

Lord Denning: Christian Advocate and Judge

*The Rt. Hon. Lord Edmund-Davies**

January 23, 1899, is a date assured of a permanent place in English legal history. For it was the day on which, above his father's draper's shop in the then small Hampshire town of Whitchurch, there was born one destined to play a paramount part in the development of English common law. By today no lawyer – and few laymen – can fail to know at least the salient facts in the life-history of Alfred Thompson ('Tom') Denning, Baron Denning of Whitchurch in the County of Hampshire, to give him the full title. It is a thrilling tale of the ascent from comparatively humble origins of one destined to occupy an imperishable place in the ever-unrolling tapestry of the law, a man whose gifts of character and intellect are such that people like myself are proud to be able to say, "I have sat and worked alongside Tom Denning on the Bench and I count that as a privilege beyond all price."

The milestones in his life are memorable. Educated locally and then as a scholarship boy at Andover Grammar School, he went on to secure first-class honours at Oxford, originally in mathematics and then, a mere year later, in jurisprudence. After active service in France in the 1914-18 Great War, he was called to the Bar in 1923 and became a King's Counsel in 1938. He was appointed a High Court judge in 1944 at the early age of 45, was elevated to the Court of Appeal in 1948, and went to the House of Lords in 1957. But in 1962 he returned to the Court of Appeal as Master of the Rolls, and he has occupied that august office ever since.

It is a stirring story of the recognition and rewarding of sheer merit. But my purpose is to reveal something of the man behind the bald record, and thereby to demonstrate that the mainspring of his life has been his firm belief in the Christian religion and his courageous application of Christian principles to the task in hand.

Like most good stories, it all began in his childhood in Hampshire, with the family's established practice of regular churchgoing, and leading on in later life to service as a Churchwarden and member of the Parishional Church Council. The familiarity with Biblical texts which he acquired at an early age did much to form and, indeed, to transform his style of speaking, so that in later life his judgments

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and addresses have (like most parts of the New Testament) consisted of sentences of remarkable clarity and brevity, frequently declining to recognise any need for an accompanying verb.

Early habits die hard, and Denning's Christian creed remains the dynamic of his life. For many years he has been President of the Lawyers' Christian Fellowship of the United Kingdom, and in his address delivered at the Annual Service in the Temple Church in October, 1977, he recalled words he had first publicly used a quarter-century earlier. They reveal an attitude which, as I believe, constitutes the bedrock of his Christian philosophy and practice. Speaking of the Ten Commandments he said:

“This intermingling of religious, moral and legal precepts was typical of early society. But now these precepts have become severed. This severance has gone much too far. They say law governs one's dealing with one's fellows, religion concerns one's dealings with God, but the two are quite separate. Likewise they say the law has nothing to do with morality. It lays down rigid rules which must be obeyed without questioning whether they are right or wrong. Its function is to keep order, not to do justice.

The severance has, I think, gone too far. Although religion, law and morals can be separated, they are nevertheless still very much dependent on each other. Without religion there can be no morality: and without morality there can be no law.”

For Lord Denning, law is (or should be) synonymous with justice, and it is with the doing of justice (as he sees it) that for nearly 40 years on the Bench he has dedicated himself. To quote my old friend, Francis Cowper, “His eyes are on the future, but his feet stand firmly in the ancient certainties of morality and true religion. They set the standard of the principles of justice to which it is his self-imposed task to mould the law . . . Times change; new diseases attack individuals and the body politic, and Denning is not the doctor to treat the afflicted patients with old prescriptions out of old bottles.” He has never restricted himself simply to ascertaining what is the law relevant to the particular facts and then blandly applying it. For if he regards the existing law as unjust he will do his utmost to discard it and substitute something better. And so he wrote in the preface to his 1979 work, *Discipline in the Law*:

“I use the word [discipline] in the sense given in the *Shorter Oxford Dictionary* of ‘Instruction imparted to disciples or scholars’. But I have no disciples, and scholars are few. Yet I use the word so as to show that I wish to impart instruction – instruction, that is, in the principles of the law as they have been, as they are, and as they should be . . . Like the centurion in the Gospel, ‘I also am a man set under authority’ (Luke 7:8). Restless under authority, irked by it – when I feel it to be wrong – nevertheless it is my duty to abide by it – unless I can persuade my brethren that it is working injustice. Then when authority is shown to be wrong, the time will come when it will be overthrown: or at any

rate it should be. If not by the judges, then by Parliament – at the instance of the Law Commission. Where I have failed they may succeed.”

Holding this view of the judicial role, it is a natural corollary that Lord Denning has always imposed the highest standards of conduct upon members of the legal profession, both inside court and out. Here are the opening words of one of his early addresses (“The Honest Lawyer”):

“If there is one thing more important than any other in a lawyer it is that he should be honest. He must be honest with his clients. He must be honest with his opponent. He must be honest with the court. Above all, he must be honest with himself. This was, you may remember, the precept given by Polonius to Laertes: ‘This above all: to thine own self be true. And it must follow as the night the day, thou canst not then be false to any man’.”

