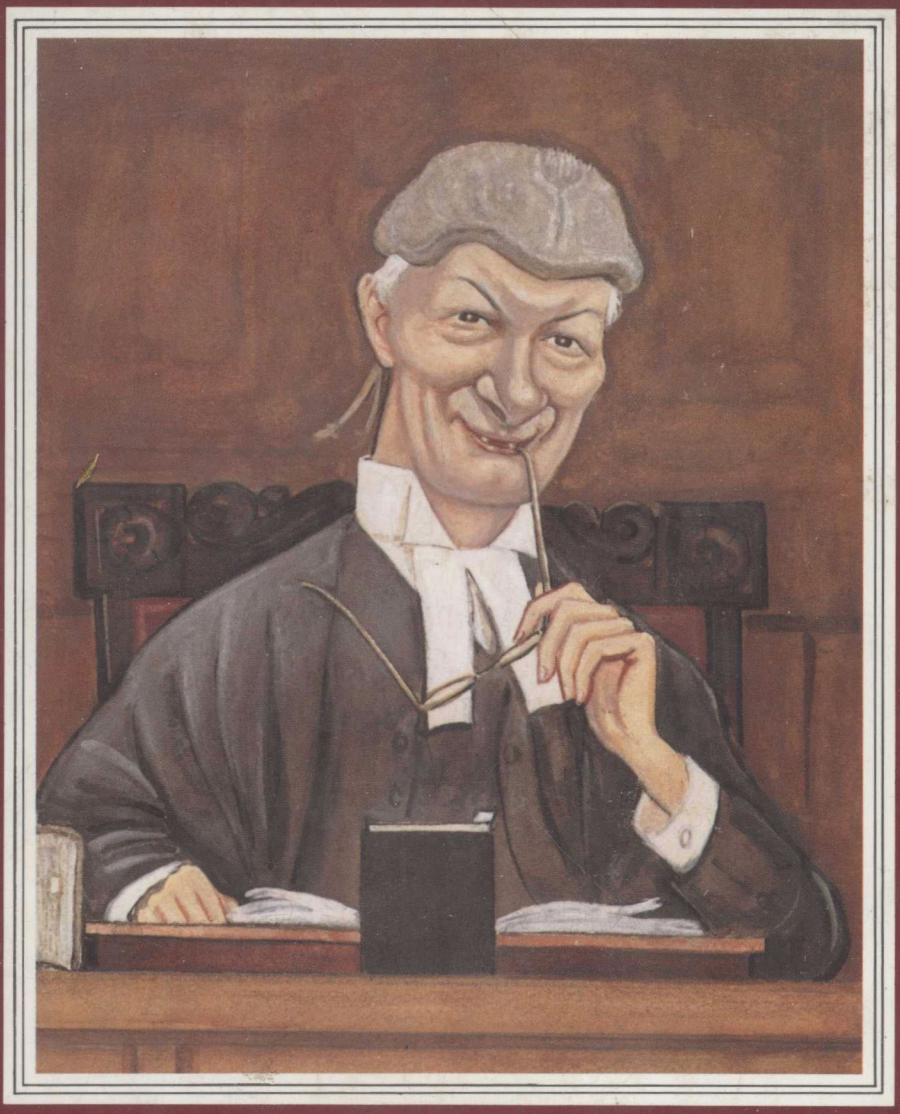
Lord Denning: The Judge and the Law



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Lord Denning: the Judge and the Law

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Foreword

LORD DEVLIN OF WEST WICK, P.C., F.B.A.

THERE is no precedent for so comprehensive an assessment of a judge's work to be issued almost immediately on his retirement from the Bench. Not that a lack of precedent would deeply distress Lord Denning (though I think his reputation of waywardness has become exaggerated). Indeed, I doubt if there is a precedent for any assessment at all that goes beyond a stately obituary in *The Times* or a paragraph in the D.N.B. Few judges, apart from those with a tally of famous cases, rate a biography.

Why, then, so elaborate a study of Lord Denning? I say at once that if there were no reason for it other than a whim of the authors, it would still be good value. He was an Appellate Judge for 35 years, an unprecedentedly (the word keeps intruding) long period; and to have a number of distinguished writers examining the development of the law during that period by following the activities of a central figure is a deserved honour for him and very attractive for us.

