

The Jurisprudence of Lord Denning
A Study in Legal History
Volume III
Freedom under the Law
Lord Denning as Master of the Rolls 1962-1982

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By

Charles Stephens

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P U B L I S H I N G

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Freedom under the Law: Lord Denning as Master of the Rolls, 1962-1982, by Charles Stephens

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I went back to Oxford for a day or two to try for that most coveted of academic awards – a fellowship at All Souls. I could answer the legal questions all right, but we had to read Latin aloud. My pronunciation was mixed between the old and the new. That did not suit that stronghold of classicists. So I joined the distinguished company of ‘Failed All Souls’! Like the more numerous company of ‘Failed BA’.

—Lord Denning *The Family Story* [London 1981] pp.38-39

Yes, I could have been a judge but I never had the Latin, never had the Latin for the judging. I just never had sufficient of it to get through the rigorous judging exams. They’re noted for their rigour. People came staggering out saying, ‘My God, what a rigorous exam’ – and so I became a miner instead. A coal miner. I managed to get through the mining exams – they’re not very rigorous. They only ask one question. They say ‘Who are you?’ and I got 75% for that.

—Peter Cook *Sitting on the Bench* [Fortune Theatre 1961]

Tragically I Was An Only Twin – The Complete Peter Cook ed. William Cook [London 2002] p. 45

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FOREWORD

I dedicate my work on Lord Denning, which is also a contribution to the study of English identity and the nature of English history, to three friends: Nirad C. Chaudhuri, Hamish Henderson and Michael Stenton.

In Oxford, during the winter of 1975-6 Mr Chaudhuri, or Nirad Babu as he should properly be called, the author of *The Autobiography of an Unknown Indian*, *A Passage to England* and *Thy Hand Great Anarch*, introduced me to the tragic history of the Bengali nation. In so doing, he reminded me that great nations can die, as well as be born and flourish. Like Lord Denning, Mr Chaudhuri lived to be 100.

In 1977, and over the following years until his death in 2002, Hamish Henderson shared his love of the Scottish nation with me and taught me to respect and honour that people. Hamish, a great poet, author of *Freedom Come All Ye* and the translator of Antonio Gramsci, was a 'man of the Left' but he was amused and touched by the fact that one of his poems appeared on the same double facing page as one of those written by Enoch Powell in an anthology of war poems entitled *The Terrible Rain: The War Poets 1939-1945*, edited by Brian Gardner and published by Methuen in 1966. The other poem on that double facing page was written by Frank Thompson, the brother of E.P. Thompson, author of *The Making of the English Working Class*; Frank Thompson was executed by agents of Stalin in Bulgaria in 1944. Enoch Powell retained the friendship of Michael Foot throughout his life; Tony Benn attended his memorial service. Serious students of the proper history of nations are not concerned with 'Left' or 'Right', designations emanating from the French revolutionary entity and progenitor of the 'Terror' known as the National Convention, but with piety, patriotism and loyalty; perennial virtues which were known to Herodotus and Thucydides as well as to Livy and Tacitus.

Between 1991 and 1997, in Cambridge, Michael Stenton and I taught students from the United States, Japan, Germany, France, Russia, Denmark and many other nations about the nature of English national identity. During those hot July and August days, when the Treaty of Maastricht was debated, turbulently, in Parliament, and the Conservative government slowly declined into sad incoherence and abject disgrace, Michael, a member of Peterhouse, instructed me in the continuities and complexities of English history. This work was conceived, if not

completed, during that period.

The German philosopher G.W.F. Hegel observed that “wenn die Philosophie ihr Grau in Grau malt, dann ist eine Gestalt des Lebens alt geworden, und mit Grau in Grau läßt sie sich nicht verjüngen, sondern nur erkennen; die Eule der Minerva beginnt erst mit der einbrechenden Dämmerung ihren Flug“ [*Grundlinien der Philosophie des Rechts* [1821] Vorrede]. It may be that the long story of England has not yet entered its *dämmerung* but, whether or whenever that eventuality may come to pass, Lord Denning will surely have an honoured place amongst the wisest of its many worthies.

ACKNOWLEDGMENTS

My wife Karin has been unfailingly supportive and optimistic. In 1998, she gave me a copy of Lord Denning's *The Family Story* for my birthday; it has proved to be an indispensable *vade mecum* and a valued *enchiridion*. I have heard it said that lawyers who use too much Latin are probably practiced deceivers and we all know that we must be on guard against Greeks bearing gifts; perhaps those who attend to the wisdom of both Rome and Greece, listening to both, but deferring to neither, are protected from the perils of fraudulent misrepresentation and sudden assault. My students at Birkbeck College, the Open University and Queen's College in Harley Street enabled me to retain a sense of proportion and to realise that my lucubrations about Lord Denning, the Law and the nature of English identity had points of contact with the quotidian world.

I am also beholden to Professor Patrick Hanafin and Dr. Piyel Haldar. Along with their colleagues at Birkbeck College's Department of Law, they guided me, with a 'kindly light', through the rebarbative thickets of 'critical legal theory'; a practice which might, by its detractors, be aptly named 'foul smelling and loathsome', as Peter Goodrich, one of its notable practitioners once described the common law. This experience provided me with a metaphorical, but indispensable, grindstone on which I sharpened the blade of my delight in the traditional patriotic verities espoused by Lord Denning whose portrait presides, in what must often be baffled perplexity, over the varied proceedings which take place in the Council Room of Birkbeck College.

