

LORD DENNING, MASTER OF THE ROLLS

REFORMER, ICONOCLAST, MORALIST

Hon Justice M D Kirby

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Mr. Justice Kirby  
Chairman of the Australian Law Reform Commission

BARBAROUS RELICS

Last week the Master of the Rolls, Lord Denning, struck again. The Court of Appeal in London held that in certain circumstances an unmarried woman has the right to oust her lover from her home where he is violent and even if he has property rights in the home. Reversing by majority earlier decisions, the court held that modern conditions of social justice require that personal rights should take priority over property rights. The case is to go to the House of Lords. Perhaps the decision will be reversed. But for the moment, it stands as the latest monument of a man who has been described as "England's most revolutionary judge":

Fifteen years ago, undeterred by the centuries-old doctrine that the domicile of a wife was always deemed to be that of her husband, Lord Denning castigated this principle as "the last barbarous relic of a wife's servitude". No doubt this attack contributed to the modification of this rule both in England and Australia. Readers who knew nothing more would simply say that this was a judge determined to strike a blow for "women's rights". But Lord Denning, a self-confessed iconoclast, has, in thirty three years on the Bench, established himself as a major judicial force for law reform. His decisions have had an impact on Australian law. One English Law Lord, writing in *The Times* in January suggested that our time would be seen by legal history as "the age of law reform, legal aid and Lord Denning".

Who is this most controversial man and what is it that he is about?

DENNING THE MAN

Alfred Thompson Denning was born in 1899, the son of a draper in the village of Whitchurch, where he still lives. He was one of five brothers. One became a General, another rose to be an Admiral. Lord Denning began life as a teacher but later returned to Oxford and a pursuit of the law. He won scholarships and first class degrees in Mathematics and Jurisprudence. In 1923 he was called to the Bar. He soon learned that the law and justice are not always the same thing. Cases came to him for opinion which, in accordance with binding authority of the highest courts, required conclusions that struck him as unjust. "The House of Lords had decided it, and that was the end of the matter", he later wrote.

These cases disturbed Denning. He later described the binding principles as "false idols, which disfigured the temple of the law". He was to come to a position where he could do something about it.

Appointed a judge in 1944, he was elevated to the Court of Appeal in 1948 and to the House of Lords in 1957. In 1962 a vacancy occurred in the position of Master of the Rolls : the Chairman of the Court of Appeal. Denning took this position and there he remains to this day. At the age of 78, he shows no diminution in his intellectual vigour and reforming zeal. His appeals to the "broad rule of justice itself", become if anything, become more frequent and more insistent.

For a judge to take this course, under our system, is novel. For the chairman of England's second highest court to do it, and frequently to carry his colleagues with him, borders on the remarkable. Needless to say, Denning has his critics. But no-one can ignore the impact of his intellect on the common law world.

STABILITY AND REFORM

Lord Denning illustrates the difficulty facing all law reformers. The law is a force for stability and predictability in society. People need to know what the law is so that they can live peacefully together without resort to violence or expensive litigation. But times change. The inventions of science and technology present challenges to the law which often speaks in the language of a previous time. Moral and social attitudes change rendering previously accepted values suspect or unpalatable. Well established principles that may have endured for centuries can lead to results that strike the modern judge as unjust but the law, nonetheless.

The original genius of the common law was the capacity to adapt rules to meet differing social conditions. The advent of the representative Parliament has tended to make judges, including appeal judges, reticent about inventing new principles of law or overturning decisions that have stood the test of time. "We do not make heresy more attractive because it is dignified by the name of reform", declared Viscount Simonds, one of Lord Denning's critics. "It is even possible that we are not wiser than our ancestors. It is for Parliament to determine whether there should be a change in the law and what that change should be".

Denning suffers no tongue-tied inhibitions just because Parliament can change the law. The fact is that Parliaments, at least until recently, showed scant interest in the reform of wide areas of the law. Individual, small injustices may not amount to many votes or much interest. Repeatedly in his thirty three years as a judge, Denning has expressed impatience with the notion that the judge's duty is blindly to follow precedents or, if there is none, to do nothing, leaving it to the legislators to act. In 1954 he put his view this way :

"What is the argument on the other side?

Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done

before, we shall never get anywhere. The law will stand still while the rest of the world goes on; and that will be bad for both".

Another aspect of the original common law system was constant law reform : judges and lawyers working together to mould principles to fit novel circumstances. Such inventiveness is not now so common. For example, in 1937 our High Court had an opportunity to create a remedy in privacy : developing a general principle so that a citizen claiming a wrongful invasion of his privacy could sue for damages. The court declined to do so holding that "however desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists". Such an argument of precedent would not have appealed to Denning. The failure to develop a general right of privacy is the reason that the Law Reform Commission has been asked in Australia to do what the courts opted not to do.

Denning, in England, has displayed no such reticence. He was not prepared to leave it to law reform commissions and bureaucrats to improve laws which, in his view, judges could perfectly well attend to. In one case, for example, he found that courts should imply into a tenancy agreement, which said nothing about the subject, an obligation upon the landlord to take care that lifts and staircases were reasonably fit for the use of tenants and their visitors. "I am confirmed in this view", he said "by the fact that the Law Commission in their codification of the law of landlord and tenant, recommend that some such term should be implied by statute. But I do not think we need to wait for a statute. We are well able to imply it now in the same way as judges have implied terms for centuries. Some people seem to think that now there is a Law Commission, the judges should leave it to them to put right any defect and to make any new development. The judges must no longer play a constructive role. They must be automatons applying the existing rule. Just think what this means. The law must stand still until the Law Commission has reported and Parliament passed an Act on it; and, meanwhile, every litigant must have

his case decided by the dead hand of the past. I decline to reduce the judges to such a sterile role so I hold here that there is clearly to be implied some such term as the Law Commission recommends".

This passage gives the flavour and texture of this extraordinary judge's style. Short sentences. Pungent phrases. Headings in his judgments to guide the reader through his reasoning. Even his critics and enemies acknowledge his skill in handling the legal techniques and in presenting them in prose which is startling because of its contrast to the normal style in which judgments are written.

#### DENNING THE DISSENTER

Needless to say Lord Denning's view of his role has frequently driven him into dissent. Even where, in the Court of Appeal, he has carried the day, he has sometimes been reversed in the House of Lords in chilling language. One of his abiding concerns has been to reform the law of contract. He has waged a battle over a quarter of a century against the unfair exclusion of claims by written terms, sometimes disguised on the back of a ticket or form. But to his 1951 plea for the law to look at the reality of contracting relationships, the Lords answered menacingly. "Phrases occur", said Lord Simon "which give us some concern". Lord Simonds added "It is no doubt essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs. But I respectfully demur to saying that there has been or need be any change in the well known principles of construction of contracts".

Undeterred, Denning has gone on to effect important changes in contract law, always guided by justice and commercial morality, as he saw it. But his enthusiasm has not been limited to contract cases. He has helped to dispose of the principle that a hospital was not liable for the negligence of its professional staff. He decided the first of many cases in which a deserted wife was held entitled to remain in the matrimonial home. In 1951 he wrote a famous dissenting judgment

lamenting the calamitous exception from the law of negligence which relieved many, including professional advisors, from actions for damages for loss caused by negligent as distinct from fraudulent misrepresentations. He did not hesitate to dissent, although he was then but recently added to the Court of Appeal. The language he used was typical :

"This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law. In each of these cases the judges were divided in opinion. On the one side there were timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed".

Although in 1951 the progressive view did not prevail, in 1963 the House of Lords introduced a limited duty of care for persons who take upon themselves to supply information or advice to people that they know will place reliance on it. Denning's dissent of 1951 became the rule in 1963 and has now been substantially adopted in Australia.

#### DENNING AND HIS CRITICS

A man who turns the law so often on its head is bound to attract criticism. In 1971 some thought he went too far when he held that decisions of the House of Lords not only did not bind the Lords themselves but might not bind the Court of Appeal. He could not abide a decision of the Lords which had abolished punitive damages. He saw it as having "knocked down the common law as it had existed for centuries." Taking two colleagues with him, he held that this rule of the Lords "should not be followed because the common law of England on this subject was so well settled before 1964 that it was not open to the House of Lords to overthrow it".

