LORD DENNING

His Judicial Philosophy

The Honourable Justice James Douglas[1]

Whitchurch is a tranquil village in Hampshire. Old Tom Denning died there on 5 March 1999. He had been born in his parents' house in the same village more than 100 years before, on 23 January 1899. In March 1974, he was eight years from the end of his long judicial career. He was still a dominant figure in the common law world. I mention March 1974 because that was the one occasion when I saw him in action as a judge.

I was a 24 year old recent law graduate, then working as Sir Harry Gibbs' associate. I had the great good luck to have accompanied Sir Harry to London where he was to sit for some months on the Judicial Committee of the Privy Council. We landed in London early on a weekday morning and checked into Brown's Hotel just off Piccadilly. It was a club-like hotel - suitable for judges and bishops, as a cynical English acquaintance remarked to me at the time.

It was my first trip to London and, energised by the surroundings and the brisk wintry weather, I set out immediately to see the sights. I knew where I wanted to go - down Piccadilly, through Piccadilly Circus, along to Trafalgar Square and up the Strand to the Royal Courts of Justice. It was shortly before lunch. I headed to the Court of Appeal, went in, sat down and had the good luck to catch Lord Denning, Master of the Rolls, presiding - courteous, avuncular, with that distinctive Hampshire burr to his voice.

He was the star in the judicial firmament for many law students of my age and that was the best thing I could then think to do to introduce myself to the sights of London. Now you might think that was pretty odd. I am almost 42 years older now and, perhaps, more world-weary. I am also very much less likely to want to go straight to the Royal Courts of Justice when I land in London. By the same token, with all respect to my judicial colleagues in Britain now, there is no-one there at present with the star quality that then attached to Lord Denning, at least in law students' eyes.

That quality derived partly from his willingness to try to modernise the law while teasing his more cautious colleagues. Students also loved his limpid prose. He used a faux-Hemingway

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[1] Judge, Supreme Court of Queensland. Lecture delivered on 19 November 2015 for the Selden Society, Australian Chapter, at the Banco Court, Supreme Court of Queensland.

style to tell the story behind the case while laying out his sympathies for all to see. We all have our own favourite examples. One of mine is *Hinz v Berry* dealing with the quantum of an award of damages for nervous shock:

> "It happened on April 19, 1964. It was bluebell time in Kent. Mr and Mrs Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child.
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> On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. … There came along a Jaguar car driven by Mr Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr Hinz and the children. Mr Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs Hinz, hearing the crash, turned round and saw this disaster."[2]

Another is *Lloyds Bank v Bundy*:

> "Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him. He was granted legal aid. His lawyers put in a defence. They said that, when he executed the charge to the bank he did not know what he was doing: or at any rate that the circumstances were such that he ought not to be bound by it. At the trial his plight was plain. The judge was sorry for him. He said he was a 'poor old gentleman'. He was so obviously incapacitated that the judge admitted his proof in evidence. He had a heart attack in the witness-box. Yet the judge felt he could do nothing for him. There is nothing, he said, 'which takes this out of the vast range of commercial transactions'. He ordered Herbert Bundy to give up possession of Yew Tree Farm to the bank. Now there is an appeal to this court. The ground is that the circumstances were so exceptional that Herbert Bundy should not be held bound."[3]

You might not be surprised to learn that Mrs Hinz held on to her generous award of damages and that Lloyds Bank were given the silver medal on Mr Bundy's appeal.

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2 [1970] 2 QB 40, 42.
3 [1975] QB 326, 334.

His eloquent defence of village cricket, in dissent in *Miller v Jackson*;[4] is so inimitably English but I shall not pause to read it to you. Nor shall I read the introduction to *Broome v Cassell & Co,*[5] even though it is as riveting an account of war time naval action as one would find in the novels of Patrick O'Brian or C S Forester. His skill as a writer was evident and one assumes that his eloquence and presence made him a powerful advocate but it is his judicial work that made his name.

I propose to provide some details of his upbringing and early career, to speak about his judicial philosophy and how that played out in some areas of the law in particular and to conclude with some observations about his Achilles' heel as a judge, too great a readiness to confuse personal prejudice with his notions of justice.

The literature on Lord Denning is immense, with many contributions from the man himself in books, articles and speeches. Apart from the books and articles about him, there is even a *Denning Law Journal* devoted to the examination of the legal issues dear to his heart. I have to thank my associate, Jarrod Jolly, for filtering through the mass of material to allow me to focus particularly on Lord Denning's judicial philosophy.

The family background and early career

Lord Denning was very conscious of the Saxon, Viking and Norman ancestry of the English and believed that the word "Denning" suggested Danish descent while his Christian name, Alfred, betokened the Anglo-Saxon King and lawgiver, Alfred the Great. The thousandth anniversary of King Alfred's death occurred in his birth year and led his parents to choose that name for him. He was known, generally, however, as "Tom" after his second name, Thompson. Some of his ancestors had been prominent during the English Civil War on both sides of the conflict. But his more recent ancestors had lapsed into poverty and obscurity. He and his siblings did much to reverse that situation.