Professor Gary Slapper has provided me with support and encouragement. We share a common affection for the work of the late Peter Cook. In the course of swapping favourite Peter Cook sketches by means of YouTube, I was reminded of the ways in which the lives of Peter Cook and Lord Denning were intertwined, not least in the case of *Goldsmith v Sperrings Ltd* in 1977. Like a white knight, Lord Denning came to the aid of *Private Eye* when that noble vehicle of true journalistic endeavour faced a grim nemesis in the form of Sir Jams Fishpaste. Lord Denning often joked that he possessed 'every Christian virtue, except resignation'. I recall, from the early 1980s, a cartoon in *Private Eye* which made use of this phrase to good effect. I feel that Lord Denning was the only judge of whom *Private Eye* might have approved. He was not quite

Mr Justice Cocklecarrot, once memorably played by Clive Dunn, but I feel that he could have been depicted on the stage by an actor made up from bits and pieces of all of those who entertained us in *Dad's Army*, except perhaps for the very Scottish John Laurie. H.E. Bates, like Lord Denning, a lover of Kent and of the kinder aspects of the English character, could have written the script. 'Pop' Larkin would have certainly been an attractive litigant in Lord Denning's eyes and I am quite certain that, just as Mandy Rice Davies thought him 'the nicest judge I have ever met', so Mariette and Primrose Larkin would have reminded him of the days when 'it was bluebell time in Kent'.

I owe a particular debt of gratitude to Professor Tony Lentin. We first met as trainee tutors for the Open University's pioneering foundation course in Law: *Rules, Rights and Justice: An Introduction to Law*. We were introduced to each other by Professor Gary Slapper as fellow historians. A facile comment by another trainee tutor about Lord Denning's 'racism' drew us together in shared indignation. I was already engrossed in the research on which this study of Lord Denning's jurisprudence is based. We spent the evening in pleasant discussion of Lord Denning, Lloyd-George, Lord Sumner and many other congenial matters. Professor Lentin shares my profound admiration for Lord Denning and has provided me with the support and encouragement which has enabled me to maintain the enthusiasm and determination necessary to bring my work to a successful conclusion. Unlike Professor Lentin, who corresponded with him and watched him in court, I never met Lord Denning, knowing him only from my study of the Law. On the final page of his biography of Lord Sumner, a very different, but equally great judge, Professor Lentin wrote these words:

As an honorary Fellow of Magdalen and a frequent visitor to Oxford, Sumner often dined in College. On one such occasion in the early 1920s, a shy young law student was ushered into his presence. 'I was invited into the Senior Common Room to meet him. Even on that short occasion, I felt that he was a rather formidable character. He looked stern. He did not have an easy manner with young people like me'. The young student was the future Lord Denning, [Lentin, A. *The Last Political Law Lord: Lord Sumner [1859-1934]* Cambridge Scholars Publishing 2008 p. 258]

As I was growing up and coming to know the world, I always felt reassured by Lord Denning's presence in our national life. At the back of my mind I felt that we were all safe as long as he was Master of the Rolls. The origins of this project lie in those memories. In 1998, I started an LLB at Birkbeck College, of which Lord Denning had been President between

1953 and 1983. My first steps in the Law were taken while he was still alive and, though I never met him in person, there was not a week in which I did not look with affection at his portrait in the Council Room of Birkbeck College. Lord Denning is therefore the other person to whom I owe a debt of gratitude. It might seem a banal comment but without the particular warmth and humanity of his presence I should never have been able to spend nearly ten years of my life preparing this work which is dedicated to the preservation of his memory.

INTRODUCTION

THE OBITUARIES OF LORD DENNING

Lord Denning sat in the Court of Appeal as Master of the Rolls from 19th April 1962¹ until 29th September 1982. As Master of the Rolls he was the senior judge in the Court of Appeal. In contrast with the House of Lords where, usually, five Law Lords hear a case, in the Court of Appeal, only three judges would sit. This meant that if one judge agreed with Lord Denning then his judgment would decide the case. Leave to appeal could be refused by the Court of Appeal, even though that refusal could be overruled by the House of Lords. Most cases were decided in the Court of Appeal; appeals to the House of Lords were the exception rather than the rule. During this period, for roughly every ten cases which ended in the Court of Appeal, one would be heard in the House of Lords. Furthermore, as Master of the Rolls, Lord Denning would be able to exert considerable influence in deciding which cases were heard in his court.² All of these factors meant that the Court of Appeal, and in particular the Master of the Rolls, could exercise a decisive effect on the shaping of the law, in particular in the development of constitutional law.³

Until 1966, the House of Lords were bound by its previous decisions; even after 1966, certainly before 1982, the House of Lords were sparing and cautious in their use of the power to override precedent which they had conferred on themselves in the Practice Statement of 1966. This meant that the House of Lords, although the final court of appeal, did not really act as a court in which the law was shaped and changed during the period in which Lord Denning was Master of the Rolls. While it could, and did, overrule a significant number of decisions made in the Court of Appeal, a determined Master of the Rolls could, for the reasons given above, exercise a more decisive effect on the development of the law than the House of Lords.⁴ Lord Denning was such a Master of the Rolls.

