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**A PASSION FOR JUSTICE,
THE NATURAL LAW FOUNDATIONS OF LORD DENNING'S THOUGHT AND WORK**

(PART ONE)

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I

INTRODUCTION

There is a constant tension in the law between certainty on the one hand and fairness on the other. While it is true that both are not necessarily incompatible with each other, there are numerous occasions where conflicts do occur. Not surprisingly, therefore, the focus in English and (probably) Commonwealth law is on the former. This explains, in large part, the rule-oriented and positivistic nature of law in these various legal systems.^[1] The primary concern in this regard is with the maintenance of the objective and, consequently, of stability, eschewing any descent into the vagueness and subjectivity that a contrary approach might entail. There is, in other words, no necessary connection as such between the law on the one hand and morality on the other.

There is much merit in the approach mentioned in the preceding paragraph inasmuch as it avoids unnecessary uncertainty once the applicable legal rule(s) have been identified. However, as already alluded to above, the major objection to such an approach is that, on occasion at least, the application of the applicable legal rule(s) does not result in what is felt to be a fair result. The counterargument to this critique is, as also already alluded to above, the proposition to the effect that what is fair is subjective and that, this being the case, it is preferable to adhere to the existing rule(s) and allow Parliament to change the law if it is felt to be unsatisfactory. Such a counterargument loses force, however, if it can be demonstrated that a fair result in the circumstances of the case is not subjective but is, rather, premised on an objective set of higher-order morality. This is, admittedly, a difficult argument to run, particularly in a pluralistic world. But a pluralistic world does not necessarily entail an absence of objective or universal values. However, there remains the problem of *justification*. If, indeed, such higher-order values exist, how are they to be justified? Indeed, can they be justified in the first instance? After all, are not most (if not all) arguments of this nature subject to the 'Humean guillotine'? In other words, one cannot derive, from a purely rational perspective, an 'ought' from an 'is'.^[2]

The 'Humean guillotine' is, however, only applicable to a process of derivation on purely logical or rational grounds. It does not impact on a process which does not rely on derivation or, alternatively, on a process where derivation is not dependent (wholly or mainly, at least) on logical grounds. An instance of the former is John Finnis's argument from self-evidence.^[3] Such an approach is not without difficulties for the natural response is to inquire why such a process is self-evident in the first instance. Indeed, I would venture to suggest that Finnis's approach is really Aquinian in origin — but with one very fundamental difference; unlike Finnis, Aquinas premises his concept of self-evidence on the existence of God as the source of all law, and this is, in fact, the alternative approach just referred to, where derivation exists, but is not premised wholly or mainly on logical grounds. But even this approach is not without difficulties. If one is to have recourse to grounds other than the rational or logical, wherein do they lie? Aquinas, for example, would argue that they come, in the final analysis, from a *supernatural* source, i.e. God, and that would require some measure, at least, of *faith*. Indeed, Aquinas attempted to *synthesise* faith and reason, drawing (in the process) not only on Christianity but also the ideas of Aristotle.^[4]

Lord Denning's thought and work (as encompassed within both his legal judgments as well as extrajudicial writings and lectures) evince this lastmentioned approach. His is a *natural law* approach, which is premised in no uncertain terms upon a religious foundation — or, to be more precise, on a Christian foundation. For him, religion and law are inextricably connected together in a symbiotic relationship. There is, to Lord Denning, a higher (and objective) law, against which all legal rules and principles have to be measured. The objection from subjectivity and relativity does not therefore bother him. And this approach is evident throughout his thought and work. In the sphere of binding precedent or *stare decisis*, for example, Lord Denning always championed fairness at the expense of certainty,

although the very doctrine itself was concerned more with the latter than the former.^[5] And such an approach also characterised his activist approach towards the interpretation of statutes.^[6] In the sphere of substantive law, he was a constant advocate of fairness, even if this meant that the existing legal rules had to be either circumvented or even abrogated altogether. All this was, of course, anathema to the general approach embodied in the Commonwealth in general and England in particular.^[7] Indeed, Lord Denning has been criticised (on occasion even trenchantly) precisely because of his alleged iconoclasm.^[8] One oft-cited criticism has been that his approach has engendered excessive uncertainty in the law — an uncertainty that has undermined the adjudicative process as well as the attainment of justice. A related fear is the unravelling of the law itself, thus leading to future difficulties as well. Is this general criticism well-founded? It is suggested that such a criticism would be justified only if there was indeed no higher or objective morality or value-system undergirding Lord Denning’s decisions. However, as we have seen, this was not Denning’s belief by any means.^[9] The purpose of the present essay, therefore, is threefold. I will first outline Lord Denning’s ethical and religious beliefs — in particular, the specific sources of influence that are indicated in his own writings. I will then briefly explore how his ethical and religious beliefs are manifested (in the process of *application*, in particular) in the law. Finally, I will attempt to assess not only the influences on but also (and more importantly) the possible justifications for Denning’s beliefs, as well as the possible reasons why there sometimes appears to be a tension between those beliefs and his actual decisions as well as writings.

I wish to state, however, that I do not possess the expertise to be able to assess the entire corpus of Denning’s thought and work. There is, in any event, simply too much to cover: his thought and work straddles so many areas that it would be impossible to cover all these areas within the narrower compass of the present essay. Even more importantly, perhaps, and as already stated, I do not have the expertise to do so in any event. Although I will attempt to briefly cover some of the more significant areas of Denning’s thought and work, my primary focus will be on his thought and work in the context of contract law. My consolation, if consolation indeed it be, is that the sphere of contract law is sufficiently broad so as to allow for a representative discussion of the much broader ideas underlying Denning’s thought and work. However, as already mentioned, our first task must be a rendition of Lord Denning’s ethical and religious beliefs, as well as the primary source(s) of these beliefs insofar as we are able to ascertain them in his (in particular, extrajudicial) writings. It should, however, finally be mentioned that wherever possible, I let Lord Denning ‘do the talking’, so to speak, for there is no substitute for the actual words utilised by the person himself: though I endeavour to interpret and place those words (so far as applicable) within the framework of the present essay.

II

LORD DENNING’S ETHICAL AND RELIGIOUS BELIEFS

In General

As already mentioned, the stock criticism of Lord Denning’s thought and work has centred on their perceived arbitrariness and the alleged uncertainty that results.^[10] As Lord Wilberforce put it, Denning’s basic philosophy was “justice à la Lord Denning for each individual; not he to excuse them; his, on the contrary, to proclaim them, but for the scientific valuer, this is a perpetual problem”.^[11] Implicit within such criticism is the assumption that Denning’s attempts to do justice are, in effect, merely manifestations of his own personal preferences. A former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, J Skelly Wright, for example, stated that “one would like to know more about the processes of practical reasoning essential to Denning’s jurisprudence — how, in particular, he determines what ‘right-thinking’ people believe, or, what may be the same thing, how he determines who is ‘right-thinking’”.^[12] Indeed, the learned writer refers to an oft-cited case to illustrate^[13] Denning’s alleged conservative bias, and observes, in this regard, that “occasionally I recoil” from such bias.^[14] On a related note, the late Professor Schmitthoff has characterised Denning’s approach as “teleological”: an approach where “[h]e thinks of the result before he considers the legal reasoning on which it has to be founded”.^[15] However, the learned writer does proceed to state that Lord Denning’s teleological approach is premised on the attainment of a just result, which is in touch “with what ordinary people would expect to be the law”;^[16] in his view, “[t]his is not the approach of a radical” but, “[o]n the contrary, it is the approach of a traditionalist who is a confirmed upholder of the traditional values of the common law”.^[17] Professor Schmitthoff also speaks of Lord Denning’s “moral courage and boldness founded on deep Christian belief and on no hesitation of being the voice in the wilderness”.^[18] Although the learned writer lists Denning’s Christian convictions as a separate factor, it is the central thesis of the present essay that Lord Denning’s conviction that he ought to (and could) arrive at a just result that was in touch with the expectations of ordinary people was premised directly on his Christian values.

Curiously, Denning’s work has also attracted the attention of the far left. Critical Legal Scholar Duncan Kennedy, for example,^[19] is of the view that “Lord Denning is a walking symbol of doctrinal fractiousness, the very spirit of contradiction”.^[20] However, Kennedy proceeds to observe that whilst Denning recognises the incoherence of legal doctrine, he (*i.e.*, Lord Denning) “doesn’t develop a picture of doctrine as inherently contractory” because “[i]t’s not in his interest as a law reformer to develop systemic contradiction as the core of the private law system” as “[h]e doesn’t want to legitimate the system”; “[h]e wants to change it while preserving its legitimacy”.^[21] And so we have yet *another* view of Lord Denning’s thought and work that is, not, however, wholly unrelated to the previous one: that Denning does not really believe in the coherence of legal doctrine in the first instance. This approach is at least minimally consistent with the former view insofar as it results, in the final analysis, in the perception that one is merely asserting one’s (here, Denning’s) personal (and subjective) preferences. It is also *pragmatic* in outlook, although with even less coherence than the previous approach.^[22] However, Kennedy’s interpretation is even more destructive inasmuch as it eschews even the perception on Lord Denning’s part that the

law achieves (or is at least capable of achieving) *objective* justice.

As I shall attempt to demonstrate, nothing in these ‘popular’ perceptions of Denning’s thought and work could be further from the truth. Denning, as already mentioned, *perceived his thought and work to be based on the objective truth to be located in the religious foundations of Christianity*.^[23] It is thus imperative that we turn to what *Denning himself* believed in, before proceeding to consider how these beliefs have been applied in his various (principally judicial) writings. Before proceeding to do so, however, it is perhaps ironic to note that Denning himself always claimed to be wary of theory and endorsed experience and practice instead.^[24] Indeed, he once remarked thus:

“Jurisprudence was too abstract a subject for my liking. All about ideologies, legal norms and basic norms, ‘ought’ and ‘is’, realism and behaviourism: and goodness knows what else. The jargon of the philosophers of law has always been beyond me. I like to get down to the practical problems which come up for decision.”^[25]

But this is certainly not a blanket notion.^[26] In referring to “the science of jurisprudence”, Denning thought that it was “a subject which the practising lawyer distrusts — at least the English practising lawyer”.^[27] This is because the practising lawyer “distrusts generalities. He prefers to get down to the facts of the particular case — to see where the justice of the case lies — and then decide it”.^[28] However, Denning thought this attitude to be rather excessive:

“This approach may be all very well for the day-to-day practitioner, but not for the judge who is on occasions called upon to make decisions of far-reaching significance. Philosophies of law, like ideologies, do have a great influence. They cannot be ignored. Austin — a Professor at London University — with his own work on jurisprudence, has exercised a great influence on the law. ... I confess to a mere nodding acquaintance with these various theories. I wish I knew more. All I know is that the law serves two great ends. One is to keep order. The other is to do justice.”^[29]

On another occasion, Denning summarised his judicial philosophy thus:

“My philosophy can be summarised under three headings: (i) Let justice be done; (ii) Freedom under the law; (iii) Put your trust in God.”^[30]

Turning to Denning’s specific enunciations of his beliefs, in a brief typescript entitled “What Life Has Taught Me”,^[31] Lord Denning commences by stating that “[t]he most important thing that life has taught me is to believe in God”. He then proceeds to state that this belief is due both to his upbringing as well as to his experience “in going through life”.^[32] And the “Preface” to his autobiography, *The Family Story*,^[33] Lord Denning observed thus:

“Religion $\frac{3}{4}$ perhaps the chiefest influence of all. Not talked of much.

