Lord Denning and Open Government

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In a judgment delivered less than a week before his retirement, Lord Denning spoke of the current demand for "open government" – adding that it is something which "is voiced mainly by newsmen and critics and oppositions."[1] The tone of his remarks is at first sight surprising: for he, more than anyone else, had given judicial support for greater openness in government at all levels. This support had been evident in his *ex officio* work as chairman of the Advisory Council on Public Records, in several aspects of administrative law, in his response to purported extensions of criminal contempt of court, and most notably in his contribution to the developing law of "Crown privilege" or public interest immunity.

Lord Denning's pronouncements in such areas do not, to employ the words of one academic commentator, provide "a body of doctrine reflecting a coherent and consistent philosophy."[2] But it is difficult for any judge to develop a coherent and consistent philosophy in the volatile field of constitutional and administrative law. The institutions vary, the statutory contexts differ, and it is misleading in most circumstances to rely upon a straightforward regard for precedent. There are well-established assumptions or presumptions or general concepts, of course, but a critical component of a judge's approach on public law must be the instinctive reaction to events. James Bradley Thayer, writing about Dicey, once spoke of the "strange contrivances" of the English Constitution as "a marvellous outcome of instinct, of a singular sense and apprehension, feeling its sure way over centuries";[3] and Dicey himself, writing about federalism, described federal notions as "absolutely foreign to the historical and, so to speak, instinctive policy of English constitutionalists."[4]

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1. *Air Canada* v. *Secretary of State for Trade (No. 2)* [1983] 1 All E.R. 161, 172.

2. J. A. G. Griffith, in an article ("A Judge who was always his own man") written after the announcement of Lord Denning's impending resignation in 1982: *The Observer*, 30 May 1982, at p. 8. On Lord Denning's resignation, see also Hugo Young ("Why Denning is Irreplaceable') in the *Sunday Times*, 30 May 1982, at p. 15 and a leading article ("End of the Denning Era") in *The Times*, 30 July 1982, at p. 11. A formal farewell ceremony in the Court of Appeal is reported in *The Times*, 31 July 1982, at p. 2.

3. James Bradley Thayer, "Dicey's Law of the English Constitution" (originally published 1885), reproduced in Thayer, *Legal Essays* (1908), pp. 191-206 at p. 191.

4. A. V. Dicey, *Introduction to the Study of the Constitution*, 8th ed. (1915), at xc.

Lord Denning readily applied the historical and instinctive policy of English constitutionalists, working out the Constitution "on purely practical grounds based on our own experience and on our own needs."[5] Historical references abound in his judgments, with comments about distinguished lawyers of the past,[6] about real or fictional cases of the past,[7] about famous sites or events,[8] and about his own experience.[9] He was fascinated by historical by-roads, as in his account of the "delightful little treaty" of 1794 with the Micmacs of New Brunswick – a treaty in which the King of England promised an Indian king and his brother that he would provide for them and for the future generation "so long as the sun rises and river flows."[10]

From his sense of the continuity of constitutional guidelines in English history, Lord Denning developed an instinctive appreciation of the balancing process inherent in matters of constitutional and administrative law. His historical references, obvious as many of them might seem, were utilised to reinforce both his constitutional assumptions of individual freedom and his view of the competing, changing demands of government and society. His constitutional assumptions favoured ordinary people – ranging from "men who work at the smithy shoeing horses, at the mill grinding corn, or at the saw mills cutting up wood"[11] to "self-employed and small shopkeepers, good men and true who pay

5. Lord Justice Denning, "The Independence of the Judges" (Presidential Address of the Holdsworth Club of the Faculty of Law, University of Birmingham, delivered on 16 June 1950), reproduced in *The Lawyer and Justice* (ed. Brian W. Harvey) (1978), pp. 55, 56. See Geoffrey Marshall, *Constitutional Theory* (1971), at pp. 86-90 (relating to Lord Denning's Romanes Lecture of 1959, *From Precedent to Precedent)*.

6. Sir Edward Coke is often referred to (see, *e.g., Cinnamond* v. *British Airports Authority* [1980] 2 All E.R. 368, 370 linking the six carpenters to six car-hire drivers) and so are less well-known figures such as Macmorron K.C. (referred to as"the acknowledged expert of his time on local government law") in *R.* v. *Clerk to Lancashire Police Committee, ex p. Hook* [1980] 2 All E.R. 353, 359.