When Lord Denning died at the age of 100 on the 5th of March 1999, a range of obituaries from anonymous tributes in the Daily Telegraph and Sunday Times, to the memoir of a fellow judge, Lord Goff in the Daily Telegraph, to more radical and critical, signed, appreciations in the

Guardian, by Sir Stephen Sedley and Geoffrey Robertson, acknowledged the significance of his role in developing English law.⁵

The Daily Telegraph obituary⁶ described Lord Denning as ‘a fearless champion of the rights of the common man’ who was concerned with justice rather than law: ‘Whenever ‘Tom’ Denning was faced with a situation that seemed to him dishonest, unjust or wrong, all his ingenuity and erudition would be directed to finding a remedy, even if the wrongdoer appeared to have law on his side. This was particularly the case when some powerful institution seemed to be oppressing a smaller body or individual.....Denning was well placed to combat the insolence of office’. Lord Denning defined his concept of justice as ‘the solution that the majority of right-minded people would consider fair’; the Telegraph’s obituarist linked this devotion to justice with Lord Denning’s religious faith, pointing out that ‘he liked to have the Bible close to hand when writing judgments’ and that, for many years, he was President of the Lawyer’s Christian Fellowship. The fact that Lord Denning’s use of language was ‘simple, clear, vigorous and direct’ and therefore accessible to the ‘common man’, in contrast with much of the language of the law, was also stressed by the obituarist. In the mind of the obituarist of the Daily Telegraph Lord Denning was a defender of a traditional conception of the English constitution which protected the rights of the ‘common man’ against those who abused their power in an oppressive manner. The English constitution was such that justice, of the kind defined by Lord Denning as ‘the solution that the majority of right-minded people would consider fair’, was accessible to all. The Daily Telegraph’s obituary presented Lord Denning as an exemplar of Englishness, emphasising that he was ‘fiercely patriotic’.

The association of Lord Denning’s Englishness with a notion of justice which accorded with the conceptions of ‘right-minded’ people and which defended the rights of the ‘common man’ against the potential oppressions of the powerful, a justice rooted in Christian and patriotic values, was echoed in the leader in the same edition of the Daily Telegraph. The leader writer wrote of ‘a deep and almost tangible Englishness’ which ‘shone through his many celebrated judgments. He was patriotic, sceptical and humane; intelligent without being intellectual’. However, after this eulogy, the leader writer’s tone changed: ‘His Englishness was sometimes a weakness. Few contemporary jurists exhibited his passion for fair play; but his sense of justice could make for remarkably bad law’. Most damning of all, in the mind of the Daily Telegraph’s leader writer: ‘It was in Lord Denning’s time that the judiciary began to get a taste for challenging Parliament. His own forays into this field were always well-

intentioned and usually harmless; but they paved the way for a generation of judges who, influenced by the practices of the Continent, saw themselves as having an explicit political role'. Lord Denning's enthusiasm for the reception of European law was also noted by the leader writer; just as he linked Lord Denning's misconceived, but 'well-intentioned' challenges to Parliament with the actions of his successors, so Lord Denning's enthusiasm for European law was associated, by the use of his own words,⁷ with the enthusiastic reception of European law by the judiciary, a development profoundly distasteful to the minds of the readers of the Daily Telegraph. In notable contrast with the obituarist's judgment that Lord Denning embodied a traditional conception of the English constitution as a bulwark which protected 'right-minded' individuals from oppression, the leader writer concluded that Lord Denning's legacy was not only mixed, but detrimental in that it had encouraged the judiciary to challenge the will of Parliament and had also enabled European law, legitimised by the decisions of the judiciary, to transform the English legal order. This view of Lord Denning identified him as a radical maverick, rather than as a defender of the traditional conception of the English legal order.

The Sunday Times obituary⁸ struck a decidedly equivocal note depicting Lord Denning as both 'radical', even 'revolutionary', and also 'conventional, 'square' and even 'reactionary'. On the 'reactionary' side, the obituarist noted that Lord Denning voted against the suspension of hanging in 1965, and stressed that 'in sexual matters he was firmly on the side of orthodox morality....was even more explicit in his condemnation of homosexuality....was against the supersession of the religious oath in court by a simple promise to tell the truth'. According to the Sunday Times obituarist: 'The solution of the apparent paradox of the 'revolutionary' and the 'establishment' figure was that what Denning cared for, deeply and passionately, were fundamental and traditional values - religion, the Christian orthodox morality, an ordered society and fair play. He had a romantic belief in English law as one of the supreme creations of man; if he laid what some thought were sacrilegious hands upon the sacred scrolls, it was not because he loved the law less but because he loved justice more. He felt that when the law ceased to be sensible, flexible and fair it was failing in its vital and historic mission; if it needed a shaking-up in order to ensure that it adopted a modern and relevant posture, he was ready and willing to administer the necessary and salutary shock'. The Sunday Times obituarist, like that of the Daily Telegraph, considered that Lord Denning was 'dedicated to defending the rights of the individual, the ordinary citizen, against the forces of

bureaucratic government’.

Lord Goff⁹ considered that Lord Denning was ‘the outstanding judge of this century in the Common Law world....he reminded a whole generation of lawyers that the duty of a judge is not merely to apply the law but to do justice’. Lord Goff saw Lord Denning as a reformer of the law: ‘He taught us all that, if justice was to be done, the Common Law could not stand still - it must be developed to respond to the demands of justice in a living society’. Lord Goff stressed ‘the extraordinary combination of tradition and modernity in his outlook’. Lord Goff concluded his appreciation by quoting the words of a document which he had read to Lord Denning, now blind, on the occasion of his 100th birthday: ‘His judgments will be read by generations yet unborn. His fame will reverberate down the centuries’. This was no hyperbole. The prediction is well founded’.

