Lord Denning on Due Process

ARTHUR SHENFIELD


In his eightieth year Lord Denning produced his The Discipline of the Law. In his eighty-first year he has followed it with The Due Process of Law. Few judges half his age could hope to match this performance, even if their volume of judicial work were less than Denning’s and at a less elevated or responsible level than his.

His first book was in large measure an Apologia Pro Vita Sua. The second one continues in the same vein, but perhaps even more so. Clearly he finds this necessary because though he is held by many, not without reason, to be one of England’s greatest judges of this century, there are also many who find much to criticize, also not without reason, in his approach to the law. Of course among all who observe him, including his severest critics, the wide sweep of his legal knowledge, his masterful grasp of case history, old and new, and his rich acquaintance with great literature from which he draws many an illuminating quotation, inspire great respect. We may add to this list his unimpeachable personal integrity, and it is then not surprising that on all sides it is agreed that he adorns the English Bench as few others have done in our time.

Yet the criticisms remain, and this book will not still them. If anything, it may fortify them. As all know, Denning seeks justice. If the established view of the law stands in the way of justice, so much the worse for what judges or textbooks have said. The law has to be restated to conform with justice. But now, as always, hard cases make bad law. In the hands of a judge of Denning’s learning the restatement of the law to serve the end of justice may perhaps serve the law itself. What appears to be a new groove chiselled out by some innovation may in reality be an apt extension of the old groove, into which it is led by the true spirit and intent of the law; or it may be the old groove itself which looks new only because it has been swept clean of the detritus deposited by a line of imperfect decisions. There is no doubt that some of Denning’s innovations have been of this worthy character, arousing the admiration of those who love the law. But he who treads this path must be exceptionally sure-footed. It will become him to have a healthy suspicion of his own predilections. The temptation can be overpowering to step into innovations which undermine, not fulfill, the law. It is one thing to say that if the established view of the law stands in the way of justice, so much the worse for legal authority. It is another, and very different, thing to say that if the law stands in the way of justice, so much the worse for the law. Yet a judge, even one of Denning’s caliber, who is ardent for justice may easily slide from the one to the other, perhaps not noticing that he is doing so. Regrettably Denning has not always avoided this temptation.

In The Discipline of the Law there was here and there a faint whiff of the dangerous hubris mentioned above. In The Due Process of Law it has become less faint. It is also to be noted that in The Discipline of the Law the student was treated to some splendid lessons on the ways of legal reasoning as applied to some notable problems in contract and tort. In The Due Process of Law there is less of this admirable instruction.

Modern Age 191
The title, *The Due Process of Law*, may arouse expectations of a dissertation on those fundamental problems which spring from the Fifth and Fourteenth Amendments of the United States Constitution, and on which American scholars have built an enormous literature. Though some of the problems which Denning examines do fall within this field, others do not. What he has done has been to string together a variety of cases which have come before the English Court of Appeal during his tenure of the office of Master of the Rolls, in order to illustrate his judicial stance and style. As the cases have had much to do with liberty and other fundamental rights as well as with due legal procedure, the due process of law does come on to the stage, but not in every case and as often as not by a side door.

For good measure, he adds an account of his investigation of the notorious Profumo-Christine Keeler affair of 1963, on which the Government asked him to report. But he was not acting as a judge in so doing, and an account of his service to the State in this affair, splendid though it was, is surely out of place in this book. Denning's reason for including it is that, combining unimpeachable impartiality with impregnable political independence, English judges are from time to time called upon to report on affairs where these qualities are essential in the reporter. So they are. Nevertheless when they respond to such calls, they step down from the Bench and the discharge of such duties falls outside the purview of the due process of the law. This is emphasized in this case by the fact that, though Denning's report was made public, the proceedings on which it was based had to be conducted in secret.

The cases presented in this book have a wide sweep. They are grouped under six headings. First, "keeping the streams of justice clear and pure" (i.e., dealing with various types of action calculated to frustrate the due conduct of the work of the courts). Second, enquiries into the conduct of various types of person, from judges themselves to the managers of gaming clubs. Third, problems of police arrests and searches. Fourth, the development of new procedures to protect the rights of litigants pending action in civil cases. Fifth, problems concerning the rights of would-be immigrants to, and in a few cases emigrants from, the United Kingdom. Sixth, the development of the rights of wives in various circumstances to various shares in "family property."