7. The general warrant cases are given considerable prominence, not only in *Chic Fashions (West Wales) Ltd.* v. *Jones* [1968] 1 All E.R. 229, 233 and *Ghani* v. *Jones* [1969] 3 All E.R. 1700, 1703 but also in *R.* v. *Inland Revenue Commissioners, ex p. Rossminster Ltd.* [1979] 3 All E.R. 385, 398 (where Lord Denning compared the "military style operation" there to "that Saturday, 30th April 1763, when the Secretary of State issued a general warrant by which he authorised the King's messengers to arrest John Wilkes and seize all his books and papers"). A fictional case injected into a comment about legal delays was *Jarndyce* v. *Jarndyce* from *Bleak House* (see *Buttes Gas and Oil Co.* v. *Hammer* (No. 3) [1980] 3 All E.R. 475, 480).

8. See, for instance, Lord Denning's remarks about the Pilgrim's Way (*Haydon* v. *Kent County Council* [1978] 2 All E.R. 97, 99-100), about George Stephenson's engine (*Allen* v. *Gulf Oil Refining Ltd.* [1979] 3 All E.R. 1008, 1012) and about the Peterloo Massacre (*Hubbard* v. *Pitt* [1975] 3 All E.R. 1, 10).

9. In *Cinnamond* v. *British Airports Authority* [1980] 2 All E.R. 368, 373 Lord Denning recalled the days when he drafted byelaws for the Southern Railway Company; in *R.* v. *Greater London Council, ex p. Blackburn* [1976] 3 All E.R. 184, 186 he referred to the Obscene Publications Act 1959: "I remember it well. I attended the debates, and took part."

10. *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex p. Indian Association of Alberta* [1982] 2 All E.R. 118, 124.

11. *Fawcett Properties Ltd.* v. *Buckingham County Council* [1960] 3 W.L.R. 831, 852-853 (H.L.).

12. *R.* v. *Inland Revenue Commissioners, ex p. N.F.S.S.B.* [1980] 2 All E.R. 378, 388.

their taxes"[13] – in their bewilderment with big organisations, governmental or otherwise; they favoured local self-government (which he saw as "an important part of our constitution"[13]); they favoured freedom of speech, freedom of assembly, personal freedom, freedom of property, and contemporary ideas about privacy and the right to work.[14] These and other assumptions are explicit or implicit in countless judgments delivered by Lord Denning from 1944 to 1982; but they were not applied in a vacuum and Lord Denning has recognised, as all judges in constitutional matters (not least those in the Supreme Court of the United States[15]) have to recognise, that some assumptions may have to be displaced from time to time.

In the area of public order, for instance, Lord Denning has eloquently spoken of "the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern" as something which must be done "peaceably and in good order without threats or incitement to violence or obstruction to traffic."[16] The integrity of a man's home, based on Chatham's claim that the "poorest man may in his cottage bid defiance to all the forces of the Crown", is asserted: but exceptions are allowed in the public interest.[17] Open justice has to be measured against respect for privacy and confidentiality;[18] freedom of expression should not become a licence to publish pornography;[19] freedom of association (especially the freedom to form trade unions) must be assessed against other values in society;[20] and personal freedom must give way to a police officer's reasonable powers of restraint.[21] The manner in which the balance was tilted was frequently controversial, so much so that one writer has described Lord Denning's championship of 'freedom' as "positively perverse",[22] and few would wish to

13. *Norwich City Council* v. *Secretary of State for the Environment* [1982] 1 All E.R. 737, 745. See also, *Webb* v. *Minister of Housing and Local Government* [1965] 2 All E.R. 193, 203.

14. See generally, Sir Alfred Denning, *Freedom under the Law* (Hamlyn Lectures, 1949); Sir Alfred Denning, *The Road to Justice* (1955); Lord Denning, *The Due Process of Law* (1980); Lord Denning, *What Next in the Law?* (1982).

15. See Archibald Cox, *The Role of the Supreme Court in American Government* (the Chichele Lectures, 1975) (1976).

16. *Hubbard* v. *Pitt* [1975] 3 All E.R. 1, 10. See also, *Kent* v. *Metropolitan Police Commissioner, Times* L.R. for 14 May 1981 (*The Times*, 15 May 1981, at p. 12) and *R.* v. *Chief Constable of the Devon and Cornwall Constabulary, ex p. C.E.G.B.* [1981] 3 All E.R. 826, 832.