There is, however, more to it than that. How much more? That is what I hoped to find out before I wrote this Foreword. But illustrious writers are difficult to drill. They are great doers of their own thing and of doing it in their own time. Months ago I read with immense pleasure of the first essays, perhaps not yet in their final forms, and started to make a forecast of where Lord Denning's place in legal history would be. A rough forecast, I thought, whose refinement must wait until all the embroidered cloths were spread out on a field below an ivory tower from which I would meditate on them at leisure. What a hope! I find myself now in the company of the laggards being herded at a gallop towards a publication date.

The survey of the completed work, the meditation, the speculation and the draft of a judgment for posterity, I must now leave to the readers. Besides assuring them of an enjoyable occupation, I can offer them a starting point which I believe they can take as firm.

When Tom and I were young the law was stagnant. The old-fashioned judge looked to the letter of the statute and for the case on all fours. He knew that he had to do justice according to law. Either he assumed that the law when strictly applied would always do justice or else he decided that, if it did not, it was not his business to interfere. Today this is not the idea. No statement of the law, be it a precedent or a statute, is ever final: it is to be read in its context and its context can change. A judge must never assume that the law always and in all circumstances does complete justice. That would be an impossible task to put upon any lawmaker. To do justice according to law the judge must keep his eye on the justice of the case as well as on the text of the law.

A case may fall into a large or a small category. If it is small, it will be in a situation which is unlikely to be repeated, and the adaptation of the law can be thought of as a straining rather than a development. Then even the "timid soul" within the famous Denning classification can do justice while protesting that it turned on the facts of the particular case. Where the category is

large, there is no concealing the need for a major development repugnant to conservative thought. Moreover, when the category is large, it is easy to say that the innovation is too considerable for the court and should be made, if at all, by Parliament. The minority speeches in *Donoghue* v. *Stevenson* [1932] A.C. 562 display the current attitude of refusing to look over the boundary wall.

In the 1920s and 1930s Lord Atkin was notable among the judges for the vigour with which he was ready to extend a principle into unoccupied territory. After the war it was Mr. Justice Denning who led the way. It was not the result in *High Trees* that came as a shock. That could, I think, have been reached unobtrusively by a little twisting and blending of old authorities, though many puisnes would have left that sort of work to the Court of Appeal. Denning, a very recent puisne, preferred to cut a new channel from the main stream.

In 1962 there was a turning point which made this book feasible. Denning's promotion to the Court of Appeal in 1948 when he was still under 50 after only three years as a puisne, half spent in Divorce and half in the King's Bench, had been remarkable. Thereafter he advanced less speedily but still fast and reached the House of Lords in 1957. His close contemporaries were Evershed, Master of the Rolls since 1949, Radcliffe, a law Lord since 1949, and Parker, about to become Lord Chief Justice in 1958. Thus for Denning as a junior law Lord the offices of Chief Justice and of the Rolls, which provide the only bypass to the slow rise by seniority in the Lords, were filled by men of his own age. In the Lords influence on the law was then heavily dependent on seniority since the senior law Lord usually gave the leading judgment.

In 1962 Evershed had served for 13 years as Master of the Rolls. He was still too young to retire but he wanted less business in the law. This meant an exchange of place with a law Lord, one who was ready to exchange the distant prospect of presiding in the Lords for being immediately the master in his own court. This was what Denning wanted. Had he remained in the Lords, he would have been behind not only Radcliffe but Reid. Reid was a very great judge, progressive but not unorthodox. Though he was only just senior to Radcliffe in appointment, he belonged to the preceding decade. Nevertheless he outlasted Radcliffe who retired in 1965 while Reid went on until 1974. By then 12 out of the 20 years of Tom's remaining judicial life had passed.

If Denning had preferred in 1962 to stay where he was, this book would not have been composed as it is. For this book is about one judge. All other books of this sort have not been about a judge but about a period or a subject. Had Denning remained in the Lords, his contribution would have been great, perhaps the greatest, but it would have been a part of the whole. Even as it is, the reader must remember that from the nature of the book the light is focused. Who, for example, found the ultimate common law solution to the problem of the deserted wife? Was it Lord Denning or Lord Diplock? And—perish the thought—would it matter which? Since, as is almost bound to happen, in the end Parliament—more precisely the Government lawyers—takes over.

