LORD DENNING & THE PUBLIC/PRIVATE DIVIDE

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INTRODUCTION

When Lord Denning retired from the Bench in 1982 a very full and detailed assessment of his contributions to many areas of the law was published, edited by Professors Jowell and McAuslan.[1] This collection contained perceptive and thorough essays on administrative law by Jeffrey Jowell, and on human rights by Claire Palley. It would be superfluous for me to seek to go down that same road - and anyway in the allotted space it would not be possible to do justice to all that Lord Denning contributed to public law. So I shall take another approach, and focus on his contributions on the control of abuses of power and in the area of what is now supposed to be the divide between public and private law. These are topics that are currently taxing the courts, and academics, and judges writing extra-judicially: What is the basis for the jurisdiction of the courts in judicial review[2] and in what ways does it differ from the basis of the courts' jurisdiction in private law?[3] Is there a substantive (as opposed to procedural) public/private divide?[4]

These are large questions and it would not be realistic to seek to answer them here, but light is shed on these issues by the ways in which Lord Denning dealt with a number of cases. The cases in which I am particularly interested were mostly brought in the Queen's Bench Division, and not in the Divisional Court by way of what we would now call judicial review. They were private law applications for declarations or injunctions for breach of the rules of natural

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[1] *Lord Denning: The Judge and the Law* (Sweet and Maxwell, 1984).

[2] C. Forsyth, "Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review" 55 (1996) *C.L.J.* 122. For critiques of this theory see Sir John Laws, "Illegality: the Problem of Jurisdiction" in M. Supperstone and J. Goudie, eds, *Judicial Review* (2nd. ed.,Butterworths, 1997) at pp.4.13-4.19; P.P.Craig, "Ultra Vires and the foundations of judicial review" (1998) 57 *C.L.J.* 63 at pp.77-8.

[3] See essays in M. Taggart, ed. *The Province of Administrative Law*, (Hart Publishing, 1997).

[4] J. Beatson, "'Public' and 'private' in English administrative law" (1987) 103 *L.Q.R.* 34 at p.38; Lord Woolf, "Droit public - English style" [1995] *P.L.* 57.

justice and fairness and rationality and non-discrimination.

LORD DENNNING AND ADMINISTRATIVE LAW

We are accustomed to assuming that "administrative law" is part of public law, so that in principle cases involving duties of fairness and rationality outside of contract should be brought by way of judicial review. This assumption has been reinforced by the decision in *O'Reilly* v. *Mackman*.[5] It is worth noting that, when this case came before Lord Denning in the Court of Appeal,[6] his judgement was on similar lines to the House of Lords decision:

> "Now that judicial review is available to give every kind of remedy, I think it should be the normal recourse in all cases of public law where a private person is challenging the conduct of a public authority or a public body, or of anyone acting in the exercise of a public duty."[7]

However, as we shall see, for Lord Denning this did not preclude the possibility of duties of fairness and rationality being imposed on private decision makers in private law.

In *Breen* v. *Amalgamated Engineering Union* Lord Denning had made explicit that in his view administrative law was not a sub-species of public law.[8] His concept of administrative law was not limited to public bodies and public functions:

> "It may truly now be said that we have developed a system of administrative law. These developments have been most marked in the review of decisions of statutory bodies: but they apply also to domestic bodies..."[9] In effect Lord Denning was saying that duties of fairness and rationality may apply to the decisions of such private tribunals, categorising them as administrative law duties. The reason for imposing such duties was that private exercises of power needed to be controlled. Lord Denning continued in *Breen* by reviewing the ways in which statutory bodies are now required to act fairly in the exercise of discretion, how discretion of a statutory body is never unfettered but must be exercised reasonably.[10] He then asked:

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[5] [1983] 2 A.C. 237.
[6] [1982] 3 All E.R. 680.
[7] *Ibid* at p.693.
[8] [1971] 1 All E.R. 1148 (C.A.).
[9] *Ibid* at p.1153.
[10] *Ibid* at pp.1153-4.