The views of the obituarists of the Daily Telegraph and the Sunday Times were echoed in the eulogies of the recently deceased Lord Denning by other figures, notable in 1999, delivered in the form of easily digestible soundbites. Lord Irvine of Lairg then Lord Chancellor, said that the name of Denning was a ‘byword for the law itself. His judgments were models of simple English which ordinary people understood’.¹⁰ Tony Blair, the Labour Prime Minister, said, with characteristic banality, that ‘he was prepared to use the law for its true purpose - in the interests of fairness and justice. He had a tremendous feel for ordinary people’.¹¹ Lord Hailsham, a former Lord Chancellor, said that Lord Denning ‘would go down in history as one of the great and controversial judges of the twentieth century’.¹² Lady Thatcher, a former Prime Minister, said that Lord Denning was ‘probably the greatest English judge of modern times. He combined a love of liberty with a passion for justice. His life and work will provide inspiration for generations to come’.¹³ Lord Donaldson, his successor as Master of the Rolls, said that Lord Denning was ‘always looking to see whether the law could be improved and had a particular regard to those whom he regarded as the underdog. He was a very great communicator, and put forward his views in words which the ordinary man in the street could fully understand, and which the tabloid reporter could report’.¹⁴ Lord Lester of Herne Hill said that Lord Denning ‘defended the vulnerable and weak and gave enlightened leadership at a time when English judicial interpretation was too often narrowly literal and too deferential to the executive’.¹⁵

Two, rather more considered, assessments of Lord Denning, which offered a rather different interpretation of his career, by Geoffrey Robertson and Sir Stephen Sedley, at that time a High Court judge, were

published in the Guardian.¹⁶ Geoffrey Robertson¹⁷ argued that Lord Denning was the first English judge to 'have any notion of 'rights', albeit conceiving them as powers belonging to citizens through birth [in England], status [an unblemished and hardworking life] and loyalty, to the Crown'. Robertson continued: 'It was Denning's crusade to do 'justice' - ie to produce a result which favoured the 'good citizen' - that led him [single-handedly at first] to revolutionise the civil law to reflect the dictates of middle-class morality'. Robertson saw Lord Denning as, up to a point' a radical figure: 'His iconoclasm seemed to presage a revolution in the courts to compare with those increasingly on the streets; for the 60s law student, the Beatles, Vietnam protests, and Denning's dissenting judgments were all part of a brave new world'. Lord Denning's credo was 'I must do justice, whatever the law may be'. For Robertson, 'this revolutionary invitation - to tear up the rule book and reach a popular result - was a welcome rejection of the 'slot machine jurisprudence' theory of deciding cases by reference to precedent'. However, there were limitations to Lord Denning's radicalism: 'He always found for David against the State Goliath when David was, for example, a television license-holder unconstitutionally mulcted by the Home Office, but not when he was an alien suspected of subversion whom the Home Office wished to deport'. Robertson was referring to the case of Mark Hosenball;¹⁸ in his opinion Lord Denning's worst decision. Robertson concluded that Lord Denning 'played Prospero to lawyers of his generation, creating the result his own opinionated mind believed 'just' through the alchemy of obscure precedents he found in old books. But it is not the role of judges to court public applause; in the end, his prejudices became his principles'.

Sir Stephen Sedley¹⁹ described Lord Denning as 'one - perhaps the last - of a sparse succession of major judicial figures who have succeeded in shaping areas of the law into conformity with a strongly-held world view'. Sedley continued: 'Denning's most abiding and probably least deserved reputation was as a liberal. He adhered throughout his life to a conservative set of personal and public values'. Sedley emphasised Lord Denning's distaste for any interference with 'individual enterprise' and his 'paternalistic, and sometimes simplistic, views on social questions'. Sedley considered that 'his literary style, in fact, is perhaps his most underrated achievement', in that it enabled him to speak 'directly and compellingly to ordinary people in well-constructed and lucid prose. Concepts which lawyers had struggled to articulate, clashes of doctrine which seemed insoluble, would emerge in his judgments as crystalline statements of principle.....the accessibility of language was the rock on

which his popularity and influence were built'.²⁰

However, like Robertson, Sedley noted the limits of Lord Denning's tolerance: 'The hate-figures of the popular press - students, trade unions, squatters, prisoners - rarely won in Denning's court. His reputation was also sullied by his views on race, which were believed to have precipitated his retirement in 1982'. However, Sedley concluded that 'it would be wrong to remember Lord Denning as a judicial Alf Garnett as it would be to remember him as a beacon of judicial virtue. He was complex in his strategic views, and in many ways a vigorous modernist'. Sedley identified Lord Denning's contribution to the judicial review of executive and local government decisions and his coining of the concept of 'legitimate expectation' as notable contributions to the development of the law while criticising his 'faith in the infallibility of the Security Services' and noted that 'the peroration of his judgment in the Birmingham Six case - 'This case shows what a civilised country we are' - will remain an ironic epitaph [not on the seven other judges who shared his conclusion] but on him'.

Sedley also noted Lord Denning's 'strongly authoritarian approach to public affairs [which] marched with a rigorous view of private morality and a patrician attitude to individuals' which was clearly revealed in his 1963 report on the Profumo affair. However, Sedley also remarked that Lord Denning's response to EEC law 'surprised everybody who thought they knew his foibles. In a 1974 judgment which ranks among the great passages of English judicial prose, he avoided both grudging acquiescence and overt welcome by using as an image the great forces of nature which an island people had traditionally coped with and survived: 'The treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back'. On these great issues of political power, Lord Denning was a realist in his stewardship of the law'. Sedley's judgment was that 'if there is a label for Lord Denning's stance as a lawmaker, it is radical conservatism. The emergence of just this as the dominant mode of the political state during Lord Denning's later years is perhaps an index of his prescience and a confirmation of his status, not merely as a judge, but as a historic figure of enduring importance'.

