Centenary of the Rt Hon Lord Denning

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On 23 January 1999 at the Law School of the University of Buckingham in England a unique assembly of judges, practising lawyers and academics celebrated the 100th anniversary of the birth of Lord Denning. Considering that he retired from judicial office as Master of the Rolls in July 1982, it is a remarkable tribute to the continuing influence of his ideas that a large assembly convened to examine his judicial contributions. Denning himself was too frail to attend. A number of senior judges, including Lord Goff of Chieveley were to call on him on his birthday. Those attending the symposium received a message apologising that he was "too decrepit to travel now" and sending his best wishes.

The symposium was divided into four parts. In the first, concerning the law of obligations, Professor Patrick Atiyah, formerly Professor of English Law at Oxford University, outlined Denning's contribution to contract law. He traced the battles which Denning fought with the House of Lords and evaluated the occasional victories of the "bold spirits" over the "timorous souls" - so described by Denning LJ in *Candler v Crane, Christmas and Co* [1951] 2 KB 164 at 178. Professor Len Sealy (formerly of Cambridge University) examined Denning's influence in the field of commercial law and company law. He emphasised, in particular, his procedural innovations including the *Mareva* injunction [*Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyds Rep 509]; his prescient perception of the "incoming tide" of European law [*H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 418] which he anticipated "far sooner than most of us"; and his "enthusiastic endorsement of a purposive approach to statutory construction". Professor Sealy concluded that because company law had its roots in the 19th century and had been served by Chancery judges "of a risk adverse disposition", there had been much "scope for a breath or two of fresh air" which Denning provided.

The third paper in this session was given by Professor Andrew Tettenborn of the University of Exeter. He traced Denning's innovations in the field of remedies, specifically in the creation of new interlocutory orders, and in the development of new areas of substantive relief. Denning manifested throughout his long career as a judge optimism about the law's capacity to provide justice and a robust faith in the common law remedy of damages to solve many problems. The lastmentioned attribute was illustrated by reference to the "Quixotic exercise" of his "excoriation" of the House of Lords' attempt to re-state the law of exemplary damages: *Cassell and Co Ltd v Broome* [1971] 2 QB 357 at 379. This earned a unique and unforgettable lordly reproof. See [1972] AC 1027 at 1054.

The second session of the symposium concerned Denning's contribution to public law. It was chaired by Lord Woolf, the present Master of the Rolls. Like Denning, he returned to the

Court of Appeal from the House of Lords to take the central seat. Mr Christopher Forsyth of Cambridge University traced Denning's many contributions to the remarkably fertile field of administrative law. He explained how Denning had breathed new life into the prerogative remedies; had expanded the law of standing so as to ensure that the rule of law would be upheld; had introduced the notion of legitimate expectations "without any citation of authority" [*Schmidt v The Home Secretary* [1969] 2 Ch 149 at 171] and had propounded a new and larger juristic basis for non-statutory judicial review.

The second paper in this session was presented by Professor Dawn Oliver of University College, London. She took up the analysis of Denning's theories about the basis and legitimacy of the modern expansion of judicial review of administrative actions. In an interesting section of her paper, Professor Oliver sought to express the fundamental values which Lord Denning observed in his decisions on administrative law. She ascribed his concern to provide effective remedies in this area as one arising out of an appreciation that "individuals have legitimate interests in their own autonomy, dignity, respect, status and security" which call for judicial protection, where necessary.

The third section of the symposium examined Lord Denning's contributions to family law. It was chaired by Dame Elizabeth Butler Sloss of the English Court of Appeal. It is not always remembered that for some time, before his appointment to the Court of Appeal, Mr Justice Denning sat as a judge in the Divorce Division of the English High Court. Dr Stephen Cretney, Fellow of All Soul's College, Oxford University, recounted in his paper an interesting story about Denning's participation in proposals for reform of the procedures of matrimonial causes. This invited the denunciation "You blackguard" from the President of the Division (Lord [Justice] Merriman) who felt that Denning had gone behind his back and undermined his authority. Denning's enormous self-confidence was sometimes irritating to his colleagues, as was his conviction that he knew all the answers.

Professor M D Freeman, also of the University College, London traced Denning's decisions in the field of family law in a paper titled "Family Justice and Family Values". He saw Denning as a "moral fundamentalist" with core values built around the "Protestant ethic". Yet despite decisions which sometimes betrayed a "prudish ... streak of 19th century morality", Denning was consistently firm in upholding the rights of wives to better protection in respect of the property of a failed marriage. His espousal of lump sum payments did much to chart the future of financial provision and "equitable redistribution" in favour of women. *Watchtel v Wachtel* [1973] Fam 72 at 94 was highly influential in this regard as was his use of constructive and resulting trusts to protect an unmarried partner in a de facto relationship. See eg *Cooke v Head* [1972] 2 All ER 38.