Yet very present in our family. Faith in God handed down from generation to generation.”^[34]

Insofar as the experiential aspect is concerned, he says that “[m]y experience as a lawyer and as a judge has verified what I was taught about God”. To him, law and religion are inextricably connected: “The aim of the law is to see that truth is observed and that justice is done between man and man.”^[35] On another occasion, Lord Denning observed that “without religion there can be no morality and

without morality there can be no law”.[\[36\]](#)

As to the question as to what constitute “truth” and “justice”, Lord Denning has this to say:

“The spirit of truth and justice is not something you can see. It is not temporal but eternal. How does man know what is truth or justice?

It is not the product of his intellect, but of his *spirit*.”[\[37\]](#)

As to how the “right spirit” is created in man, Lord Denning is of the view that “[t]hat is the province of religion” — in particular, the Christian religion. He elaborates thus:

“Religion concerns *the spirit* in man *whereby he is able to recognise what is truth and what is justice: whereas law is only the application, however imperfectly, of truth and justice in our everyday affairs.*”[\[38\]](#)

Indeed, “the spirit in Man, when it reachest the highest and wisest plane, is but the reflection of the spirit of God”. And in an amazingly candid passage, Lord Denning states thus:

“I do know that in the great experiences of life, and indeed in the small ones too, such strength as I have is of God, and the weakness is mine. Need I enumerate the experiences? Take the hard things. When faced with a task on which great issues depend; when high hopes lie shattered; when anxiety gnaws deep; or when overwhelmed by grief; where can I turn for help but to God? Or take the joyful things: A hard task attempted or done; the happiness of family life; or the beauty of nature; where can I turn for thankfulness but to God? All experiences convince me, not only that God is ever-present, but also that it is by contact with the spirit of God that the spirit in Man reaches its highest and wisest plane.”[\[39\]](#)

It is suggested that the “spirit of God” Denning refers to is probably a reference to the Holy Spirit, who is also described in the Bible, *inter alia*, as a “counsellor”.[\[40\]](#)

In an address to the Medico-Legal Society, Lord Denning elaborated on the concept of “justice”[\[41\]](#) thus:

“Justice is not a temporal thing; it is eternal; a thing of the spirit; and the nearest approach to a definition that I could give is that justice is *what the right-thinking members of the community believe to be fair. Simply that. You and I, representing the right-thinking members of the community, doing, as best we can, what is fair — and, in these days, fair not only between man and man but between man and the state.*”[\[42\]](#)

In another address, Lord Denning again linked the concept of “justice” to the eternal realm:

“Surely we ought to go back two thousand years and say, ‘What doth

it profit a man if he gain the whole world and lose his own soul?" In organized society *the soul of man finds its expression in justice.*"[\[43\]](#)

The upshot of all this, insofar as lawyers are concerned, is that:

"[L]awyers should be men of religion: and speaking generally that has always been the case in this country. It is the reason why the common law of England is so great. The law has been moulded for centuries by Judges who have been brought up in the Christian faith. The precepts of religion, consciously or unconsciously, have been their guide in the administration of justice."[\[44\]](#)

In a message given to the Quarterly Meeting of the Lawyers' Christian Fellowship held at the Law Society on 22 May 1950, entitled "The Influence of Religion on Law",[\[45\]](#) Denning LJ (as he then was) observed that "[i]n the days when the Bible was first put into English the Judges laid down rules which were undoubtedly influenced by Bible teaching".[\[46\]](#) More importantly, perhaps, he points out (in the same message) to "the more fundamental teaching of our Lord":[\[47\]](#) "the Gospel of Love",[\[48\]](#) *i.e.*, that one is to love God first and then our neighbour as ourselves.[\[49\]](#) Although "[t]his is a precept of religion, not of morals nor of law",[\[50\]](#) Denning was of the view, nevertheless, that "it is not unrelated to them",[\[51\]](#) for "[i]n social organisation, love finds its primary expression through justice":[\[52\]](#) "The two — love and justice — are interdependent."[\[53\]](#) And, as already seen above, Denning proceeds to point out that justice "is not the product of [a man's] intellect, but of his spirit".[\[54\]](#) He also reiterates a point (again) already mentioned above to the effect that "religion[\[55\]](#) concerns the spirit in man whereby he is able to recognise what is truth and what is justice; whereas law is only the application, however imperfectly, of truth and justice in our everyday affairs".[\[56\]](#)

Insofar as societal welfare is concerned, in a lecture delivered as far back as 1953,[\[57\]](#) Denning argued that "the Welfare State has come into being by a true application of Christian principles, but ... there is a danger of its being mishandled and abused by people who have no knowledge of those principles and seek only their own advantage".[\[58\]](#) Indeed, as we shall see in a subsequent Section of this essay,[\[59\]](#) this is the Christian distinction between *agape* (self-sacrificial love) on the one hand and overweening self-interest on the other. To the extent that the latter is now predominant (particularly with the modern decline of religion in general and Christianity in particular), there are tremendous problems with the freemarket or capitalist system, which are (in turn) reflected in, *inter alia*, the existing contract law, as we shall see below.[\[60\]](#) Denning's views in this lecture were that "[i]t is plainly wrong in a Christian society, where each should love his neighbour, that some people should be sick and in need, and that nothing should be done about it";[\[61\]](#) he then observes that "[i]t cannot all be left to the few good Samaritans"[\[62\]](#) and that the State should step in. So, "the Welfare State came into being as a consequence of the application of Christian principles to the existing social order".[\[63\]](#) One major problem which *subsequently* arose, however, was that State-provided social security, *in the absence of guidance by true Christian principles mandating love for fellow human beings*, soon degenerated into selfish abuse.[\[64\]](#) Denning argues that the recapture of love and service through Christian principles is essential to combat such abuse; but he adds:

"If these principles are to guide the people of the Welfare State, then it is important that the State itself should show that it is religious. You cannot expect the people to be faithful to Christian principles if the State itself is not so."[\[65\]](#)

Finally, Denning has observed thus:

"So I would say: In coming upon legal obstacles, it is not enough to keep your law books dry. It is as well to have a Bible ready to hand too. It is the most tattered book in my library. I have drawn upon it constantly."[\[66\]](#)

In The Law

(1) General:

What precisely did Lord Denning stand for in the more explicitly legal realm? He was, in fact, a passionate advocate of many institutions that are traditional elements underlying the Rule of Law: for instance, the independence of the judiciary;[\[67\]](#) trial by jury;[\[68\]](#) and various freedoms (including freedom of the press[\[69\]](#)). One overarching theme, as demonstrated in many of the elements just described centres, in fact, on the need to restrain the misuse of power.[\[70\]](#) However, Denning's views on some other topics are less clear: for instance, his views on capital punishment.[\[71\]](#) He also advocated equality for women,[\[72\]](#) although here writers have argued that Denning's judgments (particularly in the sphere of family law) have fallen short of the mark.[\[73\]](#) Indeed, the following observation made by Denning may raise the ire of feminists:

“[T]he law recognises the *natural* state of affairs whereby the man's proper function is to work to provide for his wife and family, and the *woman's proper place is to look after the home and bring up the children. If a wife is to do these things properly, she has usually to withdraw from the money market and find her reward in the home — a reward which is much more worth while.*[\[74\]](#)

However, if as has been (and will be) argued, Denning is true to his Christian principles, the relationship between husband and wife is, in effect, one of mutual respect and, above all, love.[\[75\]](#) The husband is the designated head of the household but he is under (in many ways) an even more onerous duty: he is to love his wife as Christ loved the Church and that he must love her as he loves himself.[\[76\]](#) The measure of the love is immeasurable, being based, as it is, on *agape*, a self-sacrificial love $\frac{3}{4}$ giving, but expecting nothing in return.

It has also been queried whether Denning's activist approach may be blighted by excessive speculation since, unlike the United States of America, there is no equivalent sociological data furnished by the famous “Brandeis brief”.[\[77\]](#) Under the circumstances, might it not, therefore, be preferable to leave, as English judges tend to do, changes in the law to the legislature which would, presumably, have relatively more access at least to such data? However, it should be pointed out that Parliament is often pressed for time and there is no guarantee that such data, even if available, would be adequately digested and acted upon. It has also been pointed out that “Parliaments have generally shown little interest in the reform of wide areas of the law. Individual, small injustices may not amount to many votes or much public interest”.[\[78\]](#) Indeed, Lord Denning himself made the (obvious) point that “Parliament is not infallible”,[\[79\]](#) and that he did not see why “*responsible* comments or suggestions on the way in which Acts work, intended only in the public interest, should be regarded as an infringement of the sovereignty of Parliament”.[\[80\]](#)

It should also be noted that Denning did not advocate rampant activism.[\[81\]](#) Referring, for example, to the reform of family law in 1977, he was of the view any reform would be too complex and widespread for judge to handle; he was of the view that:

“The judges can work on a minor scale within the existing law.

The great changes must come from the Law Commission, which you [Lord Scarman] so well presided over. *But the judges can do a great deal inbetween.*”[\[82\]](#)

He was also firmly of the view that “[n]ew criminal offences ought to be created by Parliament and not by the judges”.[\[83\]](#)

In a later work, Denning vigorously denied the charge of being politically motivated; he emphatically stated:

“I deny the charge. Some decisions are fraught with political consequences $\frac{3}{4}$

such as decisions about trade unions or local authorities or ministers.

