DENNING’S LAW

THE DISCIPLINE OF LAW
by Lord Denning
(Butterworths)

Not long ago a spoof edition of the defunct Times carried a law report: a Court of Appeal presided over by Lord Denning M.R. had granted an interlocutory injunction to a frog to restrain members of the National Union of Seamen from picketing its pond.

What made the joke so pointed was that there was barely a sentence in it which was not paralleled in Denning’s real judgments: the grandiloquent pronouncement of the law’s concern for humble creatures threatened by the corporate might of a powerful trade union; the sentimental appeal to schoolbook history; the cavalier treatment of precedent, except that which suits the conclusion from which he has started; and the habit of basing his judgment on authority which neither the court nor counsel has mentioned during the argument.

But it is much too late in the day to dismiss Denning as an idiosyncratic and opinionated old judge. Today he is still one of the best appeal judges to appear before, alert, courteous and businesslike. In over 30 years he has left his footprints all over our law and our legal system, displaying an extraordinary mixture of sensibility to how time and tide were running and of political, social, moral and personal obscurantism.

Lord Scarman, in every way a more formidable but a more modest lawyer, reformer and judge than Denning, has more than once spoken of Denning’s work as a milestone in the history of English common law. So it is, and its historic character makes an interesting comparison with earlier expositions of the common law.

It says a lot not only about Lord Denning but about the society he serves that he combines Coke’s penchant for heresy with Blackstone’s smugness, and yet is tolerated by the establishment and revered by the purveyors of contentional wisdom. Those who are more modestly skilled in the law can see, as Denning himself has, that nothing that matters in our society should change have increasingly come to realise that far from being a threat to them, Denning is a vocal ally; and that his reputation as a rebel, reformer and a friend of the weak and helpless is both a first-class advertisement for the judiciary and a useful stalking-horse for some of the nastiest elements in our society. The shout of right-wing rage provoked by the Haldane Society’s recent call for his resignation was loud testimony to that.

In case anyone should be misled into thinking that the title of Denning’s book is unconsciously ironic, the preface explains that “discipline” is used in the sense of “instruction imparted to disciples or scholars”. Denning is setting out to collate and codify for posterity the areas of law in which he has made or has tried to make his major judicial impact: he is openly proselytising.

His premise is impeccable: “The principles of law laid down by the Judges in the 19th century . . . are not suited to the social necessities and social opinion of the 20th century. They should be moulded and shaped to meet the needs and opinions of today.” In the hands of a progressive judiciary in touch with ordinary people’s real needs it could be the basis of a socialist jurisprudence. In the hands of a judiciary which, Denning included, represents a reactionary social and political elite it is often the opposite: a call to abandon precedent where the judges calculate the social price of consistency to be too high. But nothing is quite that simple. The common law with which we entered the second half of this century contained plenty of anomalies and injustices; it has acquired more of them, some manufactured by Denning himself; but there is no denying that Denning has stood head and shoulders above his contemporaries in loosening the stranglehold of bad precedent and of literal and narrow interpretation of statues and contracts, and in such elementary ethical exercises as holding people legally to their promises or making them answerable in law for negligently misleading others. The book chronicles Denning’s considerable contributions in these and other fields of law, and if I pass over them here it is because it seems to me more important at the moment to get Denning in perspective than to follow him down the primrose path of self-esteem which his book charts.

The book is set out in seven parts: the construction of documents; misuse of ministerial powers; locus standi; abuse of “group” powers; High Trees; negligence; and the doctrine of precedent. Each part is not only unashamedly autobiographical, but quite un-self-critical. You will find, certainly, recantations such as this comment on the dissenting judgment in Faramus v Film Artistes’ Association:

“. . . I went too far in saying that a Rule may be invalidated simply because it is unreasonable. It is only invalid if it is unreasonable restraint of trade.”

But those familiar with the full range of Denning’s judgments on trade unions will look in vain for the difference in this distinction.

After a brief expression of regret for having criticised the House of Lords in Broome v Cassell he repeats the sarcastic comment with which he had already greeted the Lords’ rebuke from the bench:

“Yes — I had been guilty — of lèse majesty”, and goes on:

“I had impugned the authority of the House. That must never be done by anyone save the House itself. Least of all by the turbulent Master of the Rolls.”

In case anyone should be left in doubt, he footnotes to that sentence Henry II’s description of Thomas a Becket as “this turbulent priest”. Denning’s detractors, few as they are, will never be able to accuse him of modesty.

But it is perhaps not the unblushing egocentricity which is the most telling sign in the book. It is the prose in which the entire book is cast. Denning’s judgments have for many years been remarkable for their lucidity and freedom from jargon; but it has become increasingly plain, and his book now puts it beyond doubt, that he is not simply a lawyer with the gift of clarity — he goes beyond lucidity, beyond straightforwardness, into a patronising populist prose which treats his readers as simpletons. In style it resembles nothing so much as an editorial in the Sun:

Stephen Sedley

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Becker v. Home Office [1972]

If the courts were to entertain actions by disgruntled prisoners, the governor’s life would be made intolerable. The discipline of the prison would be undermined. The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action.