There was one daughter and four boys. He was the fourth boy. They had a poor but happy childhood. He was a brilliant student at Andover Grammar School, which he attended on a scholarship. Of it he said:

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4 [1977] QB 966, 976.
5 [1971] 2 QB 354, 371.

> "… an Elizabethan grammar school. What could you have better?"[6]

He received a scholarship to attend Magdalen College, Oxford where he began to study mathematics in October 1916 before his conscription in the summer of 1917. He was keen to join the Army and served on the western front with two of his brothers, Jack who was killed at the battle of the Somme and Reg who was wounded there. Another brother, Gordon, fought at Jutland and died of tuberculosis in 1918. Tom Denning himself fought at the Somme in April 1918 in decisive fighting which resulted in the collapse of the Ludendorff offensive and laid the basis for the allied victory in September to November 1918.[7]

He described his two brothers who died as "the best of us". That was a significant claim. Lord Denning's own talent was obvious but of his two surviving brothers, Reg later became a lieutenant-general and Norman a vice-admiral.

Tom returned to Oxford and completed his education in mathematics after the end of the war. His university career was brilliant. In spite of the quality of the education available at some of the English grammar schools, such as Manchester Grammar, it seems clear that the inhabitants of the upper echelons of the English class system did not rate them highly. Denning himself felt ashamed at having been at a grammar school, but, as he later wrote, he "need not have worried. Everyone was very understanding. And when I took a First Class in 1920, they were as proud of my achievement as I of theirs."[8]

He then taught for a year at Winchester College but, with encouragement from the president of Magdalen, returned to Oxford to read law. He received a scholarship founded in memory of Lord Eldon to be awarded to "a Protestant of the Church of England" who had obtained a first class honours degree as an undergraduate. He was devoted to the Church of England and had a first class degree.

Magdalen's academic reputation in the early 1920s was not stellar. It had a reputation for the social position of its students rather than their scholarly talents. Denning described his law tutor there as knowing no law except on the Statute of Frauds. The tutor was an unsuccessful

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6 Alfred Thompson Denning, *The Family Story* (Butterworths, 1981) vi.

7 Charles Stephens, *The Jurisprudence of Lord Denning* (Cambridge Scholars, 2009), vol III, 15 (citing Denning, *The Family Story*, above n 6).

8 Denning, *The Family Story*, above n 6, 37.

barrister who had once had a case on that subject. Nonetheless, Denning received first class honours in the law school with very good marks for most subjects, except jurisprudence for which he received a gamma minus. He reflected that:

> "Jurisprudence was too abstract a subject for my liking. All about ideologies, legal norms and basic norms, 'ought' and 'is', realism and behaviourism, and goodness knows what else."[9]

That did not deter Lord Denning from developing his own philosophical approach to the law, particularly during the period when he sat on the Court of Appeal during the 1950s. The depth of that approach is another issue.

He did not succeed in the testing competition to become a member of All Souls College at Oxford, an academic research institution with no undergraduate students. Undeterred, he pressed on with his ambition to become a barrister. He had the assistance of a prize studentship of £100 per annum which helped him survive until his practice grew. He commenced at the Bar in 1923 and by about 1930 was making £1,000 per annum. He also wrote articles for the *Law Quarterly Review* and helped bring out a new edition of *Smith's Leading Cases in the Common Law*. He also co-edited the 9th edition of *Bullen & Leake's Precedents of Pleadings* published in 1935. The work on *Smith's Leading Cases*, he said, taught him most of the law he ever knew. It was an immense task involving much research and, in particular, assisted him to resolve the issues raised in the *High Trees* case in 1946, a decision to which I shall return.

In 1932, he married Mary Harvey, the daughter of the vicar of his home town in Hampshire, Whitchurch. His religious instincts were deep and significantly influenced his philosophical approach to the law. They had one child, but Mary died tragically in 1941. Their son later became an academic and a fellow of Magdalen College. Tom Denning remarried Joan Stuart in 1945. They remained happily married until her death in 1992.

He had been granted silk in 1938 and was made a judge in the Probate, Divorce and Admiralty Division in 1944. He had never done any divorce work as a barrister, nor did he like it, but the offer of a position on the High Court was not one he felt he should refuse. He was then only 45 years old and young for such an appointment. Judges appointed then were not obliged to retire at any particular age. He transferred to the King's Bench Division late in 1945.

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[9] See R F V Heuston, 'Lord Denning: The Man and his Times' in J L Jowell & J P W B McAuslan (eds), *Lord Denning: the Judge and the Law* (Sweet and Maxwell, 1984) 3. Prof Heuston notes that this language redolent of Kelsen's views would not have reached Oxford when Denning was a student.

The next year, he delivered judgment in *Central London Property Trust Limited v High Trees House Limited*,[10] the decision by him which has probably influenced the development of the law more than any other.