Denning’s refusal to apply laws which he regards as out-moded and unjust has been unremitting and relentless. At times it has led to unfortunate clashes with some of his judicial brethren who, though no less dedicated to doing justice than he, have felt compelled to apply the established law, even though they have strongly disliked it and openly criticised it and pleaded for Parliament to amend it speedily. Perhaps the clearest example of this clash arises from their differing attitudes to the task of interpreting Acts of Parliament. Not for Denning a mere literal interpretation, for (as he reminds us) “the letter killeth, but the spirit giveth life” (II Corinthians, 3,6). For him the judge’s task is to find out the intention of Parliament. He accepts that, in doing this, you must naturally start with the words used in the statute. But, he insists, “You *don’t* end with them – as some people seem to think. You must discover the meaning of the words . . . Judges are too often inclined to fold their hands and blame the legislature, when they really ought to set to work to give the words a reasonable meaning, even if this does involve a departure from the letter of them. By so acting they are more likely to find the truth.”

But finding what *is* the truth in the context of statutory interpretation can confront the most zealous judge with grievous problems. Sometimes his sworn duty to “do right by all manner of people after the laws and usages of this realm” puts the judge in grave difficulty, for certain of those laws and usages may be repugnant to him. He can meet that unfortunate situation in one of two ways. First, when the law appears clear, he can shrug his shoulders, bow to what he regards as the inevitable, and apply it. If he has intellectual and moral twinges in doing so, he can always invoke Lord Chancellor Simonds, who said in 1962:

“To me, heterodoxy, or as some might say, heresy is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some, abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent.”

Alternatively, a judge can be bold and deliberately set out to make new law if he thinks the existing legal situation is unsatisfactory. But he risks trouble if he goes about it too bluntly. And sometimes the law, being declared in statutory form, is too much for him, dislike it though he may. In the first year of the 18th century, Chief Justice Holt said, "An Act of Parliament can do no wrong, though it may do several things that look pretty odd", and judges have long been chafed by this undoubted supremacy of Parliament, whose most questionable enactments must be applied. Faced by so unfortunate a situation, they must do the best they can. They may, for example, find it possible to hold that some other and fairer construction of a statute is conceivable. If so, they seize upon that more attractive construction with as near an approach to gaiety as is seemly in a judge.

If, perchance, there is a lacuna in a statute, they may decide to follow the trail blazed by Lord Denning, who declared over 30 years ago:

"When a defect appears, a judge cannot simply fold his hands and blame the draftsman. *He* must set to work on the constructive task of finding the intention of Parliament . . . A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must do as they would have done. A judge must not alter the materials of which it is woven, but he can and should iron out the creases."

Nevertheless, a judge who follows that advice runs the risk of being gravely censured, as Lord Denning himself was, Lord Simonds saying:

"The duty of the court is to interpret the words that the legislature has used: those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited . . . If a gap is disclosed, the remedy lies in an amending Act."

But Lord Denning remained unrepentant, and 20 years later he retorted by saying in the Court of Appeal, "We do not now in this court stick to the letter of a statute. We go by its true intent. *We fill in the gaps.*"

Whatever view the reader may take about such gap-filling (and there is room for widely differing opinions even among righteous men), Lord Denning has scant respect even for long-established law if he thinks its application would lead to an unjust result in the particular case. For to him justice is far preferable to mere conformity, even though the "just" decision may introduce great uncertainty into the law. Holding in 1954 that the relevant statute enabled the court to order a husband to pay maintenance for his child born before marriage, and refusing to follow an earlier decision to the opposite effect, he said:

"What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall

never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.”

Not surprisingly, Denning has frequently been rebuked in the House of Lords. But his mettle is such that, though he must naturally dislike such experiences, in no way have they dismayed him. And, to gain his point, he has never hesitated to seek a wider audience for his views. Opposing what he regarded as merely slavish adherence to precedent, he went off to Oxford in 1959 and delivered in his Romanes Lecture weighty blows upon the doctrine that even the House of Lords was bound by precedent. He said:

“If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes tumbling about them.”

And, echoing Mr Justice Jackson, he continued:

“The common law will cease to grow. Like a coral reef, it will become a structure of fossils . . . The House of Lords is more than another court of law. It is more than another Court of Appeal. It is the Court of Parliament itself. It acts for the Queen as the fountain of justice in our land. It lays down . . . the fundamental principles of the law to govern the people; and, whilst adhering firmly to these principles, it should overrule particular precedents that it finds to be at variance therewith.”

His words went unheeded at the time. But not for long, for they paved the way leading to the important statement of 1966, in which the House of Lords announced their intention “. . . to modify their present practice and, while treating former decisions of this House as formally binding, to depart from a previous decision when it proves right to do so.” It was a mighty victory. But not as great as Lord Denning would have liked, since it has been held that in all United Kingdom courts below the House of Lords the binding force of precedents still prevails in full vigour. Even so, it has had an important effect in freeing the House of Lords from the shackles of the past and has enabled them to do justice in several cases, regardless of previous holdings which would otherwise have prevented them from adopting what they regarded as a proper and preferable course.