Denning's stance and style in this very wide range of cases are mostly not difficult to predict. In problems of attempts to frustrate the work of the courts, such as contempt, threats to witnesses, journalists' claims to confidentiality of sources, and gagging writs, he is almost a traditional judge, firm but just in defense of the dignity of the courts and the majesty of the law. However, there is one strange exception here. No English judge of our time has been more resolute than Denning to make the power of trade unions answerable to the law, despite their immense legal privileges, where the law still requires it. Yet here we find him blessing, almost conniving at, the exemption of certain longshoremen from imprisonment ordered for contempt of court, for fear that otherwise a general strike would ensue. Thus was the due process of law thwarted, not guarded, by its own great champion.

In enquiries into the conduct of various persons, we see Denning both as a man of tradition and as a man of innovation. There are not a few in Britain who are uneasy about the inquisitorial powers exercised by inspectors appointed by the Government to enquire into the affairs of companies whose conduct has fallen under some suspicion. But not Denning. He is satisfied as long as the inspectors act fairly and honestly. Due process of law may be impossible in the nature of these cases, but there is reason to try to get the procedure closer to it than it is.

In enquiries into the conduct of aliens, Denning examines the prominent case of Mark Hosenball, the American journalist who was expelled from the United Kingdom on the ground of danger to national security. He comes down flatly in favor of the principle that in such cases natural justice is excluded. An alien has no right to remain in the United Kingdom except by the grace of the Government. The Government may expel him if it judges that his presence is prejudicial to the security of the State, or for
that matter to any other important interest of the nation. No doubt he is right in English law, though it would be a little different in the United States. But why is he prepared to accept without scrutiny the fiat of the Home Secretary on the point, however confidential may be the information upon which it is based? When Ministers of the Crown refuse to comply with a subpoena duces tecum on the ground of the necessity of secrecy, it is now established in England (it always was in Scotland) that the judges, though not the litigants, may examine the documents to see whether the Ministers are acting reasonably and in good faith. Why cannot they similarly be entrusted with a sight of the confidential information in the Hosenball type of case, at least at the appeal level?

On searches and seizures Denning upholds the long-established powers of the police, at the same time setting out their limits with admirable care and clarity. Then he considers the notorious military-style operation, as he described it, of a search by Inland Revenue officers of the premises of a firm of tax advisers engaged in devising schemes of tax avoidance for their clients, and of the private homes of the firm’s principals. It was in every respect the most odious use of the presumed powers of search ever seen in Britain for three centuries, and Denning, the champion of the liberty of the subject, found it to be illegal. But the House of Lords found it to be within the powers granted to the Revenue by Parliament. Shame on Parliament! Or if, which is persuasively arguable, Denning was right and the Lords wrong in the construction of the statute, shame on the Lords!

The strengths and weaknesses of Denning’s stance and style are most prominent when he is busy restating, reforming or developing the law. Sometimes his sure hand and eye direct his bolts splendidly to the bull’s eye. Sometimes, however, his eagerness to shoot at established law or practice draws him into an erratic performance. Then in a series of cases he can veer from points close to the bull’s eye to others woefully distant from it. In such cases one must be thankful for the restraining hand of the Lords who so often give him pain.

His strengths are well displayed in the fostering of new types of Court orders to safeguard the legitimate rights of litigants. Pirates selling illicitly recorded tapes of copyrighted music, and bootleggers recording non-copyrighted performances of artistes without permission, have reason to beware of the “Anton Piller” order. Before this procedure was devised, they could often easily dispose of incriminating material before action could be joined. The “Mareva” injunction is a still more important innovation. It introduces into English law the French principle of “saisie conservatoire” or the American principle of foreign attachment, enabling a creditor to have the Court seize assets still within its jurisdiction of a debtor who has left it, pending the outcome of the suit between them. In an age when debtors can move themselves and their assets around the world with ease while creditors go through the procedures of seeking judgment against them, “saisie conservatoire” is an essential protection of the honest trader. Not that the “Mareva” injunction has had an entirely smooth passage. In an important case (the “Siskina”) the Lords found that it was an illegitimate invasion of the legislative function. One can almost feel the tension and relief in Denning’s mind as it turns out that the “Siskina” judgment rested on narrow grounds and the principle of the “Mareva” injunction was not buried.