Lord Denning's decision to take the Rolls was right for him because it was coupled with the determination to seize the latent power of the office. This is the power that a Chief Justice has always exercised, but not hitherto the president of the Court of Appeal,—the power of choosing his own cases and

his own colleagues, the former more important than the latter since no Lord Justice is a "yes" man.

Traditionally, the influence of the Court of Appeal is based on the fact that over a large area of the law it is in practice the final court. Lord Denning exercised this influence to the full. When, to the 20 years of his Presidency, there is added the nine years from 1948 to 1957, one is enabled by that statistic alone to estimate his huge contribution to the law. To be added to this there is the novel influence exercised by the Leader of the Opposition. He has himself given in his own books the fullest account of his opposition to the Lords and of the decisions in which it was embodied. I look forward especially to seeing what the eleven authors of this book make of them.

It is as the Leader of the Opposition that Lord Denning is best known to the public. Here he has the advantage of being the monarch, albeit a constitutional monarch, of his own court: the House of Lords has only a council of regency. The public, as well as the Press, which is avid for it, likes personification. "Lord Denning rules that . . ." sets the pulse racing in a way that "the Court of Appeal decides that . . ." can never do. Since 1940 when the Lord Chancellor ceased to sit regularly, the House of Lords has been without an active monarch. I believe that as a body they would impinge more strongly on the public mind if they had one.

The secret of Lord Denning's attraction—for the profession as well as for the general public—is, I think, the belief that he opens the door to the law above the law. "I imagine that every lawyer in his heart" Lord Radcliffe has written "sighs for some doctrine of Natural Law to bring to bear upon the raw material of his labours. It is his escape route from the sharply delimited areas of legislative enactment and established precedent. It is more than that: it is his link with a more universal conception of justice than his own municipal system is likely to seem to embrace."[1] But the natural law, he thought, "was not likely to be more than a minor formative influence upon the work of the judge." Lord Denning, I believe, thought differently. He thought, as Lord Radcliffe did not, "that judges in our society could remake the body of the law they administer into what they may approve as a shape of greater justice."

This remaking has been done once successfully in English law, but the enterprise took over four centuries to complete and began with a different aim. Faced with the constrictions and inadequacies of the mediæval common law, the Chancellor acted by threatening to imprison anyone who did not accept instead the equitable alternative he offered. In the eighteenth century Lord Mansfield tried his hand at direct improvement. Already the common law courts were accepting some equitable solutions. Equity, for example, had introduced the rules permitting secondary evidence of a deed to overcome the common law rule that the plaintiff who could not produce his bond was paralysed. These and other similar relaxations came to be applied by the common law courts themselves. Lord Mansfield greatly accelerated this process which led a century later to the fusion of law and equity. But his attempts to get the judges to think equitably and reform the law accordingly were with one exception, the action for money had and received, which made binding the "ties of natural justice and equity," frustrated.

In the United States what Lord Mansfield and Lord Denning (the latter

[1] *The Law and its Compass*, (Faber & Faber, 1960), p. 25.

more greatly handicapped) attempted, has been achieved by a simple manipulation of the Constitution. In the phrase "due process of law" in the Fifth and Fourteenth Amendments, the "law" is not the law as it is but the law as it ought to be, what Justice Frankfurter described as "those canons of decency and fairness which express the notions of justice of English-speaking peoples."[2] In this way equity, as static in the United States as in England and merged with the common law in 1938, has been given new life.

Has Lord Denning succeeded in giving practical effect to his conception that justice is above the law? That he has made a great impact on the law is unquestionable. But is his achievement in this respect merely a matter for comparison with the senior Law Lords of his time, Reid, Wilberforce and Diplock? Or is it something unique? The multitude who applauded his judgments and put his books into the bestseller lists, believe that it is unique. What is the verdict of the discerning? This book, I trust, provides the material for their answer.

August 1983

[2] *Adamson* v. *California*, 332 U.S. 46, 67 (1947).

Preface

English legal scholarship, though much enriched over the last decade or so through the infusion of a socio-legal approach, is still rather limited in format; the textbook, monograph or an article on a specific topic or area of law is still the norm, examination of the contribution of individuals to the development of the law the exception. The genesis of this book bears witness to this statement. On or around Lord Denning's eightieth birthday in 1979, we were struck by the absence of any attempt in books or law journals to assess his contribution to the development of English law since his appointment to the Bench in 1944; in America, the leading journals would have been vying with each other to produce special issues on an American equivalent of Lord Denning. It was typical both of the man and the state of legal scholarship that the only publication celebrating Lord Denning's eightieth birthday was a book written by himself—*The Discipline of Law*.