Lord Denning's contribution to the shaping of the law was clearly controversial and complex. He can be claimed as a traditionalist, defending the ancient English constitution, or condemned as a reactionary, even a racist, who defended the secret state, was hostile to trade unions, rejected the 'permissive society', feminism and the growing tolerance of sexual minorities and was anxious about the impact of immigration from the former Commonwealth. However, he can also be seen as a reformer, a

pioneer of judicial review of the executive and a major contributor to the reception of European law by the English courts. As Sedley observed, he could also be seen as a forerunner of the ‘Thatcher’ revolution with its insistence on the rights of the individual, Hayekian devotion to the rule of law as the basis of a market economy, rejection of the claims of Irish nationalism and hostility to the power of the organised working class. Although in some ways J.A.G. Griffith²¹ criticised Lord Denning in the same way that he criticised the ‘politics of the judiciary’ in general as being conservative and as favouring the established order,²² he also acknowledged Lord Denning’s distinctive and constructive contribution to the development of the law: ‘In practice, judges are often most reluctant to be creative in the development of the Common Law, though it is precisely there that Lord Denning had been at his most creative during his long judicial life’.²³ Hugo Young,²⁴ a biographer of Margaret Thatcher²⁵, began, but did not finish, a study of Lord Denning who fascinated him.²⁶ On the occasion of Lord Denning’s retirement in 1982, Young wrote: ‘To anyone who believes the law should liberate, not enslave, he is a beacon. He discovered that young, as a poor student, in the 1920’s. He is just about the only octagenarian who has never forgotten it’.²⁷

The English legal order experienced considerable stress during the period that Lord Denning was Master of the Rolls. By the time of his retirement in 1982, the outlines of a major debate about its nature and future had emerged. The English constitution is grounded on statute, moderated by judicial interpretation, and the Common Law. As Dicey emphasised,²⁸ the decisions of the courts were both a repository of constitutional law and also a means of developing and shaping that law. Given the relative quiescence of the House of Lords during the period in which Lord Denning was Master of the Rolls, the role of the Court of Appeal in shaping the laws of England, and the constitution itself, was decisive.²⁹ Although some constitutional law can be found in the statutory law of that period,³⁰ it is arguable, following Dicey, that the most important developments occurred in the courts and that Lord Denning’s contribution was of particular significance.

In 1962, when Lord Denning became Master of the Rolls, few doubted the superiority and stability of the English legal order. By 1982, thoughtful commentators had begun to question both the superiority and the stability of that order. The following analysis of the judgments of Lord Denning will shed light on the development of English law and the English constitution between 1962 and 1982. However, before considering Lord Denning’s judgments in the Court of Appeal between 1962 and 1982, it will be necessary to examine his own writings about the

law³¹ in order to gain a sense of his understanding of the nature of law and the English constitution.

Notes

¹Lord Denning was first appointed to the Court of Appeal in 1948. He was promoted to the House of Lords by Harold Macmillan on 24th April 1957. In his Romanes lecture of 1959, delivered in the University of Oxford, Lord Denning seemed to go so far as to claim that the House of Lords, in its judicial capacity, should appropriate legislative powers to itself enabling it to change the law when it needed changing, rather than having to wait on the more leisurely process of Parliamentary law making. Although the Practice Statement of 1966 was a move in this direction, in 1959 such radicalism was anathema to the senior Law Lord, Lord Simonds. Although Lord Denning often dissented from the majority decision in the Lords, his dissent could make little or no impact. Frequently he was at odds with Lord Simonds in particular who once memorably expressed his distaste for Lord Denning's preference for 'filling in the gaps' left by poor or confusing drafting as 'a naked usurpation of the legislative function under the thin disguise of interpretation'. According to the Sunday Times obituary, it was the frustration which resulted from conflict with Lord Simonds that led Lord Denning to accept the apparent demotion from the House of Lords consequent on his acceptance of the office of Master of the Rolls in April 1962. In the Court of Appeal, Lord Denning's judgments, even the dissenting ones, could have much more impact on the shaping of the law than was possible in the House of Lords. It is also worth noting that Lord Denning's appointment to the Court of Appeal on 19th April 1962 was made by Harold Macmillan. Macmillan was an unorthodox Conservative who was the author of a number of relatively radical initiatives between 1957 and 1962 ranging from the creation of Life Peerages, the setting up of the National Economic Development Council, the establishment of new Universities and, most radically of all, the application, in 1961 of the United Kingdom to join the European Economic Community. Macmillan's appointment of Lord Denning to the Court of Appeal, as Master of the Rolls, in April 1962 could be seen in this context as an unorthodox, but inherently conservative, attempt to modernise the institution of the law along similar lines to those which Macmillan adopted with regard to other institutions during the period of his premiership. Lord Denning's appointment came between the Orpington by-election, in the seat next door to that of the Prime Minister, which the Conservatives lost to the Liberals, and the so-called 'night of the long knives' on 13th July 1962 when Macmillan sacked seven Cabinet ministers, including the Lord Chancellor. It was a time of decided instability in the fortunes of the Conservative government. In this context, Macmillan's appointment of Lord Denning to conduct the inquiry into the circumstances surrounding the resignation of John Profumo in June 1963 should be considered an astute manoeuvre; the deployment of a conservative, but unorthodox, judge of Lord Denning's calibre was perhaps the only way in which

the gravest crisis of his premiership could have been resolved satisfactorily. In the febrile atmosphere of the summer of 1963, a judge of the stamp of Lord Simonds would not have been able to construct a report which would be credible, let alone have saved the government. Lord Denning did not disappoint; his Report saved Macmillan, perhaps even the Establishment itself. Despite his modest criticism of his conduct as Prime Minister during the affair, Lord Denning retained a substantial amount of respect for Harold Macmillan. He concluded his account of the whole business in *Landmarks in the Law* by quoting from the letter which Harold Macmillan wrote to him on his retirement on 28th July 1982 in which he praised him for his ‘commonsense, fair play and justice’ and concluded ‘as Lord Mansfield and Lord Camden, so Lord Denning’. Lord Denning then commented that ‘Macmillan was a very great man’. *Landmarks in the Law* [London 1984 p. 365].