I say that advisedly because, rather surprisingly, it is the only decision of Lord Denning included in the list of "15 top cases" compiled recently by the English Incorporated Council of Law Reporting from the votes of its readers.[11] They were asked to select the cases they thought had made the greatest contribution to English legal history during the last 150 years, the period covered by the authorised law reports. When one includes the shortlist of 40 from which the 15 were chosen, the only other judgment attributable to Lord Denning is his dissenting view in the Court of Appeal in *Norwich Pharmacal Co v Customs and Excise Commissioners*.[12] The majority in the Court of Appeal was upheld in the House of Lords so Denning's dissent was not influential. The only other decision of some note to which I could make a link was *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[13] dealing with negligent misstatement. I refer to it because, although Lord Denning was not a party to the reasons, his dissenting views in *Candler v Crane, Christmas & Co*[14] were, no doubt, influential in the adoption of the majority view in *Hedley Byrne*. His own view was that *Candler v Crane, Christmas & Co* was his most significant decision.[15]

The *High Trees* case is regarded as the source of the doctrine of promissory or equitable estoppel, at least in English law. In reasons brief by modern standards, Denning J decided that the representation by the landlord that payment of rent at the full rate would not be enforced, although not a representation of existing fact but one as to the future, was still enforceable as a promise intended to be binding even if it lacked consideration. The prospect that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, would, therefore, be binding without consideration pleased him as a result of the fusion of law and equity.[16]

The High Court of Australia through Sir Owen Dixon had adopted a different approach leading to a similar result in *Grundt v Great Boulder Proprietary Gold Mines Ltd* when Sir Owen said:

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10 [1947] KB 130.
11 See The Incorporated Council of Law Reporting for England and Wales, *150 Years of Case Law on Trial* (17 July 2015), http://www.iclr.co.uk/150-years-case-law-trial/
12 [1974] AC 133, 137.
13 [1964] AC 465.
14 [1951] 2 KB 164, 174.
15 Denning, 'Foreword' (1986) 1 *Denning Law Journal* 1.
16 [1947] KB 130, 134-135.

> "The principle on which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations. … One condition appears always to be indispensable. … [I]t is often said simply that the party asserting the estoppel must have been induced to act to his detriment."[17]

In a later, 1975, decision, *Moorgate Ltd v Twitchings*,[18] Lord Denning referred to that approach and to some correspondence he had with Sir Owen about the *High Trees* decision. In *Moorgate* he modified his view by describing the issue as whether it would be unjust or inequitable to permit a party to withdraw from the assumption.

I have not been able to track down the correspondence between the two but Sir Owen had, interestingly, delivered an illuminating talk on judicial method at Yale in 1955. Without explicit reference to the *High Trees* decision, but referring to a very similar factual situation, he discussed how a judge might approach the issue in the following words:

> "What might a modern court of last resort say to the claim? What might reforming zeal do if coupled with boldness of innovation? It could hardly go as far as denying that consideration is necessary to the formation of every simple contract … ."[19]

After that oblique and apparently intended barb at the original Denning approach, Sir Owen went on to consider a number of possible answers to the problem, including the application of theories from the law of contract. He also said that the doctrine of estoppel could cover the issue raised by the *High Trees* case, whether an agreement to reduce rental payments, not supported by consideration, could nonetheless be enforced, by saying:

> "It is by no means fanciful to regard the fundamental principle of an estoppel which comes from dealings between the parties to be simply that one of them is disentitled to depart from an assumption in the assertion of rights against the other when it would be unjust and inadmissible for him to do so. It is a necessary condition that the second should have acted or abstained from acting, upon the footing of the state of affairs assumed, in such a way that he would suffer a detriment if the first party were afterwards allowed to set up rights against him inconsistent with the assumption. It is further necessary that it should be unjust and inadmissible for the first party to depart from the assumption for the purpose of asserting rights."[20]

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17 (1937) 59 CLR 641, 674.

18 [1976] QB 225, 241-242.

19 Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (collected by Judge Woinarski) (William Hein & Co Inc, 2nd ed, 1997) 160. It is clear that the address was aimed at least partly at Denning; see Philip Ayres, *Owen Dixon: A Biography* (Miegunyah Press, 2003) 240, 253.

20 Dixon, above n 19, 163-164.

That focus on injustice or unconscionability and detriment did not appear in the *High Trees* decision. In Australia, particularly since the High Court's decision in *Waltons Stores (Interstate) Ltd v Maher*,[21] the focus is clearly on unconscionability and detriment, not on whether the promise was intended to be binding even if it lacked consideration.