17. *Chic Fashions (West Wales) Ltd.* v. *Jones* [1968] 1 All E.R. 229, 233. See also, *Ghani* v. *Jones* [1969] 3 All E.R. 1700, 1705, where Lord Denning spoke of "the interest of society at large in finding out wrongdoers and repressing crime."

18. *Home Office* v. *Harman* [1981]2 All E.R. 349, 363-364.

19. *R.* v. *Metropolitan Police Commissioner, ex p. Blackburn (No. 3)* [1973] 1 All E.R. 324, 327-328; *R.* v. *Greater London Council, ex p. Blackburn* [1976] 3 All E.R. 184, 188; *R.* v. *Metropolitan Police Commissioner, ex p. Blackburn, The Times, Times* L.R. for 6 March 1980 (*The Times*, 7 March 1980, at p. 10). In the House of Lords in 1959 (H.L., Vol. 216, c. 503, 2 June 1959) Lord Denning stated: "To write literature is the proper use of freedom: to indulge in pornography is the abuse of it."

20. For a statement of Lord Denning's views on trade union legislation, see *British Broadcasting Corporation* v. *Hearn* [1978] 1 All E.R. 111, 115-116.

21. *Dallison* v. *Caffery* [1965] 1 Q.B. 348, 367.

22. Patricia Hewitt, *The Abuse of Power (Civil Liberties in the United Kingdom)* (1982), at p. 243. See also, J. A. G. Griffith, *The Politics of the Judiciary*, 3rd ed. (1985).

defend the former Master of the Rolls on all his rulings. Indeed Lord Denning himself has confessed to second thoughts.[23]

One of the most troublesome balancing exercises occurs where issues of national security are at stake. The difficulties – and, indeed, the temptation to tilt the balance in favour of the interests of the state[24] – have been explored at length, both in special inquiries and in the courts of law; and the legal complexities were explored by M. L. Friedland in a study prepared for the McDonald Commission in Canada a few years ago.[25] Judicial decisions since Lord Denning's retirement are a reminder of the difficulties.[26] During his judicial career, Lord Denning, adopting what he took to be Parliament's intention, gave considerable weight to arguments of national security in matters of deportation;[27] and a background of security doubtless made him unsympathetic in litigation over journalists' sources of information relating to the Vassall Inquiry.[28] The Vassall Inquiry was to be followed, incidentally, by Lord Denning's investigation of the circumstances leading to the resignation of the Secretary of State for War. This investigation, the Report of which appeared in September 1963,[29] involved Lord Denning in effect acting "as detective, solicitor, counsel and judge"; and, given its "serious defects in procedure", the public acceptance of the Report may – according to the Salmon Commission – "be regarded as a brilliant exception to what would normally occur when an inquiry is carried out under such conditions."[30] It might be added that hitherto few inquiries into matters of national security in this country have conformed with normal standards of procedure or publicity; and Lord Denning's extra-judicial venture was no exception.

23. See Lord Denning, *What Next in the Law?* (1982), at pp. 246-252, with reference to *British Steel Corporation* v. *Granada* [1981] 1 All E.R. 417.
24. Statement on the Findings of the Conference of Privy Councillors on Security, Cmd. 9715 of 1956, para. 16.
25. See M. L. Friedland, *National Security: The Legal Dimensions* (1979). See also, J. Ll. J. Edwards, *Ministerial Responsibility for National Security* (1980) and C. E. S. Franks, *Parliament and Security Matters* (1979). The 3-volume Report of the McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police appeared in 1981. See, more recently, the Report of the Special Committee of the Senate on the Canadian Security Intelligence Service (Delicate Balance: A Security Intelligence Service in a Democratic Society) (Ottawa, November 1983).
26. See *Secretary of State for Defence* v. *Guardian Newspapers Ltd.* [1984] 1 All E.R. 453, (C.A.) (and the comments on national security at 458, 460 and 462); *R.* v. *Secretary of State for the Foreign and Commonwealth Office, ex p. the Council of Civil Service Unions, Times* L.R. for 6 August 1984 (*The Times*, 7 August 1984, at p. 15).
27. See *R.* v. *Brixton Prison (Governor), ex p. Soblen* [1962] 3 All E.R. 641, 659 and *R.* v. *Secretary of State for the Home Department, ex p. Hosenball* [1977] 3 All E.R. 452, 457.
28. *Attorney-General* v. *Mulholland and Foster* [1963] 1 All E.R. 767. See generally, C. J. Miller, *Contempt of Court* (1976), at pp. 58-61. The Vassall Inquiry was conducted by a Tribunal of Inquiry (under Viscount Radcliffe): its Report was published in April 1963 (Cmnd. 2009).
29. Lord Denning's Report, Cmnd. 2152 of 1963. Lord Denning referred to the investigation in *R.* v. *Clerk to Lancashire Police Committee, ex p. Hook* [1980] 2 All E.R. 353, 356 and in *Lonrho Ltd.* v. *Shell Petroleum Ltd. Times* L.R. for 12 March 1980 (*The Times*, 13 March 1980, at p. 18).
30. Report of the Royal Commission into Tribunals of Inquiry, Cmnd. 3121 of 1966, para. 21. See also, Sir Cyril Salmon, *Tribunals of Inquiry* (Lionel Cohen Lectures at the Hebrew University of Jerusalem, 14th Series, 1967), at pp. 13-15.