> "Does all this apply to a domestic body? I think it does, at any rate when it is a body set up by one of the powerful associations which we see nowadays. Instances are readily to be found in the books, notably the Stock Exchange, the Jockey Club, the Football Association, and innumerable trade unions. All these delegate power to committees. These committees control the destinies of thousands. They have quite as much power as the statutory bodies of which I have been speaking. They can make or mar a man by their decisions. Not only by expelling him from membership, but also by refusing to admit him as a member, or it may be, by a refusal to grant a licence or to give their approval. Often their rules are framed to give them a discretion. They then claim that it is an unfettered discretion with which the courts have no right to interfere. They go too far. They claim too much ... their rules are said to be a contract between the members and the union.So be it. If they are a contract, there is an implied term that the discretion should be exercised fairly. But the rules are in reality more than a contract. They are a legislative code laid down by the council of the union to be obeyed by the members. This code should be subject to control by the courts just as much as the code laid down by Parliament itself. If the rules set up a domestic body and give it a discretion, it is to be implied that body must exercise its discretion fairly."[11]

Here is a strong marker that there is no substantive public/private law divide. Powerful bodies, whether public or private, are under duties of fairness and rationality in certain circumstances, particularly where their decisions have a serious adverse effect on an individual, and the imposition of these duties is not limited to cases where there is an interference with the "right to work." Read alongside the decision in *O'Reilly* v. *Mackman* the implication of *Breen* is that, even though it is necessary to proceed by way of application for judicial review in public law cases - where what is being challenged is, broadly, the exercise of a public or governmental function - the same or similar duties of fairness and rationality may arise in private law.

THE BASES FOR THE APPLICATION OF ADMINISTRATIVE LAW

This brings us to the question, what are the bases for the jurisdiction of the courts in private law to require bodies to act fairly and rationally in their decision making? There are a number of bases: contract, where notionally the courts are not imposing obligations, but giving effect to the express or implied intentions of the parties; or non-contractual bases, such as the need to protect property rights,

[11] *Ibid* at p.1154.

to prevent abuse of monopoly power, to protect against restraints of trade, or to protect a person's right or liberty to work; or general public policy in favour of controlling abuses of power, which may in fact embrace each of the other heads. Lord Denning's judgments have considered each of these bases for the jurisdiction. An additional particular head could be added, the control of the exercise of common callings - though often these will fall under the monopoly head.[12] Although, as far as I am aware, Lord Denning did not consider the law on common callings in any detail in his decisions, he relied on one of the leading cases, *The Ipswich Tailors*[13] in *Nagle* v. *Feilden.*

The case of *Nagle* v. *Feilden* illustrates these points about the bases for the private administrative law control of power.[14] The plaintiff had been refused a trainer's licence by the Stewards of the Jockey Club because she was a woman. She applied for a declaration that this practice was against public policy, and for an injunction. On the question whether the statement of claim disclosed a cause of action and whether it should be struck out, the court found for the plaintiff. Lord Denning's reasoning was based on the fact that the Jockey Club exercised a "virtual monopoly in an important field of human activity" and that "the common law of England recognises that a man (sic) has a right to work at his trade or profession without being unjustly excluded from it."[15]

Under the Treaty of European Union Article 119, the Sex Discrimination legislation and other measures the particular facts in *Nagle* v. *Feilden* could be dealt with nowadays without recourse to the common law. But the case still stands as authority for the duty of private regulatory bodies not to discriminate. So if a person were refused a trainer's licence for irrational reasons not covered by European law or British legislation, such as their religion, the colour of their hair, their political affiliations or personal animosity on the part of a member of the licensing body, applying *Nagle* v. *Feilden* the court would again find that this was unlawful, in effect imposing duties of fair and rational decision making on the regulatory body.