In 1948, two years after the *High Trees* decision, Denning J was promoted to the Court of Appeal where he remained as a Lord Justice until his appointment to the House of Lords in 1957. Professor R F V Heuston, whose insights into Lord Denning's work and life repay reading, said of that period in Denning's life:

> "If the reader of the law reports had not already realised it, there were now many signs of a powerful new mind at work. In many ways the judgments of the Fifties are classic Denning; there is still enough respect for precedent for the analysis of the cases to be full and careful, and the style, clear and vivid, is not yet marred by the self-conscious tricks of the Seventies."[22]

Judicial Philosophy

It was during his first period in the Court of Appeal, before he rejoined it as Master of the Rolls in 1962, that Lord Denning himself said that he developed his judicial philosophy. His willingness to express a philosophy has been described as unusual. As Professor A W B Simpson said, rather memorably:

> "Hardly any of those many hundreds of forgotten and curiously anonymous men who have held high judicial office in the common law system have left us even the briefest statements of their judicial philosophies. Indeed, so far as most of them are concerned, there is no reason to suppose that they possessed one in any self-conscious or articulate sense. Just as plumbers may plumb for a lifetime without perplexing themselves as to what it is all about, so too may judges judge, and most do. But from time to time there have been exceptions, and Lord Denning is one."[23]

Lord Denning's expression of his judicial philosophy was typically brief and dogmatic and I quote:

> "(i) Let justice be done; (ii) Freedom under the law; (iii) Put your trust in God."

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[21] (1988) 164 CLR 387.
[22] See Heuston, above n 9, 10.
[23] A W B Simpson, 'Lord Denning as Jurist' in Jowell and McAuslan (eds), above n 9, 445.

He took as his motto when made a law lord, "*Fiat justitia*", discarding the conventional additional words "*ruat caelum*" on the theory that, if justice is done, the heavens should not fall; they should rejoice.[24]

The *Denning Law Journal's* take on Lord Denning's values is more expansive and includes the importance of developing the common law; the need for judicial and community recognition of the importance and urgency of reform and modernisation of law; the importance of preserving the traditions of judicial independence, integrity and creativity; the importance of reflecting upon the interplay between law and morality; and the essential role to be played by the law in the defence of the individual in the modern state.[25]

Let me deal with Lord Denning's own three-part formulation though, and in reverse order, starting with "Put your trust in God".

Put your trust in God

He was a devout Anglican all his life, loving that church's worship, liturgy and language. For many years he presided over the Lawyers' Christian Fellowship. In one of his books, *The Changing Law*, he wrote about the derivation of many of our fundamental legal principles from Christianity.[26] He began by discussing the obligation to tell the truth and keep one's promises. The latter he contrasted with what used to be called contracts of adhesion, where the party with less economic strength has no ability to bargain about the terms but must either accept them or go without the benefit of any contract at all. He drew on the views of St Thomas Aquinas to excuse holding a party to the letter of such a contract where unforeseen circumstances have arisen which make it unjust to enforce it against him. He regarded that as an area where the law had overreached itself with contracts as it had in respect of the interpretation of statutes. His view was that literal interpretations of contracts or statutes could lead to departures from "real" truth. He promoted the purposive approach to the construction of statutes now adopted in Australia rather than the existing common law rules requiring interpretation according to the grammatical and ordinary sense of the words.

He equated our conception of justice with the Christian teaching of love for God and your neighbour which he illustrated by Lord Atkins' decision in *Donoghue v Stevenson*[27] and the

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[24] Denning, *The Family Story*, above n 6, 172-173.
[25] 'Editorial' (1986) 1 *Denning Law Journal* 5, 6.
[26] Denning, *The Changing Law* (Stevens & Sons Limited, 1953) 99-122.
[27] [1932] AC 562, 580.

discussion there, derived from the parable of the Good Samaritan, about who was the neighbour to whom a duty of care was owed.

He also discussed punishment for crime in the Christian context, treating the abolition of capital punishment as a reflection of a more Christian outlook on the right way to punish offenders, focussing on the reformation of the criminal. He drew attention to the need to recognise that society itself is responsible for the conditions which make people criminals.

In that context, however, he also stressed individual responsibility, including repentance. In discussing criminal responsibility, he focussed on the need to show that the offender had a guilty mind, the rule of English law from the time of Henry I, equating crime with sin.

He justified the rules relating to criminal insanity by reference to Christian principles so that if the offender was driven by some blind impulse but which he knew, nevertheless, was wrong, he was not excused in law. Then, in addressing the relations between man and the State, he drew on the primary principle of Christian ethics in politics as respect for every person simply as a person. He illustrated this with the words of the 13th century cleric and jurist Henry of Bracton that "the King is under no man, save under God and the law". Those were the words used by Lord Coke, in response to Charles I's views on the divine right of monarchs. In modern terms they mean that the executive power is under the law. Lord Denning contrasted our system in that context with modern totalitarian systems of government.

He used Christian principles to argue against the evils of excessive accumulation of wealth and opportunity in the hands of a few. He referred to the creation of the welfare state in Britain and the enforcement by the courts of obligations of employers to provide safe conditions of work to their workers and compensate them for injury. He also discussed, however, the dangers posed by the welfare state in increasing governmental powers over the individual.

Finally, he referred to the institution of marriage and the availability of divorce since the State abandoned the principle of indissolubility. In concluding his views on that he said:

> "[P]eople have come to regard divorce as a matter which can be arranged between the parties. In so doing, they only too often disregard the interests of their children and pursue their own selfish ends. Every thinking person is profoundly disturbed by this state of affairs. It has a grave effect on the family unity and on the national character …"[28]

[28] Denning, *The Changing Law*, above n 26, 121.