Whichever way the case goes, one side or the other will say it is a ‘political’ decision. That is their way of saying that it is a policy decision with which they disagree.”[\[84\]](#)

On another occasion, he stated:

“I never turned to politics. I have never been a member of a political party. As a Judge I keep aloof.”[\[85\]](#)

Turning to matters of *legal technique and scholarship*, it should be noted, first, that Lord Denning constantly emphasised the importance of command of the language, for (as he aptly points out) “[l]anguage is the vehicle of thought, the vehicle by which you persuade others, whether judges, juries or your fellow man”.[\[86\]](#)

Lord Denning also exhibited scholarly ability right from the outset of his legal career.[\[87\]](#) He was one of the editors of the then significant *Smith’s Leading Cases*.[\[88\]](#) And as a former editor of the prestigious *Law Quarterly Review*, PV Baker, reminisces, Lord Denning’s first article “was in the best tradition”.[\[89\]](#) Indeed, Denning went on to contribute “five further articles and a number of reviews and comments”.[\[90\]](#) Lord Denning was also, of course, a prolific author and produced a great many books. Many of his lectures across the Commonwealth have also seen print. We have, and shall in fact continue to have, occasion to refer to a great many of Lord Denning’s extrajudicial writings in the course of the present essay. It is noteworthy that despite his emphasis on justice, Lord Denning’s doctrinal dexterity is without peer. This is especially evident in his earlier writings,[\[91\]](#) although it is true that as his emphasis on justice comes more to the fore in later years, there is less *obvious* concern with doctrinal and technical legal arguments.[\[92\]](#)

(2) *The Law of Contract:*

Professor Stephen Waddams has observed that “Lord Denning’s greatest influence in Canada is certainly in the law of contracts”.[\[93\]](#) This may arguably be the case in Singapore as well. My focus will therefore be on the law of contract, although I hasten to confess that I am particularly comfortable with this approach because that is one of my areas of research as well. That having been said, I will, however, also attempt to very briefly review how Lord Denning’s natural law foundations have infused themselves within other areas of the law as well; this will be the topic of the next Section. I should add, at this juncture, however, that owing to constraints of space, I shall only be highlighting a few areas of contract law, particularly as they impact (both directly as well as indirectly) on the issue of Lord Denning’s ethical and religious beliefs.[\[94\]](#)

A more general observation by Lord Denning himself may be apposite before turning to the more specific areas of contract law proper. Denning observes that insofar as the law of contract was concerned:

“[T]he influence of the Church was immense: because the Church courts assumed jurisdiction in matters of conscience. Originally in English law a promise was not enforceable unless it (*sic.*) was hedged about with the formality of a seal. But the teaching of the Church was in favour of rejecting formalities and insisting on good faith.

The just man is ‘he that sweareth not his neighbour and disappointeth him not, though it were to his own hindrance.’[\[95\]](#)

If a man made a promise and did not keep it, the ecclesiastical courts would punish him for breach of faith.”[\[96\]](#)

Unfortunately, however, contract law today has been secularized, with the emphasis on rationalism and individualism,[\[97\]](#) and this may well explain why courts have been unable to objectively mediate the tension (mentioned at the outset of this essay) between certainty and technicality on the one hand and fairness on the other.[\[98\]](#) As Professor Berman pertinently argues,[\[99\]](#) a return to the objective religious foundations will enable a new (and more coherent) theory of contract law to be developed. Denning would surely agree with this suggestion. Indeed, and as we have seen, Denning endorsed the mitigation of the harshness of capitalism by a Welfare State founded on Christian principles.[\[100\]](#) Such mitigation in contract law embraced (as we shall see) a more substantive, natural law approach.

Turning to the more specific areas of contract law proper, the doctrine of consideration is familiar to all law students. Yet, it is not without problems. As far back as 1937, the English Law Revision Committee recommended its abolition.[\[101\]](#) More recently, I reiterated that call.[\[102\]](#) But it appears that the doctrine is too well-entrenched to be abolished. However, a strict application of it often leads to injustice. This is particularly the case, perhaps, in the situation concerning the promise to take part payment in full discharge of a debt already owed; this has, in accordance with the leading authorities (notably that of the House of Lords in *Foakes v Beer*[\[103\]](#)),

been traditionally held not to constitute consideration. When the English Court of Appeal introduced the very broad concept of practical benefit or detriment in the case of *Williams v. Roffey Bros & Nicholls (Contractors) Ltd*,^[104] relating to a situation where there was a promise to pay more, it was thought that this broad principle might be extended to a *Foakes v Beer* situation (with respect to a promise to take less). Such an opportunity indeed arose in the subsequent Court of Appeal case of *Re Selectmove*.^[105] However, owing principally (in the present writer's view at least) to the doctrine of binding precedent,^[106] the Court of Appeal refused to extend that principle.^[107] This being the case, the various exceptions that mitigate any possible injustice become of signal importance. In this regard, the most important exception is that embodied in the doctrine of promissory estoppel, and has its origins in the seminal judgment of Denning J (as he then was) in *Central London Property Trust Ltd v High Trees House Ltd*.^[108] Briefly put, if one person makes to another an unambiguous representation that he or she will not enforce his or her strict legal rights, intending that other party to act on it, and that party does act on it, then the representor/promisor will not be allowed to resile from his or her promise if it would be inequitable to do so.^[109]

The *High Trees* case^[110] is commonly hailed as a landmark in the common law of contract.^[111] However, it was also a radical step forward.^[112] To Denning himself, the *High Trees* case “helped to narrow [the] gap” between the the “strict rules and the social necessities of the 20th century”,^[113] thus achieving justice in the process.^[114] He also recounts that “[i]t was not a reserved judgment. I decided it at first instance straightaway at the end of the argument”;^[115] he proceeds to observe thus:

“Its importance was in getting rid of the old notion that estoppels were confined to representations of fact and did not extend to representations as to the future. It brought in a new species of estoppel called promissory estoppel. Many were the doubts cast upon it, notably by the House of Lords, but it became and is well established.”^[116]

Indeed, certain aspects of the doctrine of promissory estoppel were couched by Denning in very broad terms. For instance, Denning insisted, both judicially^[117] as well as extrajudicially,^[118] that detriment was not an essential requirement of the doctrine itself; indeed, he pointed out that often, a *benefit* would accrue instead. Professor Atiyah has pertinently pointed to the fact that such an approach raises problems because Denning, by adopting a *promise*-based (instead of a reliance-based) approach, still insists that the promisee must have acted upon the representation concerned; in addition, if reliance be insisted upon (as Denning does), then why should the promisee be in a better position than he was before if he has not suffered any detriment (which Denning eschews)?^[119] I have also argued elsewhere that the most concrete manifestation of inequity is the demonstration (on substantive evidence) that the promisee has incurred a detriment and that whilst not conclusive, the factor of detriment ought therefore to be included as part of the doctrine of promissory estoppel, its weightage depending on the significance of other factors. ^[120]

As a (hopefully) not altogether irrelevant aside, Lord Denning, when delivering the Braddell Memorial Lecture in 1975 at the University of Malaya in Kuala Lumpur, Malaysia, referred to the *High Trees* case and, with some satisfaction, observed thus:

“I am glad to say that I see in two cases in Malaysia, that you have agreed with me. So I am glad to find some supporters in a very intelligent part of the world.”^[121]

Indeed, since 1975, the *High Trees* case has not only been further endorsed, but has also been the subject of further analysis and elaboration in both Malaysia and Singapore.^[122]

However, perhaps even Denning himself realized the very real danger that a logical extension of the doctrine would pose to the doctrine of consideration itself. So, for example, in *Combe v Combe*,^[123] Lord Denning was of the view that the doctrine of promissory estoppel could be used only as a shield and not as a sword.

Interestingly, we are subsequently told, in a separate videotaped interview, that “Lord Denning withdraws his reservations in *Combe v Combe* ... about the defensive nature of estoppel and ‘is quite happy to see the doctrine of consideration go’ in favour of a more fundamental principle that a man should stand by his word”.^[124] The Australian High Court indeed went this stage further, and allowed the doctrine of promissory estoppel to be utilised as a sword as well, although the point is still left open under English law. ^[125]

When all is said and done, however, Denning reminds us once again that the doctrine of promissory estoppel is based on *moral foundations*; it is a doctrine that aids in the attainment of justice and the avoidance of the technicality and injustice that have been

encrusted around the doctrine of consideration. Indeed, of the doctrine of consideration, Denning says that “[i]t has been replaced by the better precept: ‘My word is my bond’, irrespective of whether there is consideration to support it” [\[126\]](#) More significantly, perhaps, there are resonances of Christian principles when he proceeds to add thus:

“Once a man gives a promise or assurance to his *neighbour* — on which his *neighbour* relies — he should not be allowed to go back on it. In stating the principle, and its extensions, the lawyers use the archaic word ‘estoppel’. I would prefer to put it in language which the ordinary man understands:

It is a principle of *justice and of equity*. It comes to this: When a man, by his words or conduct, has led another to believe that he may safely act on the faith of them — and the other does act on them — he will not be allowed to go back on what he has said or done when it would be *unjust or inequitable* for him to do so.” [\[127\]](#)

It might be significant, however, to mention that Denning had, many years ago, expressed that view (in relation to the doctrine of consideration) that “I myself would not be prepared to see it go” [\[128\]](#) This is of course rather curious, given the (oftimes technical) injustice that the application of the doctrine of consideration has often engendered.

Lord Denning was also very activist in the sphere of implied terms, which he viewed as centring on the demands of what he termed “simple justice”; [\[129\]](#) and he made no secret that in implying terms, courts were, in effect, “[filling] in the gaps” [\[130\]](#) To this end, his assertion, in *Liverpool City Council v Irwin*, [\[131\]](#) that the courts could imply terms whenever it was “reasonable” into the contract is not in the least surprising. Although this general principle was rejected by the House of Lords, [\[132\]](#) Denning actually won a victory of sorts, for in the *Liverpool City Council* case itself, the House drew a distinction between “terms implied in fact” and “terms implied in law” [\[133\]](#) the test of reasonableness and public policy applying to the latter, which constituted a broader category of terms implied in a particular *class* of contracts, even if this would be contrary to the actual or presumed intentions of the parties concerned. What was particularly interesting was the ambiguity of the language utilised, [\[134\]](#) which suggests that the House was not very comfortable with the distinction, in particular, the criterion of reasonableness. Indeed, Lord Wilberforce, for example, persisted with the rubric of “necessity”, [\[135\]](#) which created a linguistic ambiguity since the same rubric was well-entrenched with respect to the narrower category of “terms implied in fact” [\[136\]](#) Denning was nevertheless quick to seize upon this distinction and (naturally) gave it his full endorsement. [\[137\]](#) This was not a ‘full victory’ as such, but it represented some headway, so to speak. What is particularly interesting about this distinction in general and the category of “terms implied in law” in particular is the focus on the concept of “reasonableness” that, in turn, correlates to Denning’s idea of what is “justice”. [\[138\]](#) And “justice” is, as we have seen, ultimately linked to Denning’s own Christian values. [\[139\]](#)

