into account the fact that the rule appears inappropriate or unjust in the case at hand. Another example would be the application of a statute to a case which the legislator probably did not intend to be covered by the statute, simply because the literal wording of the statute appears to dictate that result. A third example would be to insist that a prior judgment of a competent court finally concludes a dispute between the parties to that judgment, even though there may now be ground for thinking that the previous court mistook the facts or the law. Another example is any rule or institution which embodies some arbitrary content, such as number or amount. A rule requiring a jury to consist of 12 persons is a formal rule in the same sense that I use the term. No judge is entitled to say: "In this particular case there would be good reasons for having a jury of 5 or 15 persons, rather than the usual number, so I will empanel a jury of 5 (or 15)". There may be many good reasons for doing that in the particular

case, but these reasons are simply ruled out of court, they are irrelevant, they must not be taken into account by the judge. Or again, a law imposing a fixed speed limit on motorists is a formal rule in this sense. When we impose a 30 miles per hour speed limit we do so because we want to make our roads safer, but the result of such a speed limit is that in individual cases we rule out of account as irrelevant the fact that in the particular circumstances such as road and traffic conditions, weather and lighting conditions, and so on, a higher or lower speed limit might well have been just as safe or even safer.

Now formality in this sense is, I believe, an essential component of any legal system; indeed it is an essential component of all rational attempts to organise society in an orderly way, with decision-making bodies authorised to act in certain ways and not in others. Every institution must use formality of this kind in its organisation if it is to operate with any sort of efficiency. Consider even a law school, and ask yourself how many formal rules there are, covering, for example, the number of courses the students must take, the marks they must get in examinations and so on. And so, too, in the law. Even in the simplest case brought before a judge there are, for instance, all sorts of rules of jurisdiction and procedure which must be observed if the case is to be heard at all. Rules of this kind are normally mandatory; they must be observed in ordinary cases, though I do not say there may not be exceptions. When these rules are observed the result is often very formal. A case is dismissed (for instance) because the facts occurred on the other side of a State border, and so outside the court's jurisdiction. It sometimes seems absurd, even formalistic, to do that, but it is a necessary consequence of the very existence of State lines. Or a case is dismissed because a document has not been filed in due time. Again the result can seem very formal or even formalistic, but it may be a completely justified way of insisting that proper procedures are observed.

In the book, *Form and Substance in Anglo-American Law* (1987) which I wrote with my friend Professor Robert Summers of Cornell, we identified four key types of legal formality about which I should like to say a few words. These four we christened 'authoritative formality', 'content formality', 'interpretive formality' and 'mandatory formality'.

Authoritative formality is a type of formality which confers legal validity on a law, or some other legal phenomenon such as a court judgment. In particular, we argued that in all legal systems laws (and other legal phenomena) are sometimes valid because they conform with a certain form, for instance they emanate from a particular source. So a legislative Act may be legally valid simply because it has passed the legislature and for no other reason. It makes no difference how good or bad the law may seem, how just or unjust, these are matters which may be excluded from consideration when the statute comes to be applied by the court. Similarly, if a court is under the system of precedent bound by ruling of a higher court in an earlier case, so that it applies the previous holding today, regardless of the underlying reasoning, then it is reasoning in a formal manner. The court which applies the precedent is in

effect saying: "The holding of the prior court is the law just because that court is a superior court whose rulings we must follow". It matters not whether the court today thinks the prior holding just or unjust.

Content formality goes to the content of a law or rule. Some laws are more or less arbitrary in certain respects. I referred a moment ago to highway speed limit. Now fixed speed limits are more or less arbitrary. If you do 31 mph you may be guilty of violating the law; if you do 29 you are not. If you are proved to have driven in excess of the limit you may be convicted even though there were good reasons for doing so; while if you were driving under the limit you can certainly not be convicted of violating it even though, at that particular time and place, a lower limit would have been appropriate.