This is an example of something I mentioned earlier, the problems in the application of the law caused by the confusion of personal prejudice with an ideal of justice. Another example comes from his refusal to accept the decriminalisation of homosexual acts between consenting adults. He was vociferous about that in later life.

This mixing of personal prejudice and an ideal of justice may be exemplified by his decision in *Ward v Bradford Corporation* where he said this, in an apparently *ex tempore* decision about a young woman who had been expelled as a trainee teacher:

> "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."[29]

No doubt the decision was legally justifiable as Ms Ward had broken the rules. But Lord Denning's statement that he was saying nothing about her morals was a trifle disingenuous!

Freedom under the law

Lord Denning's second philosophical plank was freedom under the law. From an early stage he insisted that the common law needed to develop better remedies for judicial review of administrative action. Those views were first expressed by him in the Hamlyn Lectures he delivered in late 1949.[30] He was remarkably prescient about the need to develop better administrative remedies and eloquent in describing the forces demanding better redress in the courts for the abuse of governmental power. He strongly endorsed Lord Atkins' dissenting speech in the wartime decision of *Liversidge v Anderson*.[31] Contrary to the majority and using vividly pointed language directed at his judicial colleagues, Lord Atkin said that the courts could examine the reasonableness of a minister's belief that a person was "of hostile associations". Lord Denning drew attention to the willingness of the then regime in the USSR

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[29] (1972) 70 LGR 27, 35.
[30] Denning, *Freedom Under the Law* (Stevens & Sons Limited, 1949).
[31] [1942] AC 206, 244.

to encroach on the liberty of the subject. He also relied, despite his reputation for Anglo-centrism, on French law to show how the control of the executive can be handled differently, not only in respect of administrative law, but also in the regulation of abuses of power by police.

In concluding his discussion about remedies for abuse of power, he recommended the replacement of the old prerogative writs, mandamus and certiorari, and actions on the case by new and up to date machinery, by declarations, injunctions and actions for negligence administered through the courts rather than in Parliament.[32]

Those views have been adopted legislatively or by procedural changes in many jurisdictions and show one aspect of his continuing relevance separate from the effect of his decisions. These themes about the abuse of power remained important to him for the rest of his life and figured prominently in later writing by him. In a controversial book published by him just before he retired, *What Next in the Law*, he said:

> "…the most important function of the law is to restrain the abuse of power by any of the holders of it – no matter whether they be the Government, the newspapers, the television, the trade unions, the multi-national companies, or anyone else."[33]

Let justice be done

And now to the first of Lord Denning's philosophical principles, "Let justice be done". It gave rise to the most controversial aspects of his career. To the outside observer, his view of doing justice according to law depended very much on his subjective view of the merits of a case. As he said himself:

> "If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule - or even to change it - so as to do justice in the instant case before him. He need not wait for the legislature to intervene: because that can never be of any help in the instant case. I would emphasise, however, the word 'legitimately': the judge is himself subject to the law and must abide by it."[34]

It was not long after his elevation to the Court of Appeal that his decisions began to draw pointed attention from the House of Lords. In *British Movietonews Ltd v London & District Cinemas Ltd*,[35] the Court of Appeal had suggested that parties were no longer bound by a

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[32] Denning, *Freedom Under the Law*, above n 30, 126.
[33] Denning, *What Next in the Law* (Butterworths, 1982) vi.
[34] Denning, *The Family* Story, above n 6, 174.
[35] [1952] AC 166.

contract if there had been an unexpected turn of events which might fall within the literal meaning of the words used but outside the true intention of the parties. Viscount Simon said that Lord Justice Denning's judgment included "phrases … which give us some concern"[36] and went on to say that the authorities relied on by Denning LJ did not support the propositions he advanced.[37]

Another criticism was made by Lord Simonds in *Magor & St Mellons RDC v Newport Corporation*.[38] Denning LJ had said that the Court's role was to find out the intention of Parliament and of the Ministers and carry it out as part of the process of statutory construction and that it could do that better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis. Lord Simonds said that appeared to be a naked usurpation of the legislative function under the thin guise of interpretation. There was speculation in Australia, apparently, whether Denning LJ might be removed from office.[39]

Nonetheless, when a vacancy occurred among the Law Lords in 1957, Denning was appointed to the position. He stayed there until 1962 when he returned to the Court of Appeal as Master of the Rolls. He did not enjoy his time in the House of Lords as much. There appears to have been some personal tension between him and Lord Simonds who continued to criticise his views.[40] In private correspondence with Sir Owen Dixon between 1955 and 1957, Lord Simonds said, of Denning, that he was personally attractive and had great learning but that he regarded him as a "judicial menace".[41] Other observations by Lord Simonds were:

> "He is learned, very learned, in the sense that he knows as much law as the rest of the Bench put together and has it at his finger tips. But if you add, that, if so, much learning hath made him mad, I can only respectfully concur."[42]

And, seven months after Denning became a Law Lord in 1957:

> "Denning himself is a thorn in the flesh – there is in him not only a passion for display but a faultiness of judgment which may become dangerous."[43]

Sir Owen wrote back to Lord Simonds in 1956 that Denning baffled him:

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36 [1952] AC 166, 181-182
37 [1952] AC 166, 184.
38 [1952] AC 189.
39 Heuston, above n 9, 12.
40 Heuston, above n 9, 13.
41 Ayres, above n 19, 253, 359 fn 82, a letter of 6 November 1955.
42 Ayres, above n 19, 359, fn 82 a letter of 11 February 1956.
43 Ayres, above n 19, 359, fn 82 a letter of 24 November 1957.