Lord Denning is perhaps best known for his judgments geared towards aiding (in particular) consumers with respect to exception clauses. This was not, however, always the case. Denning has, on more than one occasion, described his involvement in the decision of *L’Estrange v Graucob*, which held that a contracting party is, absent fraud or misrepresentation, [\[140\]](#) bound by exception clauses in a contract on appending his or her signature to it. He confesses:

“I thought I had done well by my clients, but since I have become a judge I have done everything I can to get that decision altered, and if students are up to date with their reading of the Law Reports, I think they will find good ground for argument somewhere in them.” [\[141\]](#)

Many years later, Denning was to recount further of his involvement in the case thus:

“In those days I wasn’t concerned so much with the rightness of the cause. I was concerned only, as a member of the Bar, to win

if I could.”[\[142\]](#)

But things rapidly (and radically) changed by the time Denning was appointed to the bench. The famous doctrine of fundamental breach as a rule of law finds its genesis with Denning himself.[\[143\]](#) Indeed, Denning observes that “[w]e invented the doctrine of fundamental breach. We got rid of those exception clauses altogether until the House of Lords in the *Suisse Atlantique* case[\[144\]](#) said we were wrong. But we’ve been getting round that case ever since!”[\[145\]](#) That last sentence has, of course, now to be qualified in the light of *Photo Production Ltd v Securicor Transport Ltd*,[\[146\]](#) which finally did away with the doctrine of fundamental breach altogether. Denning in fact characterised the then emerging doctrine of fundamental breach as a rule of law as “a new principle emerging which says that the fundamental obligations of a contract take precedence over printed rules and conditions”.[\[147\]](#) Interestingly, Professor AG Guest was of the view that Denning’s approach “might be open to the objection that it created a new head of public policy, but it could be argued that a gallop or two on the ‘unruly horse’ might benefit both judges and jurists alike — even at the risk of being thrown off”.[\[148\]](#) One possible explanation for the very vigorous rebuff that Denning received with respect to his development of fundamental breach as a rule of law is that he went too far, particularly when he ‘strayed’, so to speak, into the realm of *commercial* (as opposed to consumer) transactions.[\[149\]](#) Indeed, the *Photo Production* case is itself a situation pertaining to a commercial transaction. More importantly, perhaps, it may be said that the underlying impetus for Denning’s approach towards exception clauses stemmed from the perception of the need to prevent abuse which (in turn) is embodied in Christian doctrine.[\[150\]](#)

To be fair to Denning, however, it should be mentioned that he did, very early on, view the conflict between freedom of contract with regard to standard forms and the need for such forms to be fair and reasonable between the parties as something that would be better resolved by Parliament.[\[151\]](#) However, he did proceed to observe thus:

“But if Parliament does nothing, are the courts do to nothing? Are they

forever to say “This is a matter for Parliament and not for us?”[\[152\]](#)

For Denning, the answer to this question was “Obviously not.”. He proceeded, as we have briefly seen above, to continue to develop the doctrine of fundamental breach as a rule of law,[\[153\]](#) and continued to (very ingeniously) do so despite opinions to the contrary by the House of Lords in the *Suisse Atlantique* case.[\[154\]](#)

Notwithstanding the sounding of the death knell of fundamental breach as a rule of law in the *Photo Production* case,[\[155\]](#) Denning could take more than scant consolation in the enactment (in 1977) of the Unfair Contract Terms Act. Indeed, speaking in 1979, Denning was of the opinion that:

“[I]t has been put right now. We can look to see whether a clause

is reasonable or not. If it is not reasonable, we can hold it to

be bad or not reasonable to apply. So all’s well now, after all these

years. At all events I hope that you will find it so.”[\[156\]](#)

On an even broader level is Lord Denning’s controversial statement of principle with respect to inequality of bargaining power that he enunciated in *Lloyd’s Bank Ltd v Bundy*,[\[157\]](#) as follows:

“Gathering all together, I would suggest that through all these

instances there runs a single thread. They rest on ‘inequality of

bargaining power’. By virtue of it, the English law gives relief to

one who, without independent advice, enters into a contract upon

terms which are very unfair or transfers property for a consideration

which is grossly inadequate, when his bargaining power is grievously

impaired by reason of his own needs or desires, or by his own

ignorance or infirmity, coupled with undue influences or pressures

brought to bear on him by or for the benefit of the other. When I

use the word ‘undue’ I do not mean to suggest that the principle

depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of one being ‘dominated’ or ‘overcome’ by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal.”[\[158\]](#)

The above statement of principle has often been read as embodying too general and vague a standard that only emphasises inequality of bargaining power and does away with the necessity for some form of wrongdoing on the part of defendant. It has therefore been rejected by the courts in no uncertain terms.[\[159\]](#) Certainly, a cursory reading of the above quotation would suggest that such an interpretation is correct. However, it should be noted that *prior* to enunciating the above statement of principle, Lord Denning in fact embarked on a fairly detailed survey of the existing law: in particular, the existing categories “where there has been inequality of bargaining power, such as to merit the intervention of the court”.[\[160\]](#) All these categories do in fact involve some form of wrongdoing by the defendant.[\[161\]](#) It is true, however, that Denning does state that there is no real need for proof of “any wrongdoing”.[\[162\]](#) However, it is suggested that this is itself inconclusive because Denning is utilising the concept of “wrongdoing” in the sense of the intention to bring distress to the other party, whereas the concept of “wrongdoing”, as used at general law, refers to various standards (depending on the doctrine concerned) that the law deems as necessary to the attainment of justice and fairness between the parties.

Are there extralegal materials (in particular, by Denning himself) that throw further light on the issues considered in the preceding paragraph? In *The Family Story*, Denning merely cites from his judgment in *Lloyd’s Bank Ltd v Bundy*.[\[163\]](#) In a separate videotaped interview, we are, unfortunately, offered no further illumination on the matter; there is, we are told by the reviewer, “a stout defence by Lord Denning of his views and a rebuttal of criticisms by a repetition that justice should be done”.[\[164\]](#) This does not, however, detract in any way from the argument just made to the effect that the so-called doctrine of “inequality of bargaining power” advocated by Lord Denning may, on one interpretation at least, be confined to those categories of actions that actually embody an element of unconscionability. In an extrajudicial lecture delivered in 1978, Lord Denning did elaborate again on the issue of bargaining power; he there mentions the use of power by someone in a strong bargaining position to “*extract unfair terms from the weaker party*”, and effected “in the name of ‘freedom of contract’”.[\[165\]](#) He also speaks of the need to “prevent *abuse of*” a situation where there is inequality of bargaining power.[\[166\]](#) Again, it is admitted that no definitive conclusion can be drawn, but the tenor of the view (particularly as suggested by the italicised words) tends, it is suggested, to support the suggestion proffered in the instant essay. It should, in addition, be pointed out that Lord Denning appeared to be focusing, rather, on the topic of exception clauses, as opposed to the situation presently considered.[\[167\]](#) It is, however, suggested that the underlying rationale is religious. Lord Denning has observed thus:

“The teaching of the *church* has been in favour of rejecting formalities and *insisting on good faith*. The *just man* is ‘He that sweareth unto his *neighbour and disappointeth him not: though it were to his own hindrance*’. *This teaching has had a great effect on our law of contract*. More and more the courts are insisting that men should honour their promises without requiring any formalities.”[\[168\]](#)

There is no reason in principle, in fact, why the courts should not adopt a broad approach analogous to that advocated by Lord Denning in *Lloyd’s Bank Ltd v Bundy*.[\[169\]](#) I have ventured to suggest elsewhere that the development of the doctrine of unconscionability may be a viable alternative.[\[170\]](#) The charge of vagueness and subjectivity may (even on a strictly secular level) be overstated. As the former Chief Justice of the Australian High Court, Sir Anthony Mason, put it in a recent article:

“Judges are the arbiters of community standards and expectations ... No

doubt greater precision would be beneficial. But, in many areas of the law where remedies are granted by reference to principles based on standards of human conduct, the principles are necessarily expressed in terms of broad standards which involve the making of value judgments. It is difficult to conceive of a system of law which does not embrace such standards. There is the risk that the unconscionable standard could be applied by some Judges to give effect to subjective ideas of fairness and reasonableness. But that would be to distort the standard.”[\[171\]](#)

Another area where Lord Denning thought that justice ought to be done pertained to contracts to confer benefits on third parties.[\[172\]](#) Indeed, in an extrajudicial context, he argues that the departure from the Christian Ethic in the nineteenth century in favour of a philosophy of giving untrammelled reign to the concept of freewill had now been discredited and that, therefore, “it is to be hoped that soon there will be restored the principle that person who makes a solemn promise must keep it” and hence, there should be recognised contracts for the benefit of third parties.[\[173\]](#) Denning thus strenuously attempted to effect a change in the law in this particular context, but was unsuccessful. A noted (albeit unsuccessful) attempt occurs in his dissenting judgment in the House of Lords decision of *Scruttons Ltd v Midland Silicones Ltd*.[\[174\]](#) However, as Lord Scarman aptly observed, Lord Denning’s “dissents are more fertile than the assents of lesser men”.[\[175\]](#) Lord Denning attempted reform once again (this time in the Court of Appeal), notably in *Beswick v Beswick*.[\[176\]](#) However, yet again, this attempt was rejected by the House of Lords.[\[177\]](#)

Recent (and not so recent) events appear to have vindicated Denning’s views in this particular sphere of contract law. This is represented, for instance, in developments to be found in two Privy Council decisions, *The Eurymedon*[\[178\]](#) and *The New York Star*:[\[179\]](#) and in the context of which Professor Atiyah was of the view that Denning’s dissenting judgment in *Scruttons Ltd v Midland Silicones Ltd*[\[180\]](#) was “perhaps Lord Denning’s greatest triumph in this area”.[\[181\]](#) In addition, and perhaps even more significantly, the UK Law Commission recently published a *Report* containing proposals for *legislative* reform — the basic thrust of which was to allow third parties to avail themselves of the benefit of contracts under certain stipulated circumstances.[\[182\]](#) Since this essay was completed, the proposals have in fact been brought to *legislative fruition* in the form of the *Contracts (Rights of Third Parties) Act 1999*.