² Lord Denning sat in Court Number 3 in the Royal Courts of Justice

³ According to Dicey, Constitutional Law was made in the ordinary courts of law: ‘Every man’s legal rights and liberties are almost invariably determined by the ordinary courts of the realm, and each man’s individual rights are far less the result of our constitution than the basis on which that constitution is founded’. Dicey, A.V. *The Law of the Constitution* 8th Edition 1915 lv

⁴ Stevens, R. *The House of Lords: Law and Politics 1800-1976* [London 1979]; Patterson, A. *The Law Lords* [London 1982]

⁵ Other evaluations of Lord Denning’s contribution to the law made after his retirement in 1982 include: Jowell, J. and McAuslan, P. *Lord Denning: The Judge and the Law* [London 1984]; Heward, E. *Lord Denning* [London 1990] 2nd ed [London 1997]. The journal of the Law School of the University of Buckingham, the Denning Law Journal, published an edition entirely dedicated to Lord Denning in 1999. Many of these papers were delivered at a conference, organised by the Law School of the University of Buckingham to mark the 100th birthday of Lord Denning on 23rd January 1999.

⁶ Daily Telegraph 6.3.99

⁷ In 1990, in a letter to the Daily Telegraph, quoted by the leader writer, Lord Denning wrote: ‘No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave, bringing down our sea-walls and flowing inland over our fields and houses - to the dismay of all’.

⁸ The Sunday Times 7.3.99

⁹ The Daily Telegraph 6.3.99 Lord Goff of Chievely, Eton and New College, Oxford, Lord of Appeal in Ordinary 1986-2001

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

¹⁶ The Guardian 6.3.99

¹⁷QC, author of *Freedom, the Individual and the Law* [London 1989] and *Crimes against Humanity* [London 1999]

¹⁸[1977] 1 WLR 766

¹⁹High Court [1992-2002] Court of Appeal [2002-]

²⁰Sedley went on to qualify this judgment with a nice piece of irony: ‘When, not long after his retirement, he appeared in full wig and gown on ‘Jim’ll Fix It’ and tried Little Noddy for knocking down PC Plod, what stuck in the mind was not the incongruity but the homogeneity of it - the same benign moralism as the legal profession had known for 40 years, in prose begotten by Samuel Smiles upon Enid Blyton’. Sedley also pointed out that: ‘Such was his authority that lawyers now believe that Lord Mansfield, giving judgment in favour of the slave James Somersett, said: ‘The air of England is too pure for any slave to breathe: let the black go free’. But the line appears in no contemporary report of Mansfield’s judgment: the phrase has a long lineage, but the attribution originates, so far as is known, in Lord Denning’s celebrated 1949 Hamlyn Lectures, *Freedom under the Law*.

²¹*The Politics of the Judiciary* 5th edition [London 1997]

²²Griffith places a quotation by Lord Denning from Anthony Sampson’s *The Changing Anatomy of Britain* [London 1981] p. 159 on the first page of his book: ‘The most politically influential of the judges however, has been the Master of the Rolls, Lord Denning.....with his own modest roots he dismisses the attacks on a class-based judiciary: ‘The youngsters believe that we come from a narrow background - it’s all nonsense - they get it from that man Griffith’.

²³Griffith, J.A.G. *The Politics of the Judiciary* 5th Edition [London 1997] p. 289

²⁴1973-1984 Political Editor of the Times; 1981-1984 Joint Deputy Editor of the Times; 1984-2003 Political Editor of the Guardian; Chairman of the Scott Trust [1989- 2003]; author of *This Blessed Plot: Britain and Europe from Churchill to Blair* [London 1998]

²⁵*One of Us: a Political Biography of Margaret Thatcher* [London 1989]

²⁶Obituary The Guardian 23.9.03

²⁷The Sunday Times 30.5.82, also quoted in Lord Denning *The Closing Chapter* [London 1983 p. 13

²⁸Dicey, A.V. Op. cit. lv

²⁹Between April 1962 and September 1982 1072 judgments of Lord Denning were reported in the All England Law Reports. The argument of this study is based on a close analysis of all of these judgments.

³⁰Commonwealth Immigration Act 1962, Peerages Act 1963, Race Relations Act 1965, Parliamentary Commissioner Act 1967, Representation of the People Act 1969, Equal Pay Act 1970, Industrial Relations Act 1971, European Communities Act 1972, Local Government Act 1972, Northern Ireland [Temporary Provisions] Act 1973, Border Poll Act 1973, Northern Ireland Constitution Act 1973, Trade Union and Labour Relations Act 1974, Referendum Act 1975, Sex Discrimination Act 1975, Race Relations Act 1976, British Nationality Act 1981, Northern Ireland Act 1982.

³¹Lord Denning made a series of public statements about the law during a period of judicial reticence. Although Lord Radcliffe, *The Law and its Compass* [London 1960]; *Not in Feather Beds* [London 1968]; Lord Devlin, *The Enforcement of Morals* [London 1965]; Lord Reid, 'The Judge as Law-maker' *Journal of the Society of Public Teachers of Law* [1972] 12 pp. 22-29 and Lord Scarman, *English Law: the New Dimension* [London 1974] made important interventions during this period, Lord Denning's interventions were arguably more significant. The Hamlyn Lectures, published as *Freedom under the Law* [London 1949], the Romanes Lecture of 1959, the *Report into the Circumstances Leading to the Resignation of John Profumo the Secretary of State for War* Cmnd 2152, *The Discipline of Law* [London 1979]. *The Due Process of Law* [London 1980], the Richard Dimbleby Lecture, *The Misuse of Power* [London 1980], *The Family Story* [London 1981] and *What Next in the Law* [London 1982] amount to a unique set of public interventions by a judge sitting in the Court of Appeal and the House of Lords during the period of the so-called 'Kilmuir rules'.