> "He seems always to be setting principle at defiance. I do not think wild horses would get a majority of the High Court to follow some of his decisions."[44]

Let me move on!

The House of Lords still regarded itself as bound by its own previous decisions until 1966, something that Lord Denning struggled to accommodate with his views about the need to loosen the doctrine of precedent, particularly in the House of Lords.

The most severe criticism of him made in those House of Lords years was his joining in the unanimous decision in *DPP v Smith*[45] on the meaning of *mens rea* or criminal intent to establish guilt for murder. That decision was trenchantly criticised by Sir Owen Dixon in *Parker v The Queen,*[46] the decision which ended the practice by which our High Court had previously followed decisions of the House of Lords. Sir Owen thought that decision contained propositions which he could never bring himself to accept and Sir Wilfred Fullagar characterised it to Sir Owen by saying that they were "hanging men for manslaughter in England now".[47]

Lord Denning was later embarrassed by his agreement in *DPP v Smith*, saying that he would have liked to have delivered a separate judgment but was discouraged from doing so. That encouragement to agree with other decisions appears to have been one of the reasons he did not like the work in the House of Lords so much. When asked later why he moved to the Court of Appeal he replied that he was too often in a minority, saying that in the Lords it was no good to dissent.[48] On other occasions he said, rather more archly, that the odds of justice being done increased when he was one of three rather than one of five.

After his return to the Court of Appeal in 1962, his prominence increased. He had been in demand as a speaker particularly since the Hamlyn Lectures in 1949 and that demand became international. He became a significant public figure in 1963 when appointed to conduct the Profumo inquiry into alleged misconduct by a Cabinet minister. At the time he was described in *The Observer* in these terms:

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44 Ayres, above n 19, 253, 359, fn 83 a letter of 15 April 1956.
45 [1961] AC 290.
46 (1963) 111 CLR 610, 632.
47 Ayres, above n 19, 276.
48 Heuston, above n 9, 15.

> "It has been left to Miss Mandy Rice-Davies[49] to bring home to the public what every barrister, who ever appeared before him knew already: that he is 'quite the nicest' judge. Charming, infinitely courteous, always anxious to help: this is how Tom Denning has always been known at the Bar.
>
> Tall and thin, neat and unobtrusive in his dress, sociable enough but not in the dining-club, old-boy reunion, City banquet sense, he has always been a bit of a lone wolf, incredibly hard-working, ruthlessly honest – the whitest lie pains him – dissenting because it is in his nature and his upbringing to bear witness, to keep faith, to do duty, a little proud in his independence."[50]

He received many honorary doctorates from universities throughout the world and published regularly towards the end of his judicial career. By then, however, his popularity had begun to wane.

There was a suggestion that, as Master of the Rolls, he would pick the cases on which he sat, particularly the ones where he believed the law needed to be changed. Leading cases decided during this period included *Anton Piller KG v Manufacturing Process Limited*[51] and *Mareva Compania Naviera SA v International Bulkcarriers SA*.[52] The jurisdiction to make *Mareva* orders, in particular, was controversial initially but the procedural utility of both decisions resulted in their establishment as harmonised rules in all Australian jurisdictions as search and freezing orders.[53]

To facilitate those sorts of developments he is said to have chosen the judges to sit with him from those who, he believed, favoured change in the law. On one such occasion, however, the tactic did not work. The two judges sitting with him on a case in which the decision had been reserved came to discuss it with him. The first judge to speak said he did not agree with Lord Denning's already circulated draft judgment in the matter and would write his own reasons. Lord Denning told him: "That's alright, you can dissent". The other judge then told him that he too disagreed with Lord Denning's reasons to which, ever confident, he replied: "Oh that's fine. You can both dissent."

Never fond of the doctrine of precedent, he had embarked on a campaign to free the Court of Appeal of its obligation to follow its own decisions. His theory was that the relaxation of that

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49 One of the prostitutes at the centre of the affair.

50 'Denning: Profile', *The Observer* (London), 29 September 1963, 9.

51 [1976] Ch 55.

52 [1975] 2 Lloyd's Rep 509; [1980] 1 All ER 213.

53 See, eg, *Uniform Civil Procedure Rules* 1999 (Qld) Ch 8 Pt 2. See also the useful discussion of the creation and development of these orders in Peter Biscoe, *Freezing and Search Orders* (LexisNexis Butterworths, 2nd ed, 2008) ch 2.

rule in 1966 by the House of Lords also applied to the Court of Appeal. In *Cassell & Co Ltd v Broome*,[54] he had invited the Court of Appeal and trial judges not to follow *Rookes v Barnard*,[55] a clear decision of the House of Lords on the proper scope of exemplary damages in defamation, asserting that the decision had been given *per incuriam*, in ignorance of an earlier decision.