The third kind of formality which we identified was what we called interpretive formality, which concerns the interpretation of legal documents such as statutes, contracts or wills. Obviously an interpretation which sticks literally and rigidly to the text, and ignores the purposes and goals of the legislature (or of the parties responsible) is a more formal way of proceeding. It excludes from consideration certain factors which in a broader inquiry might be relevant. The best example of strict interpretive formality comes from the famous Gilbert and Sullivan opera, *The Mikado* where the Lord High Executioner tells the Mikado, though untruly, that he has executed a wandering minstrel who, unknown to him was the Mikado's eldest son and heir apparent to the throne. Not unnaturally the Mikado is upset at this and condemns the Lord High Executioner and his associates to death. They protest loudly that they did not know the wandering minstrel was the heir apparent, that they did not mean to kill him, that it was a mistake, and (in the case of one of the party) that he wasn't even there. Too bad says the Mikado. The Act of Parliament providing for the death penalty for plotting the death of the heir apparent is unfortunately badly drafted. It says nothing about mistake, or not knowing or even of being there at all! The Act must be observed as it stands.

And then there is mandatory formality, which concerns the possibility of laws being cut down or modified at the point of application by countervailing considerations of substance, or of equity.

Now there is not doubt that the English legal system is a very formal legal system in all these ways. In the book I co-authored with Professor Summers we compared the levels of formality in the English and the American legal systems and I will say something about this comparison because it is, I think, interesting and relevant to the laws of other countries such as Australia. I am not sufficiently familiar with trends in Australian law today to say exactly how this country would fare in a similar comparison, though I suspect that, as in so many other areas of life, Australia occupies a position somewhere between England and America. But so far as the Anglo-American comparison goes there is no doubt that English law is much more formal than the American in all the different types of ways I have identified. If we look at how laws derive their legal validity in the English legal system, we shall find that the answer is highly

formal: laws generally are valid simply because of where they come from, their source. Laws which come from Parliament are valid and cannot be set aside by the courts; there is no such thing as an unconstitutional statute in the English legal system, subject only now to the qualifications that the law of the EEC takes precedence over English law in certain cases. Similarly, laws which come from the courts themselves are valid by virtue of the system of precedent; a higher court's decision binds a lower court and must be followed, no matter how unjust it may seem. In the United States, on the other hand, legal validity often raises all sorts of substantive considerations. Of course formality matters in America too, but laws must also comply with certain substantive arguments. Statutes must be constitutional, for instance, and that often raises difficult substantive issues about the law's justice; even case law is much less rigidly binding than in England, or (I believe) than in Australia. The system of precedent, as it applies in America, gives courts far more leeway to avoid applying previous decisions which they find unjust or unsatisfactory.

What is more there are many problems in American law about the relative validity of different levels of law, federal law, state law, constitutional law, case law, administrative agency law and so on. There are often conflicts between these laws, and the problems of choosing which is the governing law is itself complicated. Now in England complications of this kind hardly ever arise. Of course statute law overrides conflicting case law, but it is usually a relatively simply matter to decide whether it does so in any given case. Conflicts between different types of law are thus solved in England by rules of ranking between those laws, and these rules are themselves very formal. One law, for instance statute law, has a higher rank than all other law, and that is purely a matter of form.

So too, it seems clear that content formality is much more widespread in England than in the United States. There are several reasons for this. The main one is that high content formality is more often found in written law, where texts have a high degree of sanctity. Now written law is much more important in England because much more of our law, it seems to me, is statutory, and because in our statute law we tend to follow a different style of drafting. We draft our statutes like detailed rules, not in terms of general principles. In America, on the other hand, it is necessary first to recognise the overwhelming importance of constitutional law, which although based ultimately on written texts, is in many ways now more like a common law subject than a statutory one. The constitutional texts are traditionally short, and the language brief and vague. It has to be fleshed out with a huge volume of case law, and only rarely do the precise words of the constitution introduce provisions of high content formality. One such provision is that requiring the President to be at least 35 years old, that is an arbitrary age limit which simply cannot be pushed aside by any contrary reasoning, but that is a very unusual example. Most American constitutional law is not like this. And so too with ordinary statute law. No doubt there are some American statutes (for instance the Internal Revenue

Code) which do appear to be of a high content formality because they are full of pretty arbitrary provisions set out in some textual detail, but most American statute law seems to be drafted in a very different style from English statute law. The style of drafting, of course, is itself influenced by other important differences between the two countries, such as the composition of the legislatures, and the relationship between executives and legislatures. But the fact remains that much American legislation is couched in much more general terms than English law, in the language of principle rather than of detailed rule, and this makes it less formal in content.