From 1962, when he became Master of the Rolls, Lord Denning became involved with the wider sphere of openness in government. His chairmanship of the Advisory Council on Public Records brought him into regular contact with the operation of what was then the fifty-year (and was soon to become the thirty-year) rule.[31] The Wilson Committee on Modern Public Records commented in 1981 on the initiative taken by the Advisory Council (under Lord Denning) in seeking a shortening of the basic closed period, and it was pointed out that the Council's views "have also carried weight in urging that 75 years should be the normal maximum closure for personally sensitive papers."[32] Perhaps his contact with the issues of closed files influenced Lord Denning's judicial approach in a case concerned with a local councillor's right of access to certain papers.[33]

Lord Denning's judicial approach towards all matters of secrecy was dictated by his own firm belief in freedom of the Press, by his rejection of excessive assertions of power by governmental and other bodies, and by his determination to avoid technicalities and seek solutions on a case-by-case basis. Where his attitude differed it was either in deference to Parliamentary wishes (for Lord Denning, despite arguments about his style of statutory interpretation,[34] regarded Parliamentary sovereignty as "fundamental in our constitution"[35]) or in response to conduct of which he disapproved. Varying expressions of disapproval can be found over the securing or handling of confidential documents in particular circumstances.[36] But it would be unfortunate if an assessment of Lord Denning's contribution to open government were to be significantly affected by a handful of

31. See Report of the (Grigg) Committee on Departmental Records, Cmnd. 9163 of 1954, paras. 125-128 (on the responsibility of the Master of the Rolls for public records); Annual Reports of the Advisory Council on Public Records (a body established by the Public Records Act 1958); Report of the (Wilson) Committee on Modern Public Records (Selection and Access), Cmnd. 8204 of 1981, paras. 292-328; and the Government's Response to the Wilson Report, Modern Public Records, Cmnd. 8531 of 1982, paras. 46-48. In an Appendix to the 24th Report of the Annual Council (HC10, 29 June 1983), a letter from Lord Denning and his colleagues (to the Lord Chancellor) comments on the Wilson Report and the Government Response.

32. Cmnd. 8204, para. 303. See generally, Colin Holmes, "Government Files and Privileged Access", *Social History* vi. (1981), pp. 333-350 and Margaret Gowing, "Modern Public Records: Selection and Access. The Report of 'The Wilson Committee'", *Social History* V. (1981), pp. 351-357. The well-documented article by Colin Holmes is, in his own words, a "brief excursion into the complex, chaotic and variable world of government files and the obscure and shadowy world of privileged access." See also, D. G. T. Williams, "Official Secrecy in England", (1968) 3 *Federal L.R.* 20, pp. 47-50.

33. *R.* v. *Clerk to Lancashire Police Authority, ex p. Hook* [1980] 2 All E.R. 353 (dissenting judgment). See the later case of *R.* v. *Birmingham City District Council, ex p. O, Times* L.R. for 23 February 1982 (*The Times*, 23 February 1982, at p. 23).

34. See *Duport Steels Ltd.* v. *Sirs* [1980] 1 All E.R. 529 (C.A. and H.L.) and, generally, Lord Denning, *The Discipline of Law* (1979), Ch. 2.

35. *Smith* v. *Inner London Education Authority* [1978] 1 All E.R. 411, 415.