He was not alone in his dislike for *Rookes v Barnard*, as our High Court refused to follow it in *Uren v John Fairfax & Sons Pty Ltd*.[56] Denning was severely rebuked for his heresy by the House of Lords, however, and also rebuked in *Gouriet v Union of Post Office Workers*[57] for suggesting that the courts could control the decision of the Attorney-General to lend his name to relator proceedings. Lord Diplock observed, probably referring to Lord Denning's dissenting remarks, that the failure to recognise the distinction between private law and public law below led to "some confusion and an unaccustomed degree of rhetoric". Professor Heuston certainly took the remark as a reference to Lord Denning and had this to say:

> "Denning's style had always been unusual: by the mid-seventies it was not quite so admired as it had been. The structure of the judgment was as clear and sound as ever, and often praised by his fellow judges, but a certain striving after effect had become noticeable in the style rather than in the arrangement. There were few or no subordinate clauses, and sometimes no verb in the sentences. So the style was lacking in cadences. Also the terse vivid opening sentence, to which he himself attached so much importance for gripping the reader's attention, often seemed inappropriate, especially in cases of severe personal injuries. Parodies began to appear - sometimes quite amusing."[58]

The popular press had also sharpened its focus on judges, even in the civil cases in which Lord Denning specialised. Rebukes of him by the House of Lords received great publicity and sometimes provoked vigorous responses from Lord Denning himself.

A contributor to an academic journal in 1980 said:

> "We are witnessing the tragic drama of a great judge whose acute sense of rightness has become a conviction of righteousness, whose consciousness of the need for justice has led him to become a self-appointed arbiter in the politics of society and whose desire to draw attention to defects in our law has more noticeably drawn attention to himself. Aided and abetted by the media, whose motives are not coincident with the interests of justice, of the legal system nor of the noble judge

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54 [1972] AC 1027.
55 [1964] AC 1129.
56 (1966) 117 CLR 118.
57 [1978] AC 435, 496.
58 Heuston, above n 9, 18.

> himself, the process has accelerated and the Master of the Rolls now takes his daily place alongside the good and the bad in the nation's headlines."[59]

By then the subject of his potential resignation had become an issue. He was much more senior than the other judges and less likely to pay much attention to what they said.

Professor Heuston says that, by then, he seemed to be in a state of some intellectual and social isolation, not having any younger judge who could act as friend or adviser. Professor McAuslan made a perceptive comparison of Lord Denning with Lord Mountbatten, saying: "What Lord Mountbatten was to the Royals, Lord Denning is to the judiciary; unorthodox, larger than life, a great performer, eager to emphasise his own considerable contributions to public life and present them in the best possible light …."[60] Professor Heuston went on to say to that list of shared qualities might be added a certain absence of humour about self.[61]

Lord Denning's resignation came finally in 1982, in his 83rd year. It was precipitated by the publication of his latest book, the fourth in three years, titled *What Next in the Law*. It created a hullabaloo. He called into question the suitability of immigrants and non-whites for jury duty. It incorporated remarks he had made a year before, that the black defendants' lawyers in cases arising out of the Bristol race riots had made their jury selections and objections based on race. Those remarks had been shown to be false. He went on to say that:

> "[t]he English are no longer a homogenous race. They are white and black, coloured and brown. They no longer share the same standards of conduct. Some of them come from countries where bribery and graft are accepted as an integral part of life: and where stealing is a virtue so long as you are not found out. They no longer share the same code of morals. They no longer share the same religious beliefs. They no longer share the same respect for the law."[62]

Earlier in 1982, he had controversially refused to find that Sikhs were protected as a "race" under the existing anti-discrimination law, a decision overturned by the House of Lords. In 1980 he had ranted against the Birmingham Six in the case of *McIlkenny* saying:

> "This case shows what a civilized country we are. Here are six men who have been convicted of the most wicked murder of 21 innocent people. They have no money. Yet the state lavished large sums on their defence. … In their evidence they were guilty of gross perjury. Yet the state continued to lavish large sums on them – in their actions against the police. It is high time that it stopped. It is really an attempt

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59 Heuston, above n 9, 22 citing (1980) *Cambrian Law Journal* 113, 114.
60 Patrick McAuslan, 'The Due Process of the Law. By Lord Denning' (1981) 44 *Modern Law Review* 233, 236.
61 Heuston, above n 9, 22.
62 Allan C Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge University Press, 2012), 167-168.

> to set aside the convictions by a side-wind. It is a scandal that should not be allowed to continue."[63]

It was later established that the Birmingham Six had been set up by police, that their confessions had been coerced and that they had no part in the bombings.