On the discrimination point *Nagle* v. *Feilden* stands out as an exceptional decision. The record of the common law in recognising the wrong of discrimination has been generally poor. "... not all sex discrimination is unlawful ....Discrimination is only unlawful if it occurs in one of the fields in which it is prohibited in the [Sex Discrimination Act 1975]."[16] Refusal to admit a member

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[12] See B. Wyman, "The Law of the Public Callings as a Solution of the Trust Problems" XVII *Harvard Law Review* (1903-1904) 156; N. Arterburn, "The Origin and First Test of Public Callings" 75 *U. Penn L.R.* (1926-27) 411; for an example see *Harris* v. *Dockwood* (1810) 3 Taunt 364. See also the discussion of this topic in M. Taggart, *Corporatisation, Privatisation and Public Law* (Legal Research Foundation, 1990) at p.29; P.P.Craig [1991] *P.L.* 538.

[13] (1614) 11 Co. Rep.53a.

[14] [1966] 1 All E.R. 689 (C.A.).

[15] *Ibid* at p.639.

[16] In *R* v. *Entry Clearance Officer, ex parte Amin* [1983] 2 All E.R. 864 at p.871 *per* Lord Fraser.

from an ethnic minority to a members'club is not unlawful.[17] The common law does not as yet prohibit discrimination on grounds of sexual orientation.[18] However, the case law on common callings does show the common law acting against discrimination: in *Constantine* v. *Imperial Hotels* a black West Indian cricketer successfully sued in tort for the refusal of accommodation in the hotel.[19]

According to Lord Denning, the court's jurisdiction to grant a remedy of declaration or injunction in *Nagle* v. *Feilden* was based on public policy. The plaintiff's case was pleaded on the basis that the practice of the defendants was "in restraint of trade and contrary to public policy." Lord Denning did not use the phrase "restraint of trade" in his reasoning, and dealt with the case on public policy grounds. In particular he held that:

> "a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his right to property. Just as the courts will intervene to protect his rights of property, so they will also intervene to protect his right to work.[20]

This is an important point, as it opens up wider grounds for the courts to control decision making in private law than restraint of trade, which is of fairly narrow application. Other case law supports the view that there is jurisdiction to control decision making of private bodies outside restraint of trade, or contract, or for the protection of property rights - or to protect a right to work. In effect the courts will rest their jurisdiction on a range of public policy considerations.

For instance, in *McInnes* v. *Onslow Fane* the plaintiff's application for a boxing manager's licence had been refused and he was complaining of the lack of a hearing.[21] The plaintiff failed because this was an application case, not a case of forfeiture or legitimate expectation, and there had been no breach of the relevant duties of fairness in dealing with applications. But Megarry V.-C. laid down requirements of a range of fair decision making procedures in application, forfeiture or legitimate expectation cases affecting a "liberty to work." They include a duty "to reach an honest conclusion without bias and not in pursuance of any capricious policy"[22] - a formulation, like that in *Nagle*, that is reminiscent of *Wednesbury* reasonableness.

Megarry V.-C.'s requirements in *McInnes* did not depend on the existence of a

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[17] *Charter* v. *Race Relations Board* [1973] A.C. 686 and *Docker's Labour Club* v. *Race Relations Board* [1976] A.C. 285.

[18] See *R.* v. *Ministry of Defence, ex parte Smith* [1996] Q.B. 517; *Grant* v. *South West Trains* [1998] All E.R. [E.C.] 193. *P* v. *S and Cornwall County Council* [1996] I.R.L.R. 347; *Chessington World of Adventures* v. *Reed* [1997] I.R.L.R. 556.

[19] [1944] 1 K.B. 693.

[20] *Ibid* at p.694.

[21] [1978] 1 W.L.R. 1520

[22] *Ibid* at p.1530.

contractual relationship, and nor did he base his decision in restraint of trade. He was drawing analogies with a wide range of cases on immigration, reputations, privacy and status as well as livelihood. The foundation of the jurisdiction appears to have been public policy - here policy in favour of enabling people to earn their living in their own way.