In the sphere of *mistake*, Lord Denning’s significant contribution is often perceived to be his judgment in *Solle v Butcher*.[\[183\]](#) In that case, the learned judge was of the following view:

“The court, it was said, had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained ... It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake ... A contract is also liable in equity to be set aside if the parties were under a *common misapprehension* either as to the facts or as to their respective rights, *provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.*”[\[184\]](#)

Lord Denning was of the view that there was no doctrine of common mistake at common law and attempted, instead, to formulate a doctrine in equity instead: which formulation is embodied in the preceding quotation. Later developments have, however, confirmed the doctrine at common law.^[185] although I have ventured to suggest yet another approach: that, given the very similar (arguably, virtually identical) linguistic formulations as well as the results of the leading cases (both at common law and in equity),^[186] there had already been a *de facto* merger of both the common law and equitable doctrines; this being the case, I suggested that a *de jure* merger might be the best way forward, especially given the fact that it was highly unlikely that the courts would be amenable to an extension of the common law principles in the light of the fact that that doctrine would render the contract concerned void (as opposed to voidable) — a result that would be especially detrimental where third party rights were concerned.^[187] For the purposes of the present essay, however, it is pertinent to note that Denning was constantly attempting to do justice via *substantive* (as opposed to merely procedural) principles. Indeed, he has expressed his own dissatisfaction with the ossification of equitable principles and has called for “a new equity”;^[188] in many ways, his judgment in *Solle v Butcher* may be viewed as an attempt to forge these new equitable principles. Interestingly, this “new equity” must, in Denning’s view, be premised on a moral conception of justice that has to be balanced with the need for order and certainty, but which certainly should not be superseded by them.^[189] Since this article was written, however, the English Court of Appeal has in fact held (quite radically and, with respect, wrongly) in my view that there is ~~no~~, for the moment at least ~~no~~, no longer any doctrine of common mistake in *equity*, and it is hoped that if the decision is appealed to the House of Lords, the House will restore the necessary flexibility by reversing the Court of Appeal and reinstating the equitable doctrine.^[190]

Turning briefly to but one instance in the sphere of illegality of contracts,^[191] we find that Denning, unlike jurists such as Professor Ronald Dworkin,^[192] does not draw a hard and fast distinction between principles on the one hand and policies on the other. For example, in focusing on the decision of the House of Lords in *Beresford v Royal Insurance*,^[193] which held that there could be no recovery under an insurance contract if the insured committed suicide,^[194] Denning was of the view that “two heads of public policy came into conflict: the one which holds that people should be bound by their contracts: the other which says that no one can recover for his own crime”.^[195] Dworkin would, however, have argued that the latter “policy”, at least, was really a “principle” premised on moral (as opposed to utilitarian) considerations. It may well be the case that because Denning adopts a natural law approach, such distinctions are of little, if any, significance to him: for everything is premised, in the final analysis, on an objective moral basis. Rather curiously, perhaps, and as seen above, Denning is also of the view that issues of public policy are best dealt with by the legislature.^[196] However, as we have also already seen, he is willing to advocate *judicial* action where Parliament does not act in a timely fashion.^[197]

To be continued...

ENDNOTES

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This is a greatly expanded version of a paper delivered at Buckingham University on 23 January 1999 in a Symposium celebrating the one hundredth birthday of one of the greatest English judges of the twentieth century, Lord Denning. This version had to be drastically reduced to accommodate not only the limited time allotted for presentation but also the limited space that was available for publication of the various papers (then scheduled, aptly, for the 1999 volume of the *Denning Law Journal*). Indeed, the much shorter paper was ultimately published in the aforementioned volume of the *Denning Law Journal* (see A Phang, “The Natural Law Foundations of Lord Denning’s Thought and Work” [1999] *Denning Law Journal* 159; another shorter article also appeared subsequently with regard to the influence of William Temple on Lord Denning: see A Phang, “Lord Denning and the Influence of William Temple” (1999) (No 140/141) *Law & Justice* 3). The occasion itself was one that would be forever etched in my memory. Although not everyone agreed with Lord Denning’s views, we did hold one thing in common – that he was a man of outstanding intellect and cared deeply for others. Everyone, myself included, had a “Denning story” – stories of the warmth and kindness of the man, often displayed to others whom society would not take a second look at. This was the measure of the man – of his greatness as well as care and concern for others. Sadly, Lord Denning passed away some six weeks later, on 6 March 1999. Had he lived to greet the new millennium, he would literally have been witness to three centuries. Sadly, this was not to be. However, his legacy in his writings, judgments and (above all) care and concern for others lives on as a legacy that few will match in the legal (or, indeed, any other) sphere.

It has been observed more than once that it was a shame that the unedited version of my paper was never published. I am therefore grateful to the Editors of the *Global Journal of Classical Theology* for being kind enough to publish it. I have taken the opportunity to make minor revisions and updated parts of it where necessary although, in essence, the article, focusing as it does on the life and work of Lord Denning, remains in essence as when it was first written (although I have taken into account as many materials as were available to me as at 31 December 2004). I am also grateful to an anonymous referee for his or her helpful comments and suggestions. Insofar as the original version of this article is concerned, I should express my deepest gratitude to Ms Rosemary Dunhill, County Archivist, Hampshire Record Office, and her staff for all their help in retrieving materials from the Denning archive; to Ms Sheena McMurtrie, Editor of the *Denning Law Journal*, for all her kindness and assistance; as well as to Mr Aqbal Singh for his comments and encouragement. All errors, however, remain mine alone.

Last, but by no means least, this essay is dedicated to the memory of Lord Denning and ~~his~~, more importantly ~~his~~, to his enormous legacy of intellectual scholarship and genuine concern for human beings from all lands and climes.

[1] See eg PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law* (Clarendon Press, 1987); P Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) at Ch III, esp at 44 and 51; and A Phang, “Positivism in the English Law of Contract” (1992) 55 *Modern Law Review* 102.

[2] See generally D Hume, *An Enquiry Concerning the Principles of Morals* in HD Aiken (Ed), *Hume’s Moral and Political Philosophy* (Hafner Press, 1948) at Pt II.

[3] See generally J Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980).

[4] For a recent account which also takes into account other related theories and ideas, see AJ Lisska, *Aquinas’s Theory of Natural Law — An Analytic Reconstruction* (Clarendon Press, 1996).

[5] For an extended discussion by Lord Denning himself, see Lord Denning, *The Discipline of Law* (Butterworths, 1979) at Pt 7. Reference may also be made to the following remark by him in *Book Review* (1950) 66 *Law Quarterly Review* 253 at 253:

“One of the difficulties of our system of precedents is that rules or tests, which seem suitable enough when they are pronounced, become hardened into formalisms and technicalities for later generations.”

However, it is important to note that Denning was not against the doctrine of precedent because he championed subjective judicial fiat. On the contrary, he is at pains to point out, in the following passage, that the doctrine is still very important (see Denning, *The Discipline of Law*, above, at p 314):

“Let it not be thought ... that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. ... All that I am against is its too rigid application — a rigidity which insists that a bad precedent must necessarily be followed. ... My plea is simply to keep the path to justice clear of obstructions which would impede it.”

[6] See generally Denning, above, note 5 at 9-22. The following more general observations (*ibid.* at 56) also bear quotation (emphasis added):

“Every Judge will seek to arrive at a *just and reasonable* result if he can do so consistently with the law. If that tool fails — so that, on any view, the actual meaning of the word or phrase itself is against you — is against *right and justice* — then you must try the *next* tool. This is to urge the Judge to *read something into* the document which is not expressed in it.”

See also Lord Denning, *The Closing Chapter* (Butterworths, 1983) at p 97 *et seq*, and where, *inter alia*, there is also Biblical reference to adherence to the spirit, rather than the letter, of the law.

[7] The position in the United States of America is far more substantive: see *eg*, Atiyah & Summers, above, note 1. Significantly, Lord Denning himself stated, as far back as 1955, that “in matters of substantive law, the English might learn much from the American professors”: see *Book Review* (1955) 68 *Harvard Law Review* 564 at 564.

[8] And see Lord Denning himself: “The Way of An Iconoclast” (1959-1960) 5 *Journal of the Society of Public Teachers of Law (New Series)* 77 (this address by Lord Denning was also published in (1960) 3 *Sydney Law Review* 209; all references hereafter will be to the first citation). Indeed, in this address, Denning elaborates (at 89) thus:

“What then is the way of an iconoclast? 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 to the case in hand. He will search the old cases, and the writers old and new, until he finds it. Like the woman in the parable, he will sweep the house and search diligently until he has found it. Once found, this principle will be invoked to modify the old beliefs and to mitigate the injustice produced by them. Only in this way can the law be saved from stagnation and decay.”

However, despite the various criticisms of Lord Denning, the balance (particularly from the perspective of the *source* of the respective views) appears to be firmly in favour of Lord Denning. The former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, J Skelly Wright, for example, observed that “Lord Denning is probably the most celebrated British judge of the modern era”: see J Skelly Wright, “Law and the Logic of Experience: Reflections on Denning, Devlin, and the Judicial Innovation in the British Context” (1980) 33 *Stanford Law Review* 179 at 180. The former Lord Chancellor, Lord Hailsham observed that Lord Denning “has been and is a golden legend”: see “Valedictory Speeches upon the Impending Retirement of the Master of the Rolls” [1986] *Denning Law Journal* 7 at 8 (hereafter “Valedictory Speeches”; Lord Hailsham’s speech is also reproduced as the “Epilogue” in Jowell & McAuslan, below, note 10). The late Professor Clive M Schmitthoff was of the similar view that Lord Denning “is undoubtedly one of the great judges of the century. Future centuries will remember him as one of the makers of the common law.”: see CM Schmitthoff,

“Lord Denning and the Contemporary Scene — A Homage to Lord Denning on the occasion of his 80th Birthday on January 23, 1979” [1979] *Journal of Business Law* 97 at 97 (this piece was in fact first published in (1974) 6 *Manitoba Law Journal* 11, when it was simply entitled “Lord Denning and the Contemporary Scene”). See also the Hon Allan McEachern, *Book Review* (1980) 14 *University of British Columbia Law Review* 377 at 380 (the reviewer was the then Chief Justice of the Supreme Court of British Columbia). Also, in his excellent book, Stevens observes that “Denning is certainly the most interesting and possibly the most important English judge of the twentieth century”: see R Stevens, *Law and Politics — The House of Lords as a Judicial Body, 1800—1976* (The University of North Carolina Press, 1978) at 488. A completely contrasting picture is, however, painted by JAG Griffith: see his *Book Review* (1979) 42 *Modern Law Review* 348 and, by the same author, *Book Review* (1983) 46 *Modern Law Review* 115 (see also below, note 10), as well as by MDA Freeman, *Book Review* (1983) 34 *Northern Ireland Legal Quarterly* 174; see also R Hasson, “The Limits of High Trees” (1987) 24 *Osgoode Hall Law Journal* 437 at 447.