All of these events attracted significant publicity, the controversy over the contents of the book being the last straw. The published version was withdrawn and replaced with the offending parts excised. Lord Denning released a statement through the Clerk to the Master of the Rolls saying that he had intended for some time to retire by 30 September 1982 because of his advanced age, but that in light of the recent controversy which had arisen over his book it was decided to bring the announcement forward. He continued sitting until the end of July 1982.[64]

Rudy Narayan of the Society of Black Lawyers offered an elegant footnote to the controversy created by Lord Denning about coloured jurors by saying:

> "Lord Denning remains one of the greatest judicial minds of his century. A great judge has erred greatly in the intellectual loneliness of advanced years; while his remarks should be rejected and rebutted he is yet, in a personal way, entitled to draw on that reservoir of community regard which he has in many quarters and to seek understanding, if not forgiveness."[65]

These idiosyncrasies of Lord Denning's later years illustrate the fundamental issue raised by the first principle of his judicial philosophy, "Let justice be done". What is justice if it is avowedly idiosyncratic to the extent that it could be with Lord Denning? When those idiosyncracies include apparently serious prejudices the danger to the rule of law becomes significant.

Sir Owen Dixon's discussion of judicial method back in 1955 in the context of the *High Trees* decision concluded with what can only be regarded as pointed remarks. It is an error, he wrote:

> "[I]f it is believed that the technique of the common law cannot meet the demands which changing conceptions of justice and convenience make. The demands made in the name of justice must not be arbitrary or fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice. Impatience at the pace with which legal developments proceed must be restrained because of graver issues. For if the alternative to the judicial administration of the law according to a received technique and by the use of the logical faculties is the

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63 *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, 323-324. See the discussion by Hutchinson, above n 59, 166-167.

64 Heuston, above n 9, 24.

65 Hutchinson, above n 62, 168-169.

> abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk. The better judges would be set adrift with neither moorings nor chart. The courts would come to exercise an unregulated authority over the fate of men and their affairs which would leave our system undistinguishable from the systems which we least admire." [66]

Sir Owen later wrote to the leading American Supreme Court judge, Felix Frankfurter, telling him that, to a certain extent, he was aiming at Denning LJ in his remarks. However, rather to his consternation, he had received a letter from Denning saying he completely agreed with everything Dixon had written in the address![67]

Conclusion

In retirement Lord Denning continued to give interviews, including a notorious one in 1990 with A N Wilson from the *Spectator*.[68] He also continued to attract attention, sometimes for all the wrong reasons. One of the saddest episodes of his later life was his participation in a television show hosted by the since disgraced paedophile, Jimmy Savile. The subject was the trial of Enid Blyton's character "Noddy" where Lord Denning presided in his dotage and in full judicial regalia.[69] His latter years show the virtue of the statutory retirement age.

Lord Denning in his prime was a man of great warmth, courtesy and charm, much loved by those who knew him well. He was a great judge in so many respects, particularly in his recognition of the need for change and development in the legal system. His best judgments reflect a high degree of scholarship and a talent for expressing the law clearly and simply.

Many of his decisions, even if not ultimately persuasive as precedents, have provided inspiration for legislative change. So have his other writings. I have mentioned the modern development of better legal remedies for judicial review of administrative action as one example. Another example that springs to mind is the legislation that has entrenched the rights of spouses to share in matrimonial property held in separate names. Early in his career in the Court of Appeal he had argued that a deserted wife had an equity in the matrimonial home, a

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66 Dixon, above n 19, 165.

67 Ayres, above n 19, 253, 359, fn 81.

68 See A N Wilson, 'England, His England', *The Spectator* (London), 18 August 1990, 8, available online at http://archive.spectator.co.uk/page/18th-august-1990/8

69 See *Lord Denning in 'Jim'll Fix It'* (Television series directed by Marcus Mortimer, BBC, 1985), available at https://www.youtube.com/watch?v=lNGSA294uDc

stance he maintained "despite some legislative setbacks and regular rebuttal by the House of Lords"[70] and which eventually attracted statutory intervention.

His decisions may have been affected by hidden or old-fashioned prejudice, particularly because of his confidence in his own judgment of what was just, the strength of his self-belief. Any judge, however, needs to re-examine faithfully his or her assumptions about life and society in the light of new knowledge to avoid making decisions inconsistent both with justice and the law. To adopt the words of the monk and writer, Thomas Merton:

> "One must face the fact that 'good intentions' are only good as long as they are faithfully re-examined in the light of new knowledge, and in the light of their fruits. … The ethic of subjective 'good intentions' has been judged and found wanting. We must refocus on the objective results of our decisions!"[71]

Lord Denning's subjective good intentions needed a healthier dose of legal objectivity to secure his place in the legal pantheon.

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[70] Hutchinson, above n 62, 162 and see *Bendall v McWhirter* [1952] 2 QB 466, 483 overruled in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 where Lord Cohen at 1228 and Lord Upjohn at 1241 nevertheless expressed their dissatisfaction with the unsatisfactory state of the existing law.

[71] Thomas Merton, *Conjectures of a Guilty Bystander* (Image Books, 1968) 113-114.

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