CHAPTER ONE

LORD DENNING AS AUTHOR

The Family Story [1981]

*The Family Story*¹ was Lord Denning's attempt at autobiography. In some respects, this work is a conventional work of family piety combined with a brief outline of his legal career. However, it also reveals Lord Denning's understanding of the nature of English history and the English legal order not least by placing his own life and work within the larger English story, of which his own family story is an epitome.

For Lord Denning, 'family' is the foundation of society. The family maintained a 'united front',² thereby creating a stable foundation for the social order. Divorce therefore posed a threat to the maintenance of that order: 'A broken home leaves an indelible mark - a dark, dark mark - on the character and temperament of the child'.³ The English constitution, the body of the nation, was founded on the family: 'Family trees only take root in a marriage bed'.⁴ The line of descent from the past maintained the continuity of that order: 'Descent by blood counts a good deal. Heredity it is called'.⁵ Family and the descent through the generations by way of the 'marriage bed' combined to produce 'our native English race'.⁶ The origins of that line of descent were lost in 'time immemorial' but preserved in the continuity of the name: 'The first beginnings are myth - derived only from names'.⁷

The English race⁸ was located in a specific geographical place whose influence was also of fundamental importance: 'Surrounding play their part - fields, hills, rivers and mills'.⁹ In the English towns, everyone knew everyone else, as a result there was no wrong doing.¹⁰ Education, based on language, literature and history, also played its part: 'The teachers who taught us. All go to the making of us'.¹¹ Religion 'perhaps the chiefest influence of all...faith in God handed down from generation to generation',¹² completed the English constitution which, growing out of its 'root' in the 'marriage bed', embraced the whole land of England.

Family, land, language,¹³ history, literature¹⁴ and religion,¹⁵ for Lord Denning these were the elements which made the England which he knew and loved

In 1957, when appointed to the House of Lords, he took the title Denning of Whitchurch, the place of his birth. In 1960, Lord Denning returned to Whitchurch, the town of his birth, buying a house, the Lawns, where he was able to live in the style of a seventeenth or eighteenth century judge such as Coke or Mansfield, 'in the sort of establishment which judges of olden days used to live'.¹⁶ As he put it: 'I am back in the place where I was born. It is good for a man to have his roots deep down. It is good for him to return to the place of his childhood. It is good for him to meet and talk with those whom he knew when he was a boy. And to feel that he has done something to keep its character as a period piece'.¹⁷ As Master of the Rolls, from 1962 to 1982, Lord Denning lived in the place of his birth and felt that his life, and therefore his judgments, were at one with England herself.

Within this framework, Lord Denning told his own 'family story' in such a way that that 'family story' was made congruent with the history of England thereby placing him, its most recent descendant, in the line of a tradition which conferred the authority to 'speak for England'. The establishment of such a genealogy gave its inheritor the authority to claim that as a judge, as Coke put it, he could speak the law which was a living thing within his breast.¹⁸

Lord Denning defined the descent of the English as issuing from the Saxon, the Viking and the Norman.¹⁹ From the Saxon comes 'fair dealing', from the Viking 'hardihood to withstand the storm' and from the Norman the 'capacity to lead'.²⁰ He aligned his own 'family story' with these elements by linking his name 'Denning' with 'Dane-ing', 'son of the Dane'²¹ suggesting that his maternal forebear, living in Somerset, as a West Saxon, must have married a Dane during the Danish invasions of the ninth century.²² He pointed out that 'law' has a Danish etymology thereby associating his legal career with a Danish, paternal forebear. However, his Christian name Alfred associated him with the Anglo-Saxon king and lawgiver, Alfred the Great. Lord Denning noted that he was born, and christened, in 1899, a thousand years after the death of Alfred the Great:

I was born in 1899, just one thousand years after King Alfred's death. He was being remembered here in Wessex. A fine statue was set up to his memory in Winchester. My father and mother decided that I should be christened Alfred. Our connection with him is not proved. But he took shelter in Somerset where the Dennings were. I like to think that there the

son of the Dane may have married into the family of Alfred the Great.²³

Having associated his genealogy with both the origins of the word 'law', by means of his Danish forebears, and the first great English law-giver Alfred, Lord Denning proceeded to associate his family with the Normans, who imported the conceptions of feudal tenure, trial by jury, Norman French and Magna Carta into the English legal order, by tracing his descent from two Norman families named 'Newdigate' and 'Poyntz'.

Lord Denning wrote about the English Civil War, the great disruption of the continuity of the English history, as if it were a 'family story'. His forebears fought on both sides of the Civil War. Newdigate Poyntz fought for the King and was killed, early in the war, at Gainsborough. His brother, Sir Sydenham Poytz became 'one of Cromwell's most famous generals'.²⁴ Lord Denning made it quite clear that, with regard to the Civil War, his sympathies were with the Parliament and Cromwell rather than the King. When writing about his brother Norman, an officer of the Royal Navy, he noted that, on the conclusion of peace in 1645, he quoted from Milton's letter to Lord General Cromwell in May 1652: 'Peace hath her victories no less renown'd than war'.²⁵ Writing about his brother Reg's career in the Army after the war Lord Denning quoted Cromwell's famous words 'Put your trust in God and keep your powder dry'.²⁶ In 1934, Lord Denning gave a copy of John Buchan's recently published biography of Cromwell to his wife. He commented: 'Oliver Cromwell has always been a hero in our family.....some people regard Charles I as a saint and a martyr. I would not so describe him myself'.²⁷ On another occasion, writing about the trial of Charles I, Lord Denning noted that the King rejected the authority of the Court 'like the Nazi war criminals at Nuremburg'.²⁸ Commenting on the trial itself, Lord Denning observed: 'He disputed with John Bradshaw. All very unseemly. He was sentenced to death. John Bradshaw was the first to sign the death warrant'.²⁹ For Lord Denning, John Bradshaw was no regicide, but a judge, like himself, applying the law without fear or favour. Lord Denning was no Royalist, for him the legacy of the disruption of the Civil Wars was the limitation of the powers of the Monarchy and the establishment of the independence of the judiciary.³⁰