Another bone of contention — albeit less substantive — centres on Denning’s style of writing. Wright, above, at 189, for instance, was of the view that Denning’s book, *The Discipline of Law* (above, note 5), “is an eminently readable book, written in a style of elegant simplicity”. To like effect is M Beloff, “Reforming Judge” (1980) 51 *New Society* 300; the Hon Mr Justice Verchere, *Book Review* (1981) 15 *University of British Columbia Law Review* 508 at 509; and A Grant, “Lord Denning: an appreciation” [1983] *New Zealand Law Journal* 358 at 359.

[9] And this might explain why he was of the view that “[i]t is of great importance that the common law should develop as one homogeneous system throughout the Commonwealth”: see Lord Denning, *Book Review* [1955] *Cambridge Law Journal* 113 at 113. If, indeed, the common law is premised on some higher moral order, the development of such a system would be justifiable. One is here reminded of the natural law underpinnings of Blackstone’s ideas, which might have (subconsciously at least) influenced Denning in part. Indeed, this proposition is buttressed by the following observation of Denning himself (in “The Universities and Law Reform” (1947-1951) 1(New Series) *Journal of the Society of Public Teachers of Law* 258 at 260): “Bentham criticised Blackstone’s work unmercifully, but it was, I think, the essential basis for the reforms which Bentham and others effected.” See also M Southin, “Lord Denning” (1970) 5 *University of British Columbia Law Review* 1 at 12.

On the influence of American law, see generally AT Denning, “The Restatement of the Law: Its Place in the English Courts” (1951) 37 *American Bar Association Journal* 329 and “The Universities and Law Reform”, above, at 265. Cf also his *Book Review* (1956) 72 *Law Quarterly Review* 418. See further above, note 7.

[10] And see generally the following excellent collections of essays: P Robson & P Watchman (eds), *Justice, Lord Denning and the Constitution* (Gower, 1981) and JL Jowell & PWB McAuslan (eds), *Lord Denning: The Judge and the Law* (Sweet & Maxwell, 1985). The former collection is far more critical although the latter does not pull its punches either. Reference may also be made to JHC Morris, “Palm Tree Justice in the Court of Appeal” (1966) 82 *Law Quarterly Review* 196; DJ Hayton, “Equity and Trusts” in Ch 3 of Jowell & McAuslan, above; P Slayton, *Book Review* (1979) 25 *McGill Law Journal* 135 at 138; WG Bellack, *Book Review* (1980) 38 *University of Toronto Faculty of Law Review* 257 at 259-260; P McAuslan, *Book Review* (1981) 44 *Modern Law Review* 233; WD Sutherland, *Book Review* (1981) 19 *American Business Law Journal* 97 at 99; The Hon Allan McEachern, above, note 8 at 378; E Tucker, *Book Review* [1985] *Public Law* 515 at 516-517; and H Foster, *Book Review* (1986) 20 *University of British Columbia Law Rev.* 331 at 334. A particularly scathing assessment is by JAG Griffith, *Book Review* (1979) 42 *Modern Law Review* 348; to take but one instance, the author opines (ibid at 349) that Lord Denning “plays not only the Ace of Trumps but all his 52 cards as if God had dealt them to him”. In the light of the basic thrust of the present essay, Griffith’s sarcasm may in fact represent the truth after all! For another of Griffith’s tirades (albeit much shorter), see *Book Review* (1983) 46 *Modern Law Review* 115; ironically, there is a Biblical allusion at the outset of the review itself. Equally scathing is Freeman, above, note 8.

See also Stevens, above, note 8 at 503: “As the majority of appeal judges began to move away from the image of high formalism, Denning came through as a judge who shot from the hip and who, despite his prominence, gave scant thought either to juristic techniques available to him or to the constitutional implications of his approach.” It is a central theme of the present essay that what looks like “shooting from the hip” is actually undirgirded by considerations of objective value. One might add that Denning was not in the least unmindful of either language or judicial technique.

[11] See Lord Wilberforce, “The Academics and Lord Denning” (1985) 5 *Oxford Journal of Legal Studies* 439 at 439. See also ibid at 443: “He had his own views as to what the individual should be entitled to, based on his own common law, Anglican, British and Victorian values and he reached his conclusions in individual cases accordingly.” While this is not an inaccurate observation, it is the central thesis of this essay that the core foundation of Denning’s decisions was religious.

[12] See Wright, above, note 8 at 190. Cf Stevens, above, note 8 at 504. See also below, note 42.

[13] This is the case of *Ward v Bradford Corporation* (1972) 70 *Local Government Reports* 27, referred to below, note 220.

[14] See Wright, above, note 8 at 190.

[15] See Schmitthoff, above, note 8 at 98. See also C Palley, “Lord Denning and Human Rights — Reassertion of the Right to Justice” in

Ch 7 of Jowell & McAuslan, above, note 10 at 253 and 261 and AWB Simpson, “Lord Denning as Jurist” in Ch 9 of Jowell & McAuslan, above, note 10 at 453; as well as M Owen, *Book Review* [1985] *Cambridge Law Journal* 305 at 305-306. Reference may also be made to the Hon Justice MD Kirby, “Lord Denning: An Antipodean Appreciation” [1986] *Denning Law Journal* 103 at 109.

[16] See Schmitthoff, above, note 8 at 98. See also below, note 42.

[17] Ibid.

[18] Ibid. See also *ibid.* at 103-104.

[19] Kennedy is the recently appointed Carter Professor of General Jurisprudence at Harvard Law School. His latest book, *A Critique of Adjudication* (Harvard University Press, 1997) adopts a postmodernist approach towards the law in general and adjudication in particular.

[20] See D Kennedy, “The Political Significance of the Structure of the Law School Curriculum” (1983) 14 *Seton Hall Law Review* 1 at 14.

[21] Ibid.

[22] See also Kennedy’s latest work cited at above, note 19.

[23] And see Lord Edmund-Davies, “Lord Denning: Christian Advocate and Judge” [1986] *Denning Law Journal* 41 at 41, where the learned Law Lord observes that “the mainspring of his [Lord Denning’s] life has been his firm belief in the Christian religion and his courageous application of Christian principles to the task in hand” (the substance of this article was first published in [1981] *Christian Legal Society Quarterly*). He also observes (*ibid* at 42) that “Denning’s Christian creed remains the dynamic of his life” and (*ibid* at 47) that Denning’s “lifework has without doubt been directed and inspired by the Christian faith in which he was nurtured and of which he has been an ever-steadfast and passionate advocate”.

[24] See *eg*, Lord Justice Denning, “The Independence of the Judges” in BW Harvey (ed), *The Lawyer and Justice — A Collection of addresses by judges and jurists to the Holdsworth Club of The University of Birmingham* (Sweet & Maxwell, 1978), 55-69 at 56 and 62; Sir Alfred Denning, *The Changing Law* (Stevens & Sons Limited, 1953) at 15-16.

And on Denning’s application of Biblical Scripture to judicial administration, see *The Closing Chapter*, above, note 6 at 32-33 (reference to Exodus 18: 13-27 and the appointment of judges to help Moses in clearing the backlog of work).

[25] See Lord Denning, *The Family Story* (Butterworths, 1981) at 240. One wonders whether there may have been some personal bias for, just prior to this passage, Denning talks about having been shown his marks, as follows (*ibid*):

“Many Alphas in most subjects. But one Gamma. That was in jurisprudence. Gamma minus.”

Reference may also be made to Simpson, above, note 15. See also Denning, “The Universities and Law Reform”, above, note 9 at 266: “[l]aw, after all, is a practical matter ... and if an ounce of practice is not worth a ton of theory it is at least worth a pound of theory”.

[26] Although in his last book (on this point, see below, note 236), *Landmarks in the Law* (Butterworths, 1984), Lord Denning observes (in the “Preface” at v) that he would not write “treatises on jurisprudences” for “I was never good at things of that kind”.

[27] See Denning, “The Universities and Law Reform”, above, note 9 at 268.

[28] Ibid.

[29] Ibid. at 268-269.

[30] See Denning, *The Family Story*, above, note 25 at 172.

[31] On file at the Hampshire Record Office. *Quaere* whether this typescript is part of a fuller one cited in the note following. However, it refers to “The Hon Mr

Justice Denning”, whereas the latter was delivered while Denning was still a King’s Counsel — thus suggesting that the latter came earlier.

[32] See also AT Denning, “Why I Believe In God” (Transcript of a talk delivered on the BBC. Home Service, Tuesday, 14 September 1943 at 10.15 pm.) (on file at the Hampshire Record Office). All references hereafter will be to page numbers of the transcript itself. See also Lord Edmund-Davies, above, note 23 at 41, where the learned Law Lord refers to Denning’s service as a Churchwarden as well as

member of the Parishional Church Council. Denning was of course also for many years President of the Lawyers' Christian Fellowship.

See, further, by the same author, "An Address by the Right Honourable Lord Denning, Master of the Rolls, given at the Annual Service of the Lawyers' Christian Fellowship on the 8th October 1970" (on file with the Hampshire Record Office; hereafter referred to as "Address") as well as "Address Delivered by the Rt Hon The Lord Denning, Master of the Rolls, at the Annual Service on October 6th" (Lawyers' Christian Fellowship, 1977; on file at the Hampshire Record Office; hereafter referred to as "Address 1977").

[33] Above, note 25.

[34] Ibid at vi. See also ibid at 180-183.

[35] See Denning, "Why I Believe In God", above, note 32 at 2. See also Denning, below, note 45 at 8.

[36] See Lord Denning, "The Right Standards of Conduct" (1957) *Law Society's Gazette* 609 at 609. See also, by the same author, "Address", above, note 32; "Address 1977", above, note 32; as well as "*Denning and Scarman: A conversation between Lord Denning, Master of the Rolls, and Lord Justice Scarman*" (BBC Broadcasting Corporation Transcript, Radio Three, Talks and Documentaries Department, recorded Wednesday 19 January 1977, Transmission: Thursday 3 March 1977), 12 (hereafter referred to as "Denning & Scarman", with page references to the Transcript itself). This Transcript is also on file with the Hampshire Record Office.

See, further, "The Influence of Religion" in Denning, *The Changing Law*, above, note 24, 99-122 at 99 (hereafter cited as "Influence"; see also *The Influence of Religion on Law* (Canadian Institute for Law, Theology & Public Policy, 1997), which appears to be a reprint of this lecture).

[37] See Denning, above, note 31 (emphasis added). See also Denning, above, note 32 at 2.

[38] See Denning, above, note 31 (emphasis added). See also Denning, "Why I Believe In God", above, note 32 at 3. See, further, Denning, "Address 1977", above, note 32.

[39] Part of this passage is handwritten (though cf the query at above, note 31). See also ibid at 4.