Were I asked to identify the hall-mark of Lord Denning’s application of Christian principles in his judicial work, I should point to his passionate and persistent respect for the individual. And the more the individual lacks the trapping of material power and worldly status, the more doughty is the support which Denning extends to him. His manifestly genuine *liking* of most of the people he meets daily in his busy life is reflected in his instinctive attitude in human relationships. And to see and hear him in his court of a Monday morning, dealing with lay litigants, is wondrous to behold. If they appear bewildered (as they often do), he proceeds with ineffable courtesy and tact to put them at their ease; with

unrivalled patience he extracts the gist of their grievances; and with consummate skill he disposes of their case in such a manner that even the unsuccessful litigant has no proper cause for complaint that he has not been fully and fairly heard. But Denning is perhaps at his best in the company of young people, for, without being in the slightest degree “trendy”, he has a quality of youthfulness which puts them at their ease and wins their unfailing allegiance. And, despite his high position and massive learning, I doubt that a less pompous man ever lived.

Time and again Denning has recalled the second commandment’s insistence that we love our neighbour as ourselves. And he has consistently given “neighbour” the widest connotation. He revelled in the famous words of Lord Atkin 50 years ago in the “Snail in the Bottle Case”¹:

“The rule that you are to love your neighbour becomes in law that you must not injure your neighbour: and the lawyer’s question ‘Who is my neighbour?’ receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law *is* my neighbour? The answer seems to be – persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

Lord Denning rightly regarded it as significant that Lord Atkin drew his principles of justice from the Christian commandment of love, and commented:

“I do not know where else he *is* to find them. Some people speak of natural justice as though it was a thing well recognisable by anyone, whatever his training and upbringing. But the common law of England has been moulded for centuries by judges who have been brought up in the Christian faith. The precepts of religion have been their guide in the administration of justice.”

Denning began his long career on the Bench as a divorce judge, and he hated it. Fortunately, his servitude lasted only 18 months before he became a King’s Bench judge. But even so short a period was sufficient to bring home to him many deficiencies in our matrimonial law. And this undoubtedly propelled him later to achieve massive improvements in relation to such complex problems as the deserted wife’s equity and her share in the matrimonial home.

In matrimonial cases the “neighbour” relationship is obvious. But Lord Denning has been quick to point out that it is a relationship which has spacious dimensions. It is of fundamental importance in a wide variety of cases. Time and again he has reverted to it when dealing with industrial injuries claims brought by workmen against their employers. And it is the basis of many of his decisions arising from the alleged misuse of Ministerial powers, and in cases concerning departure from natural justice, cases about unfair discrimination on grounds of

1. *Donoghue v. Stevenson* [1932] A.C.562, 580.

race, religion or sex, cases involving the interpretation of exemption clauses in contracts, and in his many decisions which completely transformed the pension rights of ex-servicemen.

The catalogue is indeed as long as it is impressive. Even so, it amounts to no more than a bald and inadequate guide to the lifework of a man dedicated from childhood to do justice between all people, "without fear or favour, affection or ill will." And that lifework has without doubt been directed and inspired by the Christian faith in which he was nurtured and of which he has been an ever-steadfast and passionate advocate.

As his score of years (1962-1982) as Master of the Rolls drew to a close, Lord Denning acquired – and continued – the habit of writing a book a year. Here they are, with their titles and dates of publication: *The Discipline of the Law* (1979); *The Due Process of Law* (1980); *The Family Story* (1981); *What's Next in the Law?* (1982) *The Closing Chapter* (1983); and *Landmarks in the Law* (1984).

The title of each suggests that it contains his last words, but his apparently complete recovery from somewhat ailing health has enabled him, now in his 87th year, to continue his vigour, his crusade for law reform. In the recent words of Francis Cowper, Editor the *Graya*, the house magazine of Gray's Inn, of which Lord Denning is, naturally, an Honorary Bencher:

"Off the Bench he can no longer indulge in his favourite sport of tug-of-war with the House of Lords. Instead, he has joined the Lords in their legislative capacity, and is able to make his voice heard in the discussion of Acts of Parliament, expressing the convictions and propounding the principles which he has always upheld in his judicial capacity. He has only changed his field of action."

Let me end this inadequate tribute to a great man with whom I have been vastly privileged to work by quoting the concluding words of one of his early published works:

"What does it all come to? Surely this, that if we seek truth and justice, we cannot find it by argument and debate, nor by reading and thinking, but only by the maintenance of true religion and virtue. Religion concerns the spirit in man whereby he is able to recognise what is truth and what is justice; whereas law is only the application, however imperfectly, of truth and justice in our everyday affairs. If religion perishes in the land, truth and justice will also. We have already strayed too far from the faith of our fathers. Let us return to it, for it is the only thing that can save us."²

2. *The Changing Law*, 1953.