36. *British Steel Corporation* v. *Granada Television Ltd.* [1981] 1 All E.R. 417, 441-442; *Home Office* v. *Harman* [1981] 2 All E.R. 349, 363-364; and *Air Canada* v. *Secretary of State for Trade (No. 2)* [1983] 1 All E.R. 151, 180-181. For a hint of disapproval of cheque-book journalism, see *Alloway* v. *Phillips (Inspector of Taxes)* [1980] 3 All E.R. 138, 143.

decisions where, rightly or wrongly, he allowed his judgments to be coloured by such sentiments.

His belief in a free press has often been recorded, and in the *Granada* case Lord Denning asserted that investigative journalism "has proved itself as a valuable adjunct of the freedom of the press. Notably in the Watergate exposure in the United States and the Poulson exposure in this country."[37] Lord Denning's vigorous approach to contempt of court is a classic reminder of his anxiety that investigations by the press should not be artificially hindered. An attempt to revitalise the law on scandalizing the court was brushed aside;[38] he led the Court of Appeal in an unsuccessful attempt to discharge the injunction in the thalidomide case;[39] the House of Lords ultimately endorsed his instinctive reluctance to extend the sanctions of contempt of court to the area of administrative tribunals;[40] and the new time-limits in the Contempt of Court Act 1981 help substantially to avoid the evils of "gagging writs" to which Lord Denning drew attention on more than one occasion.[41]

Lord Denning's rejection of abuse of power is central to his influential role in the development of what he termed a "well-organised and comprehensive" system of adminstrative law.[42] His judicial contributions can be seen in such areas as error of law on the face of the record, jurisdictional error, and natural justice. In the application of the principles of natural justice to the operation of big public local inquiries, Lord Denning's views (again doubtless influenced by the background of access to information) were to be rejected by a majority of the House of Lords; but he articulated the views of many people in his assertion that there had "been a deplorable loss of confidence in these inquiries . . . We must use our authority to see that inquiries are conducted fairly, in accordance with the requirements of natural justice."[43] In the control of discretionary power, however, Lord Denning achieved some notable successes in the courts during the 1970s;[44] though, as we shall see, his refusal to concede unfettered discretion even to ministers of the Crown had already been demonstrated in his approach to governmental secrecy.

37. [1981] 1 All E.R. 417, 441. See the attitudes to investigative journalism adopted by Lord Wilberforce in the House of Lords in the *Granada* case ([1981] 1 All E.R. 417, 455) and by the Court of Appeal in *Blackshaw* v. *Lord* [1983] 2 All E.R. 311, 325, 336, 339.

38. *R.* v. *Metropolitan Police Commissioner, ex p. Blackburn (No. 2)* [1968] 2 Q.B. 150.

39. *Attorney-General* v. *Times Newspapers Ltd.* [1973] 1 All E.R. 815. See now the Contempt of Court Act 1981, s. 5 ("discussion of public affairs"). See, on the thalidomide decision in the Court of Appeal, a leading article ("In the Public Interest") in *The Times*, 17 February 1973, at p. 15: this stated that it "is good that the Court of Appeal has acknowledged that there may be occasions when the right to public comment is of supreme value." See generally, Harold Evans, *Good Times, Bad Times* (1984), Ch. 4.

40. *Attorney-General* v. *British Broadcasting Corporation* [1979] 3 All E.R. 45.

41. *Wallersteiner* v. *Moir* [1974] 3 All E.R. 217, 230.

42. *O'Reilly* v. *Mackman* [1982] 3 All E.R. 680, 691.

43. The judgment of the Court of Appeal is discussed in Peter Levin, "Public Inquiries: the Need for Natural Justice", *New Society*, Vol. 50 (15 November 1979), at pp. 371-372. The decision of the House of Lords is reported as *Bushell* v. *Secretary of State for the Environment* [1981] A.C. 75.

44. See generally, Lord Denning, *The Discipline of Law* (1979), Part Two ("Misuse of Ministerial Powers"); H. W. R. Wade, *Constitutional Fundamentals* (Hamlyn Lectures, 1980), Ch. 4.

A rejection of technicalities – save, perhaps, when technicalities can be used to bolster individual rights or freedoms[45] – is frequently found in Lord Denning's judgments.[46] This approach is found from the outset in his attitude towards administrative law,[47] and he recognised earlier than most "that adminstrative law is in a phase of active development and that the judges will adapt the rules . . . to protect the rule of law."[48] Lord Denning's application of rules of *locus standi*[49] and, more broadly, of natural justice[50] depends very much on a case-by-case technique through which he is able to adapt the rules to protect the rule of law. A similar technique was reflected in his long struggle to overturn the rigid principles which governed the law of Crown privilege until about twenty years ago.