But the innovation which gives Denning his warmest glow of satisfaction displays his weaknesses as well as his strengths. This is the development of the deserted wife’s equity in the matrimonial home. That some such development was needed can hardly be denied. But the matter is not simple. Wives no doubt have rights hitherto neglected by the law, in particular a recognition of their contribution to family property, even if only by way of traditional housewifely activities. But the husbands’ mortgagees and other creditors also have rights. Real property law is thick with thorns. In his eagerness to do justice to wives and in his impatience to preempt legislative action, Denning has been ready not only to tug statutes and precedents out of shape, but also to take a cavalier attitude to the complexities of third and
fourth party rights. It is no wonder that the Lords have restrained him. As it happens, legislation has in fact proceeded partly on the lines mapped out by Denning, and it may proceed further. But in this the wider aspects of the matter could be taken into account.

For all its faults, one cannot lay this book down without a sense of gratitude. In the immortal words of Stephen Decatur we may acclaim its author. "Lord Denning, may he always be right. But right or wrong, Lord Denning!"

“Likewise, No Doubt”


STUDYING CLASSICS in graduate school, I found that scholars using Latin sine dubio, "without doubt," had no shred of direct evidence to cite for the claim made: the reader was to take it as self-evidently true. Professor Arnold Toynbee (1889-1975) spent his life in this "doubtless" state; the last time he had any doubts was in his boyhood: he found Christianity "unverifiable and extravagant."

Toynbee finished this book before his terminal illness, in 1974. It is a shame Oxford University Press did not release it until 1981: promptly posthumous, it would have made Toynbee another William O. Douglas, old and wise, yet hip and with-it. It is a perfect seventies book: "karma" and "Earth Mother" abound; "technology" and "bigness" are bad, small is better; "relevant" is a good word, "futurologist" a compliment for the Byzantine scholar Khalkokondyles. To "have 'dropped out' of Christianity" puts one in "the Westernized intelligentsia." All monotheism, in fact, "inherited from Judaism," is a poison whose "antidote . . . is a polytheism which recognizes that non-human Nature is divine."

This book highlights the essence, the successes and failures, of each of the four great periods of Greek history: Mycenaean, Hellenic, Byzantine, and Modern. "The Greeks," throughout all four, are a "non-Western people": no proof is offered, ipse dixit. "Their Heritages" are the heavy burden of the past each stage bore from the preceding ones. This is karma, Sanskrit-Buddhist concept engrafted into genetic coding and Skinnerite psycho-social determinism:

Even if we believe that death spells spiritual as well as physical annihilation for each individual, we must concede that karma will be transmitted either physically through genes or culturally through the transmission of a social heritage by education in the broadest meaning.

The four historical surveys assume detailed acquaintance with all periods. The speculation on the Mycenaean age I found stimulating, but any recent National Geographic article on Greece details new finds destroying some of Toynbee's conclusions. "For instance, there is no evidence for blood sacrifices in Crete." The February 1978 issue has some, and the February 1981 issue shows conclusive signs of human sacrifice on Minoan Crete, undermining Toynbee's view of its "peaceful . . . higher culture."

Pieter Geyl criticized Toynbee's careful selection of "instances which will support . . . him," and benign neglect of "innumerable others with which his theses would not bear company" and of how "those cases he does mention can be explained . . . so as to disagree no less completely with him."

Here Toynbee adds a new twist: he contradicts himself on the meaning of his evidence, having it both ways. The same suffering is light or serious, beneficial or disastrous, as he needs to make his point. The earliest loss, of Mycenaean culture, "the catastrophe," proved "[t]he Hellenic Greeks' good fortune in escaping . . . potential legacies." "The temporary loss of such practical amenities as razors and lamps . . . temporary squalor . . . a cheap price to pay," becomes a "more serious regression into inefficiency and discomfort" five centuries long. Total illiteracy, "[l]oss of