Then there is interpretative formality; and here too there are very great differences between English and American practice. English law still tends to follow a much more literal method of interpretation; it pays less regard to the ultimate aims or purposes of the legislature, and more to what the legislature has actually said in its statutory enactments.

Finally there is mandatory formality. Here again the conclusion is that English law is much more inclined to insist that a statutory text or a common law rule should be applied without regard to consequences or even to possible equitable or other considerations which might appear to require the literal rule to be modified when it comes to be applied.

Now I don't want to exaggerate these differences. Although I think they are important in many ways, I would not want to suggest that English law is totally wooden and formalistic in the four ways I have outlined. All that I am saying is that the tendency in English law is to be more formal in these four ways. But equally it would be wrong to think that American law is not often formal too. Every legal system must have some degree of formality; all that I say is that the American system has a great deal less formality than the English and perhaps most other systems as well.

IV.

Now the time has come for me to draw together the two themes of this lecture, and to consider how far greater predictability correlates with a more formal legal system. It seems to me that there is indeed a high degree of correlation between these two aspects of a legal system. The more formal the system is, the more predictable it is likely to be, at least in general terms. Consider again the four types of formality that I have been talking about. Surely it is clear that predictability is enhanced when it is easier to identify a valid law; and surely there can be no doubt that it is easier to identify a valid law when regard is had solely to its source. The high degree of predictability which this confers on English law derives from the relatively simple constitutional principles governing the validity of different sources of law, that statute law is always supreme, and that the relative rank of other sources of law is very easy to determine. In the US on the other hand, as I have suggested, it is

often necessary to test the validity of a law by looking at all sorts of substantive arguments. This surely makes for a much lower level of predictability in a very large range of situations. Whenever it is uncertain what the federal or a state constitution mandates in a particular situation, to take just one simple and regular problem, it is very hard to predict whether a particular statute, or some form of executive action is legally valid or not.

Take next content formality: now here again, the more formal the law, the more predictable it is likely to be in practice. Indeed, one of the very reasons for having content formality in the law is to enhance predictability, and especially ease of administration. Consider again such a simple matter as fixed speed limits on the roads. These are laws of a high content formality, as I have suggested. Now it is perfectly possible to have laws of lower content formality: for example the laws could simply make it a violation for a person to drive at a speed which is unsafe in all the circumstances, and indeed some states do follow this course. But there are real practical problems in relying solely on a law of that kind to restrict speeding. First, it would be vastly more troublesome to enforce the law; police and courts would have much more difficulty knowing when to prosecute and convict. But it would also be worse for the ordinary citizen who surely would much prefer to know what the speed limit was, than to have to guess what police and courts will say.

Now many lawyers, especially academic lawyers, dislike laws of high content formality. They protest that laws of that kind often have arbitrary edges, that they may be under inclusive or over inclusive, that laws like this do not track the underlying purpose or reason of the law closely enough, and so on. The distinguished American scholar, Karl Llewellyn (best known as author of the Uniform Commercial Code) once said that the best rules never extend beyond the reasons for the rules, a remark often quoted by American academic lawyers. But if you stop to think about that you will find it really leaves no room at all for rules. One of the main purposes of having a rule in the first place is to prevent arguments in difficult borderline cases; and that requires rules to have some content formality. There must be cases where we apply the rule just because it is the rule, which is rather a formal thing to do.