It is now taken for granted that the government does not have an unfettered control over the disclosure of documents in a court of law.[51] The break from the decision of the House of Lords in *Duncan* v. *Cammell Laird & Co., Ltd.*[52] was secured largely through the efforts of Lord Denning (soon after he became Master of the Rolls), aided and abetted initially by Salmon L.J. and Harman L.J.. As recently as 1956 a former Law Officer had said in the House of Commons that "one cannot delegate to a judge the decision whether or not Crown privilege should be given without involving him in matters of public policy which are outside his ambit and in which it is most undesirable to involve him."[53] In three influential decisions the Court of Appeal began to dismantle the defences of Crown privilege. In the first of these, *Merricks* v. *Nott-Bower*, Lord Denning said that he did not believe that Lord Simon (in the *Cammell Laird* case) envisaged claims of Crown privilege based automatically on the phrase "for the proper functioning of the public service" in order to make documents taboo.[54] In the second, *Re Grosvenor Hotel, London (No. 2)*, Lord Denning truly had the bit between his teeth, reminding us that "it is the judges who are the guardians of justice in this land: and if they are to fulfil their trust, they must be able to call on the Minister to put forward his reasons so as to see if they outweigh the interests of justice."[55] In the course of his judgment he criticised the *Cammell Laird* decision and drew inspiration from

45. See *R.* v. *Minister of Agriculture and Fisheries, ex p. Graham; R.* v. *Agricultural Land Tribunal (South Western Province), ex p. Benney* [1955] 2 Q.B. 140, 167.
46. See, *e.g., R.* v. *Brighton Gaming Licensing Committee, ex p. Cotedale Ltd.* [1978] 3 All E.R. 897, 899; *Sheffield City Council* v. *Graingers Wines Ltd.* [1978] 2 All E.R. 70, 72; *Lovelock* v. *Minister of Transport, Times* L.R. for 11 June 1980 (*The Times*, 12 June 1980, at p. 9).
47. See Sir Alfred Denning, *Freedom Under the Law* (Hamlyn Lectures 1949), at p. 126; Lord Denning, "The Way of an Iconoclast", (1959) 5 *J.S.P.T.L.* 77, at p. 88 ff.
48. *R.* v. *Crown Court at Knightsbridge, ex p. International Sporting Club (London) Ltd.* [1981] 3 All E.R. 417, 423, *per* Griffiths L.J.
49. See, *e.g., R.* v. *Horsham J.J., ex p. Farquharson* [1982] 2 All E.R. 269, 282.
50. See, *e.g., R.* v. *Secretary of State for the Environment, ex p. Santillo* [1981] 2 All E.R. 897, 919 and *Payne* v. *Lord Harris of Greenwich* [1981] 2 All E.R. 842, 845.
51. For recent accounts of the law, see P. P. Craig, *Administrative Law* (1983), Ch. 18; John Bell, *Policy Arguments in Judicial Decisions* (1983), Ch. 4.
52. [1942] A.C. 624.
53. HC, Vol. 558, cc. 962-963, 26 October 1956 (Sir Lynn Ungoed-Thomas Q.C.).
54. [1964] 1 All E.R. 717, 722.
55. [1964] 3 All E.R. 354, 362.

developments elsewhere in the Commonwealth. Later on, in the third case *(Wednesbury Corporation* v. *Minister of Housing and Local Government),* he spoke of the "overwhelming importance" attached by Government departments "to ensuring secrecy for their own documents", and he deplored a situation where the courts are (in the words of Master Jacob) to "be led through a kind of ritual dance, decorously receiving the Minister's certificate, and bowing to its authority."[56]