[40] See John 14: 16, 26; 15:26 and 16:7. See also Denning, "Address 1977", above, note 32, where he observes thus:

"The whole world today, so far as spiritual values are concerned, is a valley of bones ... A valley of dry bones dead to the things of the spirit. Would that I could prophesy with Ezekiel — 'Come from the four winds O Lord and breathe on them that they may live. So I prophesied as he commanded me, and the breath came into them, and they lived, and stood upon their feet, an exceeding great army.' Can we put this spirit back into the soul of man and bring it back into a world which is so dead to it?"

The reference in the above quotation is to Ezekiel 37: 9-10. And see Ezekiel 47: 1-12, which is also, it is submitted, a reference to the Holy Spirit; and cf John 4: 10-13.

And on the role of the Holy Spirit generally, see below the Section entitled "The Relevance of Christian Apologetics".

[41] Interestingly, in his coat of arms, Denning took as his motto, "*Fiat justitia*", viz, "Let justice be done": although he later found the actual origin of this motto to be rather dubious: see Denning, *The Family Story*, above, note 25 at 172.

[42] See Lord Denning, "The Freedom of the Individual To-day" (1977) 45 *Medico-Legal Journal* 49 at 55 (emphasis added). See also, by the same author, "Why I Believe in God", above, note 32 at 3; above, note 36 at 614; *The Road to Justice* (Stevens & Sons Limited, 1955) at 4; "Life and Law in Our Time" (1966) 2 *Manitoba Law Journal* 3 at 13; "Law and Life in our Time" (1967) 2 *University of Tasmania Law Review* 349 at 359; "Recent Changes in the Law" [1966] *New Zealand Law Journal* 167 at 174; and "Giving Life to the Law" [1976] 1 *Malayan Law Journal* ciii at cviii.

[43] See Lord Denning, "Let Justice Be Done" (1975) 6 *Manitoba Law Journal* 227 at 228 (emphasis added). The quotation is from Matthew 16:26. See also, by the same author, *The Road to Justice*, above, note 42 at 5, where Micah 26:8 is quoted.

[44] See Denning, "Why I Believe in God", above, note 32 at 3. See also, by the same author, "Influence", above, note 36 at 109.

[45] In pamphlet form (Bletchley Printers Ltd, 1950) (hereafter "The Influence of Religion on Law"). See also, by the same author, "Influence", above, note 36.

[46] See Denning, "The Influence of Religion on Law", above, note 45 at 2.

[47] Ibid at 3.

- [48] Ibid.
- [49] Citing from Luke 10: 25-28: see *ibid*. See also below the main text accompanying notes 214-215.
- [50] Ibid.
- [51] Ibid.
- [52] Ibid.
- [53] Ibid — and citing from William Temple: see below, note 295. On the influence of William Temple generally, see below, the Section entitled “The Influence of William Temple”.
- [54] Ibid. See also above, note 37.
- [55] The reference here is to “the Christian religion”: see *ibid* at 4.
- [56] Ibid. See also Denning, “Influence”, above, note 36 at 122 and above, note 38.
- [57] See Sir Alfred Denning, *The Christian Approach to the Welfare State* (The 17th Shaftesbury Lecture, The Chaseton Press of H Williams & Son, Ltd, 1953).
- [58] Ibid at 3.
- [59] Entitled “The Relevance of Christian Apologetics”.
- [60] See the Section below, entitled “The Law of Contract”.
- [61] See Denning, above, note 57 at 7.
- [62] Ibid.
- [63] Ibid at 14.
- [64] See generally *ibid* at 7 *et seq*.
- [65] Ibid at 14.
- [66] See Denning, *The Family Story*, above, note 25 at 181; he then proceeds to refer to Lord Atkin’s use of the Bible in *Donoghue v Stevenson* [1932] AC 562: see the main text accompanying below, notes 214-215. And on the point as to the veracity of the Bible, see above, note 309.
- [67] See *eg*, Denning, “The Independence of Judges”, above, note 24 and, by the same author, “The Independence and Impartiality of the Judges” (1954) 71 *South African Law Journal* 345; “Law and Life in Our Time” (1967) 41 *Australian Law Journal* 224 at 225; and “Giving Life to the Law”, above, note 42 at cviii.
- [68] See *eg*, Denning, “Law and Life in Our Time”, above, note 67 at 225-226 and, above, note 42 at 355-356; as well as, by the same author, *Freedom Under the Law* (Stevens & Sons Limited, 1949) at 38-40 and 55-59 and *The Family Story*, above, note 25 at 162-163. However, it was Lord Denning’s controversial remarks on the jury system, approximately a decade and a half later (in the original version of *What Next In The Law* (Butterworths, 1982)), that ultimately led to his decision to resign from his position as Master of the Rolls. See also Lord Denning, *The Closing Chapter*, above, note 6 at 5-24. There was another round of controversy some years later, stemming from some of Denning’s remarks in an interview: see AN Wilson, “England, His England” *The Spectator*, 18 August 1990, 8. Reference may also be made generally to Palley, above, note 15 at 327-330.
- [69] See *eg*, Sir Alfred Denning, *The Road to Justice*, above, note 42 at Ch 4 and, by the same author, “Law and Life in Our Time”, above, note 67 at 227 — although the learned judge correctly points to the need for *balance*, so that the freedom not be abused. See also, by the same author, “Restraining the Misuse of Power” in *Jubilee Lectures Celebrating the Foundation of the Faculty of Law, University of Birmingham* (Wildy & Sons Ltd, 1981), 1-12 at 6-7 (this particular Holdsworth Club Presidential Address was in fact delivered on 3 March 1978) and *The Changing Law*, above, note 24 at 11-12.
- [70] And see generally Denning, “Restraining the Misuse of Power”, above, note 69 and, by the same author, above, note and “Misuse of Power” (1981) 55 *Australian Law Journal* 720. Reference may also be made to Lord Denning’s more recent works: see *eg*, *The Due Process of Law* (Butterworths, 1980) and *What Next In The Law*, above, note 68 especially at Pt 8. This is also demonstrated in the

activist stance he adopted in the sphere of administrative law: see *eg*, JL Jowell, “Administrative Law” in Ch 6 of Jowell & McAuslan, above, note 10 as well as E Young, “Developing a System of Administrative Law?” in Robson & Watchman, above, note 10, 157-186, and (in a rather more specific context) P Polden, “The Uses of Power: Mr Justice Denning and the Pensions Appeal Tribunals” [1988] *Denning Law Journal* 97. Reference may also be made (in the context of constitutional law) to DGT Williams, “Lord Denning and Open Government” [1986] *Denning Law Journal* 117. In an interesting and comprehensive essay, Professor McAuslan examines Denning’s development of what he perceives to be “a doctrine of abuse of rights in the area of land law”: see generally JPWB McAuslan, “Land, Planning and Housing” in Ch 5 of Jowell & McAuslan, above, note 10; reference may also be made to the more critical essay by P Robson & P Watchman, “Sabotaging the Rent Acts” in Robson & Watchman, above, note 10, 187-211.

[71] See *eg*, Denning, “Law and Life in Our Time”, above, note 67 at 228, where the learned judge was of the view that capital punishment ought not to be restored; he then proceeded to observe thus (emphasis added):

“There is an overriding moral issue. Are we to call upon the State to do collectively an act which none of us individually would be prepared to do or even to witness? Although I voted against the abolition I have *altered* my view. I know that the question is much debated here [in Australia]. All I will say is that these questions should not be Party questions at all. They should be simply left to the free vote of members of Parliament itself.”

See also Denning, “Law and Life in Our Time”, above, note 42 at 354 and, by the same author, below, note 142 at 24, as well as *The Family Story*, above, note 25 at 164-165. Cf Denning, “Life and Law in Our Time”, above, note 42 at 5-6. Cf also his views in his last published work (on this point see below, note 236), above, note 26 at 27, where he reiterates the views quoted above, but also adds (*ibid* at 28): “Yet even today when I read of ‘murders most foul’, I feel instinctively, like many of my countrymen, ‘They ought to be hanged.’”.

[72] See *eg*, “The Rights of Women” in Denning, *The Changing Law*, above, note 24 at 79-98 and, by the same author, *The Equality of Women* (Eleanor Rathbone Memorial Lecture, Liverpool University Press, 1960).

On his views with respect to abortion, see *The Closing Chapter*, above, note 6 at 44-45.

[73] See *eg*, MDA Freeman, “Family Matters” in Ch 4 of Jowell & McAuslan, above, note 10 and Hasson, above, note 8 at 441-442.

[74] See Denning, *The Changing Law*, above, note 24 at 98 (emphasis added).

[75] See generally Ephesians 5: 22-33.

[76] See Ephesians 5: 25 and Ephesians 5: 28 and 33, respectively.

[77] See Wright, above, note 8 at 190.

[78] See Kirby, above, note 15 at 106.

[79] See Denning, “The Independence of the Judges”, above, note 24 at 64.

[80] *Ibid* at 67 (emphasis added). See also Denning, *The Changing Law*, above, note 24 at 14.

[81] And see his views with regard to the doctrine of precedent, above, note 5.

[82] See Denning & Scarman, above, note 36 at 9 (emphasis added); Denning, significantly in my view, then proceeds to talk about consumer protection as well.

[83] *Ibid* at 13.

[84] See Denning, *What Next In The Law*, above, note 68 at 333 (emphasis added).

[85] See Denning, *The Family Story*, above, note 25 at 28.

[86] See Denning, *The Road to Justice*, above, note 42 at 51-53; and, by the same author, above, note 5 at 5-8; *The Closing Chapter*, above, note 6 at 57-65; “Law and Life in Our Time”, above, note 67 at 229; “Law and Life in our Time”, above, note 42 at 358; “The Freedom of the Individual To-Day”, above, note 42 at 59; as well as “Giving Life to the Law”, above, note 42 at cvii. See also generally S Waddams, “Lord Denning: A Commonwealth Perspective” in Ch 10 of Jowell & McAuslan, above, note 10; Kirby, above, note 15 at 107; and *Book Review* [1980] *New Zealand Law Journal* 231 at 231.

For a very interesting piece on Denning’s distinctive judicial writing style, see C Harvey, “It all Started with Gunner James” [1986] *Denning Law Journal* 67 (this article was first published in XVII *Gazette* (1983) of The Law Society of Upper Canada).

[87] On his appreciation of academic texts, see *eg*, *Book Review* (1947) 68 *Law Quarterly Review* 516.

[88] See Denning, above, note 5 at 202. He was also co-editor of *Bullen and Leake's Precedents of Pleadings* (Stevens & Sons Ltd/Sweet & Maxwell Ltd, 9th

Ed, 1935) — significantly, Denning is also described in the title page as “sometime Eldon Scholar in the University of Oxford and Prize Student of the Inns of Court”.

[89] See PV Baker, “Our Centenary” (1984) 100 *Law Quarterly Review* 514 at 517.