Now here also, it seems to me, there are very significant differences between the English and the American legal system. We in England prefer laws of high content formality in many places where Americans prefer to use vague common law ideas like reasonableness or still vaguer ideas like balancing tests, which require a large number of factors to be weighed up metaphorically in the judge's mind and some sort of balance to be struck between them. What is more, England often uses statutory law, detailed, carefully drafted statutes which attempt to meet every possible contingency in advance, rather than to leave the law to develop in the traditional common law, case by case manner. These statutes certainly operate in a more formal way than common law principles, and I believe they also help to make our law more predictable in operation.

Then there is interpretative formality and here also, it seems to me that the English tradition of looking almost exclusively at the words of a document, and confining our attention to the general context of the document tends to lead to more predictable results, than the American tradition of allowing all sorts of other evidence of intention to be produced.

And finally mandatory formality in the English tradition also leads to higher levels of predictability. Obviously when laws are apt to be cut down at the point of application by recourse to equitable or other considerations arising from the particular facts of the case, the result of applying the law will be less predictable.

V.

Now there are, of course, negative aspects to formality. Even if it leads to higher levels of predictability, and even if we all agree that that is itself desirable, formality has its own unhappy features. In particular, higher levels of formality and predictability may lead to more injustice or to decisions which are bad on other grounds, for instance, that they conflict with the public interest on social or economic grounds. That cannot be denied, and it is something of a cliché to say that we must balance the need for more predictability in the law with the need for justice or the pursuit of more substantive goals generally. Unfortunately, as it seems to me, the demands of justice in each individual case are often seen as very pressing indeed. The trends of modern legal scholarship are in this respect often strongly reinforced by media pressures, and the wider public interest in predictability sometimes seems in danger of being overwhelmed by the insistence that the law should achieve a just result in every individual case.

But in striking this balance between the needs of justice in the particular case, and the needs of predictability and formality, a number of things need to be borne in mind. One is that the fundamental purpose of respecting formality is that it is an important part of a system of distributing power in society. A formal decision excludes from consideration some matters which would be relevant in a broader or different inquiry, and that often seems wrong, but it is only wrong if there is no more appropriate person or place or time to raise these other matters. Frequently a formal decision rules out as irrelevant some matters but only because there are different persons, places or times, by whom, when and where these matters can or should be considered.

Even when a judge finally decides a case by making a formal decision which seems unfair in the result, he may be doing so because he considers that any change in the law should be made by the legislature. That means, of course, that if we have more formality and predictability in law, we must find some way of constantly monitoring and if necessary reforming the law, so as to ensure that injustice and substantively bad decisions are minimised. It is one thing for a

decision-maker to apply a formal rule which leads to an unjust result when he knows that the rule will probably be reconsidered and reformed by someone else in the near future; and another thing to do this in the knowledge that the injustice will be repeated time after time, and that no change is in sight. Now to understand the English legal system it must be realised that the higher levels of formality which operate in the courts are partly counterbalanced by the fact that legislative law reform is taken much more seriously in England than in many other countries. It is an accepted aspect of our constitutional and political system that the state of the law is something which must be kept under constant review by the executive and the legislature. Extensive law reform machinery exists in England, and proposals for reform carefully drafted by commissions and committees of every kind are constantly being produced, and sent to Parliament for examination. And because in the Parliamentary system of government common to Britain and Australia the executive is so much more closely involved in a partnership with the legislature, most of these proposals will be eventually enacted, though they may of course be subject to some modification on their way through parliament.

Now I do think there are great advantages in a clear separation of the functions of adjudication from those of law reform. A judge in England conceives of his function as being to apply the existing law. If he believes that the law does not work well or is unjust he may say so; and in that event there is a real likelihood of something eventually being done by way of legislation. English judges believe that legislatures are better equipped to examine proposed changes in the law. They have the machinery of the public service to explore the alternatives fully, they can call upon a wider range of scientific or other experts where necessary, they can consult with many interested parties and groups, and they can publish their proposals for public comment and consideration. And in the end, the legislature must approve most legal changes, and that obviously gives the opportunity for the public voice to be heard through the elected representatives of the people. Furthermore, when change is needed, many people need notice of the changes in advance; they need to know what changes are going to be made, and when the changes will be effected so as to plan their own activities. Legislation usually gives adequate notice of change in these ways, while change made through the case law system often fails to give due warning in advance. So in the end the greater predictability of the English legal system does not necessarily lead to greater conservatism. Predictability does not necessarily rule out change.