What Lord Denning was urging at that stage was a requirement that the Minister should justify his claims of privilege, a power on the part of the courts to inspect the documents privately, and a power ultimately to order disclosure. He felt that a Minister's claim would rarely be overruled, especially where the objection was related to the actual contents of a document. Even so the views of the Master of the Rolls and his colleagues had not been tested in the House of Lords; and, when Lord Denning sat in another Crown privilege case, with two different colleagues, he found himself in a minority. The new case was *Conway* v. *Rimmer.*[57] Lord Denning took his stand on the earlier "trilogy of cases" holding "that the court has a residual power in a proper case to override the objection of a minister."[58] The majority of judges, however, felt bound by authority to disagree with Athos M.R., Porthos and Aramis L.JJ.;[59] and it remained for Salmon L.J. (in his capacity as either Porthos or Aramis) to suggest extra-judicially that the majority view "may be considered a triumph for sound orthodox principle over heresy – or it may be condemned as retrograde, reactionary, and wrong."[60] In the event the House of Lords, freed from the shackles of binding precedent, reinstated the views of the Three Musketeers,[61] thus establishing "the vital principle . . . that the last word lies not with a Minister but with the courts, and that is the place for it."[62]

The battle was not over yet. In *Conway* v. *Rimmer* the House of Lords had accepted Lord Denning's view that the courts had a residual authority to question claims of Crown privilege. Not until *Burmah Oil Co. Ltd.* v. *Bank of England*[63] were the new principles to be considered by appellate courts in respect of policy documents of the central government, and once again Lord Denning instinctively anticipated (in a dissenting judgment) the approach to be adopted by a majority of the House of Lords.[64] There followed the decision of McNeill J. in *Williams* v.

56. [1965] 1 All E.R. 186, 190.
57. [1967] 2 All E.R. 1260.
58. *Ibid.*, at 1262.
59. *Ibid.*, at 1273 (Russell L.J.).
60. *The Times*, 4 July 1967, at p. 10, reporting Salmon L.J.'s speech to Justice on "The Bench as the last bulwark of individual liberty." In the course of his address Salmon L.J. said: "For my part I do not mind being compared with the Three Musketeers. They certainly had independence and courage, if not more besides."
61. *Conway* v. *Rimmer* [1968] A.C. 910. For the subsequent trial of the action, which was lost by the plaintiff, see *The Times*, 17 December 1969, at p. 4.
62. *The Times* (a leading article), 29 February 1968, at p. 11.
63. [1979] 3 All E.R. 700, affirming the Court of Appeal at [1979] 2 All E.R. 461.
64. See Case-Note at [1980] *C.L.J.*, pp. 1-5.

Home Office[65] and then the apparent backtracking in *Canada* v. *Secretary of State for Trade (No. 2)*.[66] Despite his indignation at the use of documents disclosed in the *Williams* litigation, however, Lord Denning took full advantage in *Air Canada* to explain the evolution of Crown privilege (or public interest immunity) – even acknowledging the House of Lords as a "relief force" which came to rescue the Three Musketeers;[67] and he re-emphasised that, in considering a Minister's certificate claiming "Crown privilege", the scales are tilted in favour of the Minister.[68]

This brings us back to the idea of balance. At the start of his campaign he recognised the special authority which must be attached to a Minister's claims based on the public interest. In this he was presumably recognising both the political accountability of Ministers through the doctrine of ministerial responsibility and the problems of justiciability which would face the courts in adjudicating on some types of claim. At no stage is there any suggestion that Lord Denning had abandoned a personal preference for disclosure. It might be recalled that, in the early stages of the litigation over the Crossman diaries,[69] counsel for the Attorney-General used the analogy of Crown privilege to justify in part his application for an interim injunction. The interim injunction was granted at first instance,[70] but it was immediately lifted on appeal to a Court of Appeal presided over by Lord Denning.[71] In a leading article which ended with the words, "Thank God for Lord Denning", *The Times* commented that the "first purpose of a free press, its chief virtue, is that people should be informed of the government of their country. Democracy depends upon it."[72]

When Lord Denning, in the Dimbleby Lecture in 1980,[73] called for judicial review of Parliamentary legislation, his arguments were gently thrust aside by some commentators.[74] At one point in his Lecture he mentioned that the judges in this country are, just as judges are in the United States, the guardians of our constitution. Those who would reject his claim, especially on the ground that judges should not be involved in political matters,[75] would do well to recall that judges are often uniquely equipped to identify areas of vulnerability in the