In the final session, which was chaired by Lord Slynn of Hadley, Lord Nolan traced Denning's part in a number of enquiries conducted by him whilst in judicial office. The best know was the investigation which he carried out into the so-called Profumo affair concerning a suggestion of sexual misconduct of a Minister compromising security. Denning's efficiency was demonstrated by the fact that he completed that inquiry under great public attention in less than three months. His capacity to undertake official inquiries whilst continuing to

perform judicial work, including on circuit, was, as described by Lord Nolan, truly astonishing. Lord Nolan paid particular tribute to Denning's skill in delivering "revolutionary ex tempore judgments", such as that which he delivered in the *High Trees* case [1947] 1 KB 130 which provided the foundation of the modern law of promissory estoppel.

Lord Nolan, who himself lately chaired the Committee on Standards in Public Life acknowledged the risks of the appointment of judges to carry out such inquiries. However, he defended the procedure as necessary in the United Kingdom to settle high public controversies and to lay to rest bitter conflicts to the general acceptance of the public. It was in this session that questions were asked concerning Australian practice and law. Justice Gummow of the High Court of Australia, one of two Justices of the High Court of Australia attending the symposium, described the limits imposed on the federal judiciary by the Australian Constitution. He referred to the recent decision of the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1997) 189 CLR 1. For the present, in the United Kingdom, Lord Denning's estimate in *What Next in the Law* (1982) p 330 seems to have been generally accepted by most participants: "Someone must be trusted. Let it be the judges".

The final paper in the symposium was given by Professor Andrew Phang of the Faculty of Law of the National University of Singapore. This was on the subject of "The Natural Law Foundations of Lord Denning's Thought & Work". By analysis of Denning's judicial opinions and extra-judicial writing, Professor Phang concluded that Denning evinced a natural law approach "which is premised in no uncertain terms upon a religious foundation - or, to be more precise, on a Christian foundation". He quoted Lord Denning's talk on the BBC in 1943 "Why I Believe in God". In this he said: "... Law is only the application, however imperfectly, of truth and justice in our everyday affairs". Justice, he described in a later address to the Medico Legal Society, was "what the right-thinking members of the community believe to be fair".

Professor Phang detected the "resonances of Christian principles" in Denning's equation of the law of estoppel to what the ordinary person would require of promises or assurances given to his neighbour. In this, Professor Phang suggested, Denning built on Lord Atkin's famous dictum enunciated in *Donoghue v Stevenson* [1932] AC 562 at 580. Just as earlier speakers in the symposium had demonstrated, by reference to statistics that the description of Lord Denning as "the great dissenter" was not born out by an analysis of his actual decisions over the long period of his judicial service, so Andrew Phang was at pains to rebut the suggestion that Denning was "a maverick". On the contrary, he described him as entirely consistent: never wavering from the conviction that English law was motivated by a spirit of justice guided, ultimately, by a supernatural force.

Needless to say this paper, presented by an overseas lawyer, provoked much discussion both within and after the session. The risks to the orderly development of the law of such a personal motivation on the part of a senior judge, affecting legal development, were mentioned by Professor P B H Birks, Regius Professor of Civil Law at Oxford University in a commentary. Other speakers referred to the need for Britain, like any modern society, to

respond to the diversity of faiths and values of its contemporary population. It would have been useful to have had views presented like those collected by Ian Holloway in his extended book review of Iris Freeman's *Lord Denning: A Life*. See (1994) 13 *Uni Tasmania L Rev* 194. Critical views but yet full of appreciation and affection.

In the evening following the symposium the Law Students Society of Buckingham University held a dinner for the participants. The address at the dinner was given by Sir Richard Scott, Vice Chancellor. Like many earlier speakers, he recounted personal tales illustrating the human kindliness of Lord Denning to all people with whom he came in contact: high and low. The symposium was memorable for the friendly conviviality provided by the University of Buckingham whose Vice-Chancellor, Professor Robert Taylor, formerly of the University of Sydney, opened the proceedings. Ms Sheena McMurtrie of the Law School organised the sessions with grace and efficiency. Issues of the *Denning Law Journal,* a publication initiated by the Law School of the University of Buckingham in 1986, were distributed at the symposium. The Dean of the Law School, Professor Alistair Alcock indicated that the papers of the meeting would be published in future issues of the Law Journal. Amongst papers for the editions which will celebrate Lord Denning's centenary are two by Australians. One is a personal memoir by Sir Zelman Cowen, past Governor-General of Australia. The other on "Lord Denning and Judicial Activism" is written by the author of the present note. It examines Denning's unquestioned creativity against the touchstone of modern debates about excessive judicial inventiveness.