Reg. v. Home Secretary, Ex p. Hoseaball [1977]

There is a conflict here between the interests of national security, on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England. Both during the wars and after them, successive ministers have discharged their duties to the complete satisfaction of the people at large. They have set up advisory committees to help them, usually with a chairman who has done everything he can to ensure that justice is done. They have never interfered with the liberty or the freedom of movement of any individual except where it is absolutely necessary for the safety of the state.

WARD v. BRADFORD CORPORATION AND OTHERS

If there were any evidence that Miss Ward had been treated in any way unfairly or unjustly I would be in favour of interfering. But I do not think she was treated unfairly or unjustly. She had broken the rules most flagrantly. She had invited a man to her room and lived there with him for weeks on end. I say nothing about her morals. She claims that they are her own affair. So be it. If she wanted to live with this man, she could have gone into lodgings in the town and no one would have worried, except perhaps her parents. Instead of going into lodgings she had this man with her, night after night, in the hall of residence where such a thing was absolutely forbidden. That is a fine example to set to others! And she a girl training to be a teacher! I expect the governors and the staff all thought that she was quite an unsuitable person for it. She would never make a teacher. No parent would knowingly entrust their child to her care.

Langston v. AUEW [1974]

In these days an employer, when employing a skilled man, is bound to provide him with work. By which I mean that the man should be given the opportunity of doing his work when it is available and he is ready and willing to do it. A skilled man takes a pride in his work. He does not do it merely to earn money. He does it so as to make his contribution to the well-being of all. He does it so as to keep himself busy, and not idle. To use his skill, and to improve it. To have the satisfaction which comes of a task well done. Such as Longfellow attributed to The Village Blacksmith:

"Something attempted, something done,
Has earned a night's repose."

The Code of Practice [see S.I. 1972 No. 179] contains the same thought. It says, at paragraph 9:

"... management should recognise the employee's need to achieve a sense of satisfaction in his job and should provide for it so far as practicable."

A parallel can be drawn in regard to women's work. Many a married woman seeks work. She does so when the children grow up and leave the home. She does it, not solely to earn money, helpful as it is: but to fill her time with useful occupation, rather than sit idly at home waiting for her husband to return. The devil tempts those who have nothing to do.
I have no time to write more now. This book was my 'holiday task' for the long vacation. Usually we travel much overseas. But this year we stayed at home. In the country. In the place where I was born. Specially to write this book for you. Done in so short a time, there are bound to be imperfections. So please forgive me."

To the desiccated sentences of the yellow press, Denning adds his own mixture of antique phrases ("travel much overseas") and sentimentality. The result may be pretty unattractive to the critical reader, but it is intended to be, and no doubt is, totally winning to the credulous and impressionable reader — among whom Denning rightly calculates that there are today a great many law students.

Even the wide-eyed student may be startled from time to time at Denning's standards. The book recites with pride Denning's judgment in Metropolitan Properties v Lennon, the case in which Freshwater put the fear of God into Rent Assessment Committees and rent officers everywhere by getting Denning to strike down an adverse rent decision on the ground that the committee chairman lived in his father's potentially comparable Freshwater flat:"

"The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did . . . Justice must be rooted in confidence."

Sound stuff. Now read on to the Gouriet case:"

"The 'Socialist Worker' . . . discovered that my wife had shares in a company which traded in South Africa — a thing she did not know herself. Yet they used it so as to undermine the confidence of their readers [sic] in judicial integrity . . ."

Perhaps, then, a small expression of regret or embarrassment . . .?

"No doubt it was contempt of Court . . ." Nor will the student who admiringly reads Denning's chapter "A lawyer for the defence" (on the Enderby Town F.C. case) find a mention of what happened when a prisoner tried to get Denning to hold up the hearing of serious disciplinary charges to allow him to be legally represented (Fraser v. Mudge): he was sown the door of the court.

In spite of his anxiety that the law should keep pace with social change, the world which Denning inhabits is in large part that inhabited by the Victorian moralists: a world in which there is only one true set of values, only one just solution to a problem, only one version of fairness — and of each of them Denning is as confidently the high priest as Samuel Smiles once was. He reminds me of something V.S. Pritchett wrote of Kipling: for him there is no problem of good and evil, only cads and bounders. He can in this way base his chapter on the construction of documents on the explicit view that while the words of a statute or a contract may not be clear, the "right and justice" of the case always will be. The judge's task then becomes a more or less arduous business of hewing down the thicket of words which lie between him and the right and just result.