We resolved to do something about what we saw as a gap in the literature of the law and put a proposal for this book to the publishers. Meanwhile Lord Denning produced another book—*The Due Process of Law*. The publishers did agree to the proposal, and since then Lord Denning has produced another three books—*The Family Story*, *What Next in the Law*, and *The Closing Chapter*—yet the combined forces of well over a thousand legal academics in the United Kingdom have between them come up with just one book of essays—*Justice, Lord Denning and the Constitution*, edited by P. Robson and P. Watchman, written entirely by Scottish legal scholars who receive all credit for a pioneering work—and two articles on Lord Denning's contribution to English Law.

This book is offered then not just as an attempt to assess Lord Denning's contribution to the development of English law over all or part of five decades during his 38 years on the Bench, but in the hope of pointing in the direction of a new field of legal scholarship in which the contribution of other noted judges with long service on the Bench might be critically assessed—in the period since 1945, Lord Reid (1949–1975, all spent in the House of Lords), Lord Diplock (1956–1984), and Lord Wilberforce (1961–1982) come to mind as obvious candidates for such treatment. While we would not suggest that the history of the development of English law can or should be rewritten purely in terms of the contribution individual judges made to the law, we think that the present position, where practically no assessment is made in these terms, presents a lop-sided picture which badly needs to be rectified. In the world of practical law individuals influence both particular decisions and the general development of the law.

We were very fortunate in being able to have as our co-authors in this venture persons of such distinction in their respective fields and we are very grateful to them for their contributions. We did not lay down in advance any ground-rules for writing the chapters or attempt to dictate what conclusions should be arrived at on Lord Denning's judicial career. We considered that each author should have a free hand in planning and writing the chapter subject only to the general principle that as definitive and rounded an assessment as possible should be attempted. In one respect the tardiness in producing this book—a tardiness for which we would like to apologise to

those of our contributors and co-authors who must have begun to despair of ever seeing their contributions in print—has allowed the work to be more complete, as Lord Denning's retirement in 1982 gave us the opportunity to assess his full judicial career (although some of his cases were only reported after most chapters were complete). Yet even now we are aware that, in the fullness of time, this book will be seen as no more than an interim assessment of Lord Denning—a fuller assessment having to wait for a "Life and Times" written we would hope by an historian and a lawyer. Nevertheless, we would like to think that this book will have value both as a record of a remarkable judicial career and as a critical assessment of the judicial role in modern society.

We would particularly like to thank Lord Devlin, P.C. for his Foreword and the Lord Hailsham of St. Marylebone, Lord Chancellor, for permission to reprint his valedictory speech made on the occasion of Lord Denning's retirement.

We had hoped to print as an appendix to this book details of all Lord Denning's reported cases—over 2,000 of them—including not merely names and references but with whom he sat, whether the decision was a majority one or whether he dissented, whether the decision was appealed and if so the result on appeal. We considered that this would be an invaluable statistical record of Lord Denning's career. In the event, the information would have taken over 300 pages of print and we reluctantly acceded to the reasonable request of the publishers that this appendix be held over and possibly published later as a separate volume. It would be interesting too to publish an equivalent table of Lord Denning's unreported cases but we suspect that that would take a further volume. One incidental fact which emerges from this book and the compilation of these tables is how incredibly hard-working and productive Lord Denning was; given the number of judgments he had to write during terms it is not too surprising that he could knock off a book in his long vacation ("This book was my 'holiday task' for the long vacation" *The Discipline of Law*, p. 315). We academics have more to learn from Lord Denning than just a study of his judgments.

The task of gathering and ordering of cases was much eased by a grant from the Nuffield Foundation which enabled us to employ research assistance for that. We would like to thank the Foundation for their generous assistance and Robert Pullen, Sarah Ricketts and Carolyn Thomas for their work on the cases for us. We would like too to thank our secretaries, Vivien Fairley and Margaret Wright, for their invaluable contributions in typing our Chapters and maintaining liaison between us, our contributors and publishers. In particular, the latter deserve great thanks for their patience, encouragement and assistance.

Hampstead — J. L. Jowell
Leamington Spa — J. P. W. B. McAuslan

June 1984

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