The crucial moment in the resolution of the constitutional conflicts of the seventeenth century for Lord Denning was the reign of James II: 'James II was a bad king. It was he who dismissed the judges'.³¹ It was the jurors in the case of the Seven Bishops, in particular the King's brewer who changed his mind, who by delivering a verdict against the King 'saved the English constitution' and so defended the principles of trial by jury³² and the independence of the judiciary.³³

Having associated his 'family story' with the triumph of Parliament, judicial independence and trial by jury, Lord Denning had secured his genealogy in relation to English history. He could claim in his own person the authority of the Anglo-Saxon lawgiver Alfred who gave him his Christian name, that of the Danes, from whom 'law' itself came, who gave him his surname, that of the Normans, who brought in trial by jury and were his forebears in line of direct family descent and finally that of Oliver Cromwell and the Parliament, for whom his ancestor Sir Sydenham Poyntz fought as a General, and whose victory ensured the preservation of trial by jury and established the principle of judicial independence.

From that time, until the lifetime of Lord Denning and his brothers, the family lapsed into obscurity, ceasing to play a role in the great dramas of English history. In 1720 there was an elopement and in a series of legal disputes over inheritance which began in 1807, all the estates, like those of the Manor of Marr, in Charles Dickens' *Bleak House*, were lost in Chancery.³⁴ Having been notable and important, the Denning family lapsed into poverty and obscurity, victims of an unjust legal order, a wrong which Lord Denning was to devote himself to putting right by embracing the cause of legal reform and dedicating his life to the pursuit of justice.

The rest of *The Family Story* was concerned with placing Lord Denning and his brothers at the heart of the history of England in the twentieth century. The decisive event of that century, for Lord Denning, was the First World War. One brother, Jack, was killed at the Battle of the Somme, another, Reg, was wounded on the Somme. Gordon fought at Jutland and died of tuberculosis in 1918. Lord Denning himself fought in the decisive fighting in April 1918 which resulted in the collapse of the Ludendorff offensive and laid the basis for the Allied victory in September to November 1918. Linking his experience with that of an earlier period of English martial prowess, he said that he felt 'proud to have been there, as were those at Agincourt' and then quoted the speech³⁵ of Henry Von St. Crispin's Day from Shakespeare's play *Henry V*.³⁶

The blood sacrifice of England's youth, in particular that of his two brothers, in the First World War remained a decisive experience for Lord Denning for the rest of his life.³⁷ At the Lincoln's Inn dinner held to mark his eightieth birthday in 1979, poppies from Picardy were displayed. Lord Denning, profoundly moved, said in his speech: 'Out of us, five brothers, three fought in Picardy. I was the youngest of the three - only there for the last nine months. Too young to go before, I came through unhurt. The other two were soldiers there from the beginning. Both were in the Battle of the Somme'. He then described how his mother fainted when she

received the telegram informing the family of Jack's death and how another brother died at the end of the war: 'Jack and Gordon - they were the best of us'. He then quoted from Lawrence Binyon's *For the Fallen*:

They shall not grow old as we that are left grow old.
Age shall not weary them, nor the years condemn,
at the going down of the sun and in the morning
we shall remember them.

At that point: 'The poppies slipped from my hand to the floor. Eyes filled with tears. It was the eve of Remembrance Day'.³⁸

The Second World War, by comparison, was a mundane matter. As Lord Denning put it: 'We all carried on'.³⁹ 'We kept bees for honey. We kept chickens for eggs. We had no car. We went without. We won through'.⁴⁰ His two surviving brothers, Reg and Norman, prospered in their careers in the armed services as a result of World War Two. Norman worked in Naval Intelligence becoming Director of Naval Intelligence in 1961 and Deputy Chief of Defence Staff [Intelligence] in 1967. In retirement, he ran the D-Notice system.⁴¹ Reg, an army officer, became Chief of Staff Eastern Command in 1947, General Officer Commanding Northern Ireland in 1948; on retirement in 1952 he became the first Colonel of the Royal Anglian Regiment. The Denning 'family story', for all of its rootedness in the English tradition, may have languished in obscurity after the decisive disruption of the Civil War, but by the mid twentieth century, with one brother an Admiral and the other a General, it had found its way back, by way of the blood sacrifice of the Somme, to the very heart of English history.

Having taken a triple first, in Mathematics and Law, at Magdalen College Oxford, won an Eldon Scholarship, passed out first in the Bar examination in 1923,⁴² assisted Sir Joseph Chitty in the preparation of a new edition of Smith's *Leading Cases*,⁴³ and embarked on a promising career at the Bar in the mid 1920s,⁴⁴ Lord Denning became a KC in 1938 and was elevated to the bench in the Probate, Divorce and Admiralty Division on the 6th March 1944. He became a trial judge on the Court of King's Bench in 1945. In October 1948, at the age of 49, he was appointed to the Court of Appeal. As he put it: 'It is in the Court of Appeal that a Judge has the chief opportunity of influencing the law.....very few cases go to the House of Lords'.⁴⁵ From 1948 until 1982, Lord Denning was in a position to shape the law of England. His principles were to 'let justice be done', 'freedom under the law' and 'put your trust in God'.⁴⁶ He was determined to challenge the conservatism of