Although *Nagle* v. *Feilden* is the leading case on the imposition of rationality in private decision making, Lord Denning discussed the basis for obligations of fairness and rationality in private decision making in a number of other cases. In *Lee* v. *Showman's Guild*, for instance, he emphasised that obligations on such an association as the defendants were not only derived from contract, but are also governed by public policy: [23]

> "Although the jurisdiction of a domestic tribunal is based on contract ... the parties are not free to make what contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. ... Any stipulation to the contrary would be invalid. They cannot stipulate for the power to condemn a man unheard."[24]

Later in the case he focused on the inequality of bargaining power in the relationship:

> "It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great as, if not greater than, any exercised by the courts of law. They can deprive a man (sic) of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers; but in practice he has no choice in the matter."[25]

Hence the public policy on which the duties were based was that of preventing abuses of (private) power which interfere with a person's "right to work."

In *Enderby Town Football Club* v. *Football Association* Lord Denning developed the concept that rules of associations are a legislative code, giving rise

[23] [1952] 1 All E.R. 1175.
[24] *Ibid* at pp.1180-1.
[25] *Ibid* at p.1181.

to control by the courts: [26]

> "Putting the fiction aside the truth is that the rules are nothing more nor less than a legislative code - a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations, though said to be a contract, are subject to the control of the Courts. If they are unreasonable restraint of trade they are invalid: see *Dickson* v. *Pharmaceutical Society*., .. If they unreasonably shut out a man from his right to work, they are invalid ... see *Nagle* v. *Feilden*..."[27]

Here Lord Denning was clearly distinguishing two grounds for intervention, restraint of trade and public policy, and maintaining a separate basis from restraint of trade or contract for the court's jurisdiction to intervene.

Thus in these cases the courts have been claiming a power to impose duties on private bodies, not on the basis that they are in contractual relationships with their members - nor infringing property rights - but because they are private legislators under a duty, as exercisers of power, to exercise their powers with due regard for the impact of their decisions on those affected by them.

That this is still an important issue is illustrated by the difficulties experienced in finding a legal basis for the control of private regulatory power in the light of the decision in *Law* v. *National Greyhound Racing Club* to the effect that regulatory bodies in sport are not subject to judicial review.[28] This raises the question whether they are subject to duties of fairness and rationality in private law. *Nagle* v. *Feilden* and the other cases referred to above would suggest that they are.

In *Stevenage Borough Football Club Ltd.* v. *The Football League Ltd.* Stevenage Football Club had sought, in the Chancery Division, to challenge the validity of the criteria applied by the Football League in refusing Stevenage promotion to the third division.[29] Stevenage alleged that the criteria were in restraint of trade and unreasonable. Carnwath J. observed that there appeared to be several lines of cases in which the courts had exercised a supervisory jurisdiction, awarding declarations or injunctions as remedies. First, those in which the court focused on the control of power exercised by regulatory bodies, treating their rules as legislative in nature.[30] Carnwath J. particularly mentioned Lord Denning's judgments in *Enderby Town Football Club* v. *Football*

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[26] [1971] 1 All E.R. 215.

[27] *Ibid* at p.219. The reference for *Dickson* is [1970] A.C. 403.

[28] [1983] 1 W.L.R. 1302.

[29] Unreported, 23rd July, 1996. The decision was upheld in the Court of Appeal: (1997) 9 *Admin. L.R.* 109.

[30] Transcript of *Stevenage*, *ibid* at p.28.

Association[31] and *Breen* v. *Amalgamated Engineering Union.*[32] Second, those which like *Nagle* v. *Feilden*, approached this kind of matter as raising issues of restraint of trade. Carnwath J. commented that this appears to be the preferred approach in the Chancery Division[33] - although it is notable that Lord Denning did not treat *Nagle* v. *Feilden* as a restraint of trade case, and nor did Megarry V.-C. treat *McInnes* v. *Onslow Fane* as a restraint of trade case. And third, cases including *Nagle* in places - especially in the judgment of Salmon L.J. - which have held that it was unlawful to deprive a person of the right or liberty to work.[34] Carnwath J. considered that he would have had jurisdiction to grant declaratory relief to Stevenage, but that he was entitled in the exercise of his discretion to refuse relief because of the delay on the part of the plaintiff and the prejudice to third parties that this would cause.[35] The Court of Appeal endorsed this view.[36]