Now there have been many cases in which most readers of this article will have been breast-high alongside Denning in his crusade for right and justice: his assertion of the power of the courts to undo bureaucratic tyrannies (Bernard v National Dock Labour Board), his defence of the right of free speech and peaceful demonstration (Hubbard v Pitt) and his rejection of the attempt to deny all women over 60 redress for unfair dismissal (Nothman v London Borough of Barnet) are among many purple passages which will be constantly cited in civil liberty cases. And yet for every such ringing judgment of his there are two which have proclaimed him an enemy of liberty and the ally of reaction: his decision that the criminal provisions of the Immigration Act 1971 were retrospective in effect (Ex parte Azam), his righteous pontifications on the morals of a student teacher who sought legal redress for an injustice (Ward v Bradford Corporation), his invocation of fire and brimstone on the heads of the brave Clay Cross councillors (Asher v Secretary of State for the Environment) — contrasting oddly with his later solicitude for the recalcitrant councillors of Tameside and his bland acceptance of the Home Secretary's right to deport aliens on the say-so of the security service (Ex parte Hosenball) . . .

The list is shameful even before you reach his constant fulminations against trade unions. A recital of those would go on for ever, but they are epitomised in the contrast between Denning's own maxims about interpreting statutes ("you must . . . start with the words used in the statute: but . . . you must discover the meaning of the words") and his cheerful rejection of the plain meaning of the words of s.13 of TULRA:

"If we were to give the words 'an act done by a person in contemplation or furtherance of a trade dispute' its full meaning, they would cover almost every difference or demand by a trade union. But judicial decisions . . . have put some limit on those words." (Star Sea Transport v Slater)

He proceeds in his book to offer some free advice to aspiring union-bashers:

". . . the officers of a trade union may take themselves out of the statutory immunity if they make demands which are wholly extortionate or utterly unreasonable or quite impossible to fulfil — and then take industrial action to enforce those demands. I ask the question: Is this a good argument or not? No one has suggested it hitherto. But if it were accepted it would go some way to restrain the abuse of power by a trade union."

Worst of all, perhaps, is his unconcealed admiration for Raymond Blackburn, Ross McWhirter and John Gouriet, whom in an unconsciously comical passage he characterises as "ordinary citizens" having "a point which affects the rights and liberties of all the citizens" as distinct from "a mere busybody interfering with things that do not concern him". Once again we are in the Humpty Dumpty school of semantics.

It would be mistaken to regard the author of all these contrasting judgments as merely eccentric or capricious. Through them runs a complex but consistent thread of 19th century conservatism: individualism, heavily circumscribed by morality; dislike of institutions taking decisions behind closed doors, but unquestioning respect for authority; support for traditional liberties, provided they are exercised in support of worthy and respectable causes. It is by now well known that, for example, no trade union gets any sympathy in Denning's court, and that anyone with criminal convictions is practically an outlaw there. He has also done some less well-known damage to the law in defence of property against need, particularly by his discovery in Torbett v Faulkner that a tenant who worked for his landlord might be an unprotected licensee even though he didn't have to live in the house in order to do his work: again, the thinking of the rural patriarch, hardly of the friend of the dispossessed. In other areas he has had difficulty in deciding what course to steer: the good old saloon-bar sexism with which he greeted the Sex Discrimination Act (Peake v Automotive Products) has given way to a bold policy of enforcement (Shields v Coomes) as it has been
borne in upon him that Britain's place in the EEC demands that the European anti-discrimination requirements be properly enforced.

The extraordinary fact is that Denning, with his flair for finding paths by guile or force to his chosen goals, is absolutely out of place in a system of law based on judicial precedent and parading certainty and consistency as its major virtues. Yet it is the very character of the English common law, with its subtle pliabilities, which has furnished him with his opportunities to legislate from the bench. He has done a great deal to preserve the credibility of the law, at least in the eyes of those who see things his way, but in doing so has stretched the system to breaking point — as the House of Lords swiftly recognised in the Gouriet case, and by means which earned him this sobering rebuke from the junior member of his own court in Goldsmith v Sperrings:

"What Lord Denning M.R. says . . . is unacceptable for four reasons. First, it amends the grounds of the appellants' summonses. They claim to have the actions dismissed or stayed as an abuse of process, not as disclosing no reasonable cause of action. No one but the Master of the Rolls has ever suggested or considered this latter ground. Secondly, it claims, in effect, that the Master of the Rolls' private researches demonstrate the law, as stated in the leading text book, to be not only wrong but unarguable. Such a claim is untenable. Thirdly, whatever virtue there may be in private judicial researches in other circumstances, they can have no place in interlocutory proceedings for a summary remedy. But the fourth and most important reason is that this part of the Master of the Rolls' judgment decides against the plaintiff on a ground on which Mr. Hawser, for the plaintiff, has not been heard. This is because Mr. Comyn never took the point, and the court did not put the point to Mr. Hawser during the argument. Hence there is a breach of the rule of audi alteram partem which applies alike to issues of law as to issues of fact. In a court of inferior jurisdiction this would be a ground for certiorari; and I do not think that this court should adopt in its own procedure any lower standards than those it prescribes for others."

Denning continues to preside daily in Court 3 in the Strand, a legend in his own lifetime. With his book he has erected a somewhat premature monument to himself; like other such memorials it omits the indefensible and boasts of things he ought to be ashamed of: nil nisi bonum. A true assessment of him has yet to come.