In America, much more legal change, of course, comes through the courts, and I am well aware that one reason for this is the belief of most judges and lawyers that if the judges didn't do the job, it would often never get done at all. And this may be a factor which operates in Australia also. If that is true, then it may be that wide ranging judicial legislation, or at least judicial activism is more justified; but I don't think this should blind us to the great disadvantages of judicial activism and the one outstanding disadvantage of legal change in this

matter is that it makes the law less predictable, and fails to give adequate notice of the change when it comes.

Another thing which is required in a more formal and more predictable legal system is a higher degree of self-discipline on the part of the decision-makers. Most intelligent decision-makers of course, would prefer to make a careful decision on substantive grounds, than to apply formal rules or laws when they make decisions. It is more satisfying for the decision-maker to feel he or she is doing a worthwhile job, using his or her intelligence, applying complex tests than mechanically applying formal laws. For many years the American tradition has encouraged judges to do this kind of thing. Some judges feel that formal rule application is a demeaning job, not worthy of an intelligent person. And law students are taught by a method which often instills in them exactly the same disrespect for formal reasoning, and a desire to explore all the substantive reasons which may be relevant to a decision. I know that there are many aspects of the American constitutional and political system which tend to encourage judges to behave like this, but it does have disadvantages. In particular, it encourages judges to think that it is their job to run everything, to police every aspect of their society, to monitor all other agencies of government. English judges, I think, bring more self-denial to their role. They think of their role in a much more limited way, they accept that other participants in the political process have an important role to play, and must be left to play it. If the laws are bad, the English judge believes it his duty to apply them, and that of the legislature to change them, but as I have said, this is not just a pious hope in England, it is usually a well grounded optimism.

Nor is this just a matter of the relationship between the judges and the legislature. It extends also to the relationship between judges and many other institutions in society. For instance English judges do not generally regard it as their job to supervise the integrity or efficiency of the police force. If the police behave badly English judges do not respond by throwing out criminal prosecutions or expanding the law of tort so as create new causes of action against the police. They assume, indeed they have said quite explicitly, that there are other methods available in the political system for bringing the police to book or for monitoring their efficiency. If the police behave badly or corruptly there should be disciplining procedures available; if they are inefficient, the executive or the legislature should make inquiry and institute appropriate reforms. Here again, therefore, English judges exercise a considerable degree of self-discipline. They do not arrogate to themselves the power to control the police because they believe that there are other important political avenues in society for dealing with such matters. In this instance, recent events have demonstrated that all is not well in the English legal system. In the past year the country has been rocked by a whole series of cases which have demonstrated that in the absence of adequate judicial control, the police have often been totally uncontrolled, and widespread perjury and miscarriages of justice have followed. But these matters are now under investigation by a

Royal Commission which perhaps confirms the point that when things go badly wrong with the legal system in England, something does usually get done.

VI. CONCLUSION

I want to conclude with two simple warnings. The first is that the different traditions we find today in England and in America and no doubt in other countries also, with regard to these questions of predictability and formality are partly influenced by a wide and reinforcing network of institutional and cultural factors. The far-ranging nature of the differences in our institutional political and social lives means that it is not possible to make simple borrowings of those aspects of each other's systems which appeal to us. But the second warning is that we need to be vigilant when some of these institutional or other factors themselves change. Levels of formality and predictability in the law and in society may themselves be changed as these institutional and cultural factors change. We in England are beginning to notice signs of change, for instance, as the legal organisation of the EEC becomes more extensive and more mature. Indeed, there are, to my mind, clear signs that the EEC is leading English law down a number of paths which plainly point to an increase in unpredictability in law, and a decrease in legal formality. In some ways, these changes may suggest a greater convergence between the English and the American traditions. Perhaps there are also changes taking place in Australia, but I must leave others to explore that possibility.