FUNDAMENTAL VALUES

We have seen that Lord Denning expressed a number of justifications for his view that the courts were entitled to impose duties of fairness and rationality on decision makers in these cases. I suggest that there is behind these and other decisions of Lord Denning - and indeed many decisions in public and private administrative law - a coherent set of values which the courts are seeking to protect by requiring that they be given some weight and relevance by decision makers. *Nagle* was about the right or liberty to work. The importance of work for an individual is that it provides him or her with security in the form of an income, and status in society. Denial of a right to work by a professional or regulatory body may amount to a denial of the right to live one's life in one's own way - a denial of autonomy. It may carry a slur on the applicant's character which could lower him or her in the eyes of society.

But the right or liberty to work was not the only interest that Lord Denning was seeking to protect in his decisions. In *Breen* the plaintiff had been refused recognition as a shop steward by the union despite the fact that his fellow workers had elected him. Discussing the remedy Lord Denning said :

> "... he has suffered in reputation and standing. He has been injured in his proper feelings of dignity and pride. He has lost the chance of

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[31] [1971] Ch. 591 and *supra* n.26.
[32] [1971] 2 Q.B. 175 and *supra* n.8.
[33] *Supra* n.30 at p.29. And see *Watson* v. *Prager* [1991] 1 W.L.R. 726 *per* Scott J.
[34] *Ibid* at p.28. See also *McInnes* v. *Onslow Fane supra* n.21.
[35] *Ibid* at pp.56-7 & 61.
[36] (1997) 9 *Admin. L.R.* 109.

a career of honour in the union."[37]

In holding that a declaration should be granted that the refusal by the union to recognise him as shop steward was invalid, Lord Denning reasoned that "it will justify him in the eyes of his fellow workers."[38] Clearly the plaintiff's interest in his own dignity, respect and status were what influenced Lord Denning to decide in his favour.[39] Examples could be multiplied, but overall it is suggested that the justifications for imposing duties of fairness and rationality in private decision making and in public decision making are the same, a recognition of the fact that individuals have legitimate interests in their own autonomy, dignity, respect, status and security, and that this calls for those in positions of power over individuals to weigh up those interests in their decision making.[40]

CONCLUDING COMMENTS

Claire Palley, in her essay in the Jowell/McAuslan collection, suggests that since at least 1949 Lord Denning had been preoccupied with the themes of power, responsibility and abuse of power (including dishonourable conduct and exploitation of process) whether by public authorities, groups or individuals.[41] The cases referred to above are only a small selection of those in which Lord Denning sought to control abuses of power. But they are of particular importance for administrative law in showing how it is not simply a branch of public law but a technique for controlling exercises of power on both sides of the public/private divide. Lord Denning's approach can help to resolve the problems caused by the decisions in *O'Reilly* v. *Mackman* and *Law* v. *Greyhound Racing Club*. He accepted a procedural divide in his judgment in the Court of Appeal in *O'Reilly*, but this need not preclude the courts exercising controls in private law. In effect the common law has long provided protection for individuals whose vital interests are threatened by exercises of decision making power whether by public or private bodies, using as its basis public policy. There are certain well established heads of public policy - implied contractual terms, restraint of trade. But the categories of public policy are not closed, and according to Lord Denning, they extend to cases where there is an imbalance of power between the parties and the weaker party's interests in his or her dignity, autonomy, respect, status or security are at risk.

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[37] *Supra* n.8 at p.1157.

[38] *Ibid* at p.1156.

[39] In this result of the case Lord Denning was in a minority, and the other judges in the Court of Appeal found against the plaintiff on the facts found by the trial judge and on evidential points.

[40] I have outlined this argument in "The underlying values of public and private law" in M. Taggart, ed., *supra* n.3; and "Common values in public and private law and the public/private divide" [1997] *P.L.* 630.

[41] "Lord Denning and Human Rights - Reassertion of the Right to Justice" *supra* n.1 at p.364.