65. [1981] 1 All E.R. 1151.
66. [1983] 1 All E.R. 161.
67. *Ibid.*, at 179.
68. *Ibid.* On the "balancing" process, see *Arias* v. *Commissioner of Police of the Metropolis*, *Times* L.R. for 11 August 1984 (*The Times*, 1 August 1984, at p. 10).
69. *Attorney-General* v. *Jonathan Cape Ltd.* [1976] Q.B. 752.
70. *Attorney-General* v. *Times Newspapers Ltd.*, *Times* L.R. for 26 June 1975 (*The Times*, 27 June 1975, at p. 10).
71. *Times* L.R. for 27 June 1975 (*The Times*, 28 June 1975, at p. 4).
72. *The Times*, 28 June 1975, at p. 13. See leading article in *Sunday Times*, 29 June 1975, at p. 12; Hugo Young, *The Crossman Affair* (1976), at pp. 44-46.
73. For a summary of the lecture, see *The Times*, 21 November 1980, at p. 4.
74. See, *e.g.*, John Griffith in *The Observer*, 23 November 1980, at p. 12 ("Up to a point, Lord Denning").
75. See generally, D. G. T. Williams, "Public Interest in the Courts" in *Staatkundig Jaarboek 1983-1984* (Leiden 1983), at pp. 117-133.

constitution. European judges are already able to do so by virtue of the European Convention on Human Rights, and the implications of the Convention have recently been spelt out by Anthony Lester Q.C..[76] English judges, encouraged more and more by the Convention and its application, are nowadays less inhibited in registering protests even when they cannot act.[77] Lord Denning was astute at combining protest and action; and to the end of his career – over the use of juries at controversial coroners' inquests,[78] over the practice of jury-vetting,[79] and over much else – he reacted, as if (in Thayer's words) through "a marvellous outcome of instinct", with assurance and authority.

Lord Denning's views have not always prevailed (even in the long term), and he himself has urged that he should be judged "warts and all". He added (on the occasion of his retirement): "There are lots of roughnesses, warts and pimples; I know them perfectly well, and so does the House of Lords."[80] He has often been accused of going beyond his proper judicial role in the utilisation of his own moral, political and religious views.[81] Yet Lord Denning has taken the lead, perhaps as a late endorsement of Sir Edward Coke's dictum in *Dr Bonham's Case*,[82] in tapping the resources of the common law in aid of contemporary needs. It is not without significance in this regard that Cooke J. of the Court of Appeal of New Zealand, has recently suggested judicially that it would not be within the lawful powers of Parliament (in New Zealand) to authorise torture in questioning by officials. "Some common law rights presumably lie so deep that even Parliament could not override them", said Cooke J.[83] Judges might, after all, be the guardians of the constitution.

The emphasis on open government has been adopted in this paper in order to illustrate the comprehensive nature of Lord Denning's approach to constitutional issues. In essence he subscribed to the common lawyer's belief in the value of publicity. Support for public justice spills over into support for open government. Lord Denning gave an impetus to the movement for open government on a practical case-by-case basis. In this, as in so many areas of the law, his influence will be missed.

76. Anthony Lester, "Fundamental Rights: The United Kingdom Isolated?", [1984] *P.L.* 46.
77. See, *e.g.*, the judgment of Sir Robert Megarry V.-C. in *Malone* v. *Commissioner of Police of the Metropolis* [1979] 2 All E.R. 620. Telephone-tapping has now been regulated in the Interception of Communications Act, 1985.
78. *R.* v. *Hammersmith Coroner, ex p. Peach* [1980] 2 All E.R. 7.
79. *R.* v. *Crown Court at Sheffield, ex p. Brownlow* [1980] 2 All E.R. 444. See Lord Denning, *What Next in the Law?* (1982), at pp. 63-65 and *R.* v. *Mason* [1980] 3 All E.R. 777. See also, Peter Duff and Mark Findlay, "Jury Vetting – the Jury Under Attack", (1983) 3 *Legal Studies* 159.
80. *The Times*, 31 July 1982, at p. 2.
81. In one case (involving the Church of Scientology) counsel, on the basis of eight cases over the previous ten years, spoke of "a reasonable belief" that there was an unconscious bias on Lord Denning's part; and the Master of the Rolls withdrew from the hearing of the appeal: *Ex p. Church of Scientology of California, Times* L.R. for 20 February 1978 (*The Times*, 21 February 1978, at p. 9). On scientology, see St John A. Robilliard, *Religion and the Law (Religious Liberty in Modern English Law)* (1984), at pp. 106-110.
82. (1610) 8 Co. Rep. 118a.
83. *Taylor* v. *The New Zealand Poultry Board* [1984] 1 N.Z.L.R. 394.