It remained for Lord Chancellor Hailsham to deliver a sharp rebuke. "It is necessary" said the Lord Chancellor

for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers." But it is not only Denning's judicial and more conservative legal critics who express astonishment at his views. Some believe that Denning is excessively teleological in his approach. He is charged with thinking of the result he wants before he considers the legal reasoning on which it has to be founded. This process is all very well, if there is agreement on the first principles that are guiding him. But should a judge, near to the apex of the legal system, be able to give vent to his personal value system, thereby disrupting settled principle and creating confusion and uncertainty in the law?

During the 1960s Denning took a leading part in the assault on Ministerial and Executive authority. He leapt to the defence of the little man taking on the bureaucracy. He appealed to the old Bill of Rights. As recently as January 1971 he took part in the decision by which the Court of Appeal granted an injunction on the application of a private citizen directed at a union which, contrary to law, had announced a ban on postal services to South Africa. He rejected the claim that the Attorney-General's fiat was necessary to permit a private citizen to bring the case. "Every individual in the land has an interest in the channels of communication being kept open. The law shall be obeyed. Even by the most powerful. Even by the Trade Unions. We sit here to carry out the law. To see that the law is obeyed. And that we will do. A subject cannot disregard the law with impunity. To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over three hundred years ago 'Be you never so high, the law is above you'."

Subsequently the House of Lords reversed this decision holding in effect that the courts could not question the long established rule that it was for the Attorney-General not the courts to decide whether such actions should be brought. This very question is now under study in the Law Reform Commission in Australia. There are some who say that Lord Denning's view, though not good law, may yet be right. Others assert that

he is too concerned with the "little man" and forgets that, in the modern state, the elected government represents the mass of "little people" and is no longer the Crown exerting selfish overweening power.

Other critics point to Denning's concern to uphold valiantly Christian principles of morality and to impose them on all members of society. In one famous case, he denied relief to a young girl, Gillian Ward, who had been expelled from a Teachers' College after being found with a man in her room at night. "I do not think she has been treated unfairly or unjustly", said Lord Denning. "She had broken the rules most flagrantly. I say nothing about her morals. She claims that they are her own affair. So be it. . . . But instead of going into lodgings, she had this man with her, night after night. That is a fine example to set to others! And she is a girl training to be a teacher! She would never make a teacher. No parent would knowingly entrust their child to her care".

The same strong language came out in his well known report on the "Profumo Affair" in 1963. He did not baulk at laying responsibility squarely on the Prime Minister and his colleagues. The report bears the mark of his moral outrage and its impact was the more electrifying because of this.

Those who do not complain about his "blind spot" where matters of morality are involved, assert that he is just a "conservative member of the English ruling class" who reflects the attitudes of a Britain in which he grew up and which was then still a great Imperial power. Wherever an international element is involved in the case, it is said, Denning has always come down in favour of English law and English courts to the exclusion of applying foreign law to the parties' transactions.

#### DENNING THE REFORMER

Whether lawyers are scandalised by Denning or admire his persistence, courage and reforming zeal, he is not a man who can be ignored. Even today, at 78, he continues to have

an influence on the life of the law. We live in a time of change and people expect judges to meet the challenges of change. Leaving every reform to Parliament will simply not do. Denning reminds us of the original genius of the common law : adapting the law's reasonable predictability and certainty to new times.

"What then is the way of an iconoclast?" he once asked an Oxford audience. "It is the way of one who is not content to accept cherished beliefs simply because they have been long accepted. If he finds that they are not suited to the times or that they work injustice, he will see whether there is not some competing principle which can be applied in the case in hand. He will search the old cases, and the writers old and new, until he finds it. Only in this way can the law be saved from stagnation and decay".

Revolutionary judge or maverick? Iconoclast or harsh moralist? One thing is certain, Lord Denning is a towering figure of the common law whose passion for justice and reform has lessons for us all.