[90] *Ibid* And for Lord Denning’s own tribute to the *Review*, see Denning, “1885—1984” (1984) 100 *Law Quarterly Review* 513.

[91] See *eg*, AT Denning, “Re-Entry for Forfeiture” (1927) 43 *Law Quarterly Review* 53 and, by the same author, *Note*, (1939) 55 *Law Quarterly Review* 343. Nor was such doctrinal dexterity dry and arid: often it was integrated with concepts and conceptual analysis: see *eg*, AT Denning, “Wages During Sickness” (1939) 55 *Law Quarterly Review* 353 and, by the same author, “Presumptions and Burdens” (1945) 61 *Law Quarterly Review* 379.

[92] Cf Kennedy, above, note 20.

[93] See Waddams, above, note 86 at 457, as well as PS Atiyah, “Contract and Tort” in Ch 2 of Jowell & McAuslan, above, note 10 at 29, where the learned author observes thus:

“Any attempt to survey Lord Denning’s contribution to the law of contract and tort must virtually become an account of the development of the common law throughout the whole of the period since the end of the second world war. In every significant area of the common law Lord Denning’s judgments can be found to illustrate modern trends and ideas.”

See also Kirby, above, note 15 and K Sutton, “A Denning Come to Judgment: Recent Judicial Adventures in the Law of Contract” (1989) 15 *University of Queensland Law Journal* 131 at 156, where the learned author observes that “[t]he pioneering spirit of Lord Denning is now to be seen reflected in the judgments emanating from the High Court of Australia”. Reference may also be made to CEF Rickett, “Lord Denning — Sincere Man and Problematic Judge” (1982) 10 *New Zealand Universities Law Review* 91 at 91 (with regard to Lord Denning’s influence on New Zealand law).

[94] The reader is directed to Professor Atiyah’s very perceptive overview published shortly after Lord Denning’s retirement: see Atiyah, above, note 93.

[95] Citing from Psalm 15:5.

[96] See Denning, above, note 45 at 7. See also, by the same author, “Influence”, above, note 36 at 104-105.

[97] See generally Harold J Berman, “The Religious Sources of General Contract Law: An Historical Perspective” (1986) *Journal of Law and Religion* 4 (reprinted in Ch 7 of Harold J Berman, *Faith and Order: The Reconciliation of Law and Religion* (Scholars Press, 1993)).

[98] This is particularly marked with respect to vitiating factors: see generally A Phang, “Vitiating Factors in Contract Law — The Interaction of Theory and Practice” (1998) 10 *Singapore Academy of Law Journal* 1.

[99] See Berman, above, note 97.

[100] See generally the main text accompanying above, note 57 *et seq*.

[101] See Cmd 5449.

[102] See A Phang, “Consideration at the Crossroads” (1991) 107 *Law Quarterly Review* 21.

[103] (1884) 9 App Cas 605, reaffirming the so-called rule in *Pinnel's Case* (1602) 5 Co Rep 117a.

[104] [1991] 1 QB 1.

[105] [1995] 1 WLR 474.

[106] It will be recalled that *Foakes v Beer* (1884) 9 App Cas 605 was a decision of the House of Lords. An extension of the principle in *Williams* case [1991] 1 QB 1 would have, in effect, entailed an undermining of the principle in *Foakes* by a lower court (here, the Court of Appeal).

[107] And see my critique in A Phang, “Acceptance by Silence and Consideration Reined In” [1994] *Lloyd’s Maritime and Commercial Law Quarterly* 336.

[108] [1947] KB 180.

[109] This is, of course, a very rough description: much elaboration is required, *eg*, the fact that in most cases, the promisor will be allowed to resile if reasonable notice is given (*ie*, that the doctrine is generally suspensory in nature only; though of rare situations like that in *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 ChD 268).

[110] [1947] KB 180. See also Denning, above, note 5 at 197-223 (an extended account by Lord Denning himself) and, by the same author, *The Changing Law*, above, note 24 at 53-54. See also Lord Denning, *The Closing Chapter*, above, note 6 at 254-257 (the Chapter is entitled “*High Trees* up to date”).

[111] See *eg*, Sir Anthony Mason, “The Impact of Equitable Doctrine on the Law of Contract” (1998) 27 *Anglo-American Law Review* 1 at 18 (“Promissory estoppel is largely associated with the trail-blazing mid-century judgments of Lord Denning in *Central London Property Trust v High Trees House Ltd* and *Combe v Combe*”). *Contra* Hasson, above, note 8 especially at 447. Cf also Waddams, above, note 86 at 469-470.

[112] And see Lord Devlin, “Foreword” in Jowell & McAuslan, above, note 10 at vi, as follows:

“It was not the result in *High Trees* that came as a shock. That could, I think, have been reached unobtrusively by a little twisting and blending of old authorities, though many puisnes would have left that sort of work to the Court of Appeal. Denning, a very recent puisne judge, preferred to cut a new channel from the main stream.”

[113] See Denning, above, note 5 at 197.

[114] Denning has characterised the *High Trees* case as “an outflanking movement”: see Denning, above, note 8 at 82.

[115] See Lord Denning, “Foreword” to the inaugural volume of the *Denning Law Journal*: see [1986] *Denning Law Journal* 1 at 2.

[116] *Ibid*.

[117] See *eg*, *WJ Alan & Co v El Nasr Export and Import Co* [1972] 2 QB 189 at 213.

[118] See Denning, above, note 5 at 214-215 and, by the same author, “Recent Developments in the Doctrine of Consideration” (1952) 15 *Modern Law Review* 1 at 5.

[119] See Atiyah, above, note 93 at 35.

[120] See generally ABL Phang, *Cheshire, Fifoot and Furmston’s Law of Contract — Second Singapore and Malaysian Edition* (Butterworths Asia, 1998) at 202-205.

[121] See Denning, above, note 42 at cvii.

[122] See generally Phang, above, note 120 at 190-211.

[123] [1951] 2 KB 215.

[124] Dockray, E Lomnicka, S Lee & J Fortin, *Review of The Denning Interviews* (Video Cassettes of Interviews with Lord Denning of Whitchurch) (1985) 101 *Law Quarterly Review* 137 at 140.

[125] See the landmark Australian High Court decision of *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. See also *Commonwealth v Verwayen* (1990) 170 CLR 394. The literature on the Australian developments is voluminous; it should be mentioned, however, that both these cases are in fact discussed at some length in Mason, above, note at 22-28. See also generally Sutton, above, note 93 at 131-145.

Insofar as the *English* position is concerned, reference may be made to the Court of Appeal decision in *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2002] 1 All ER (Comm) 737, where Sir Andrew Morritt VC did refer to the Australian High Court decision of *Waltons Stores*, above, and, whilst not completely closing the door to allowing estoppel to function as a cause of action in and of itself, was clearly reluctant to adopt a more positive stance — citing the absence of precedent as well as the need for sufficient certainty (which he did not find on the facts) (see *ibid* at 750). The learned judge did, however, acknowledge that the House of Lords might adopt a different (and more liberal) approach in the future (see *ibid* at 750-751). Judge and Mance LJ were also of a similar view: emphasising both the point from precedent as well as (*per* Mance LJ) the desirability of distinguishing amongst the various categories of

estoppel (see *ibid* at 753-754 as well as 760-761 and 763, respectively). Significantly, perhaps, even within the relatively more conservative context of English law, the law might conceivably shift in the direction that Lord Denning had envisaged all those many years ago.

[126] See Denning, above, note 5 at 223.

[127] *Ibid* (emphasis added). See also Denning & Scarman, above, note 36 at 13.

[128] See Denning, above, note 8 at 81.

[129] See Denning, above, note 5 at 33. See also *ibid* at 34 (reference to “reason and justice”).

[130] *Ibid* at 34.

[131] [1976] QB 319.

[132] See [1977] AC 239. See also Atiyah, above, note 93 at 37-39.

[133] Since reaffirmed in a number of cases: see *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 and *Spring v Guardian Assurance Plc* [1993] 2 All ER 273 at 296 and *Malik v Bank of Credit and Commerce International SA* [1997] 3 WLR 95 at 108-109.

[134] See generally ABL Phang, “Implied Terms Revisited” [1990] *Journal of Business Law* 394.

[135] See [1977] AC 239 at 254.

[136] See Phang, above, note 134. See also, by the same author, “Implied Terms in English Law — Some Recent Developments” [1993] *Journal of Business Law* 242.

[137] See *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187 at 1196-1197.

[138] See above, note 42.

[139] See above, note 43.

[140] See [1934] 2 KB 394. And on the last mentioned point, see *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805.

[141] See Denning, above, note 36 at 610. See also generally Denning, *The Road to Justice*, above, note 42 at 89-92 and, by the same author, above, note 8 at 83-84, as well as *The Family Story*, above, note 25 at 99 and 174-175. See, further, Denning, above, note 115 at 2, where he talked about cases on exception clauses going “back to my junior days when I induced the Court of Appeal to uphold a most unrighteous clause in *L’Estrange v Graucob*”.

[142] See Lord Denning, “This is My Life” [1986] *Denning Law Journal* 17 at 20.

[143] The literature is voluminous. However, for excellent expositions of the doctrine of fundamental breach in the context of exception clauses, see the following works by Professor Brian Coote: “The Rise and Fall of Fundamental Breach” (1967) 40 *Australian Law Journal* 336; “The Effect of Discharge by Breach on Exception Clauses” [1970] *Cambridge Law Journal* 221; “The Second Rise and Fall of Fundamental Breach” (1981) 55 *Australian Law Journal* 788; and “Discharge for Breach and Exception Clauses Since Harbutt’s ‘Plasticine’” [1977] *Cambridge Law Journal* 31; An extremely interesting, but rather scathing, comment is by JA Weir, “Nec Tamen Consumebatur ... — Frustration and Limitation Clauses” [1970] *Cambridge Law Journal* 189. See also Denning himself, above, note 6 at 266-272.

[144] See *Suisse Atlantique Société d’Armement SA v Rotterdamsche Kolen Centrale* [1967] 1 AC 361.

[145] See Denning, above, note 142 at 20. And see the cases cited at below, note 154.

[146] [1980] AC 827.

[147] See Denning, above, note 8 at 84.

[148] See Denning, above, note 8 at 89 (discussion following Lord Denning’s address). Interestingly, it has been held, in the Indian context, that an exception clause can be rendered nugatory via an application of section 24(e) of the Contracts Act as being opposed to

public policy: see Phang, above, note 120 at 322-323.

[149] See MP Furmston, “Contract and Tort after Denning” [1987] *Denning Law Journal* 65 at 73. Cf Atiyah, above, note 93 at 42, where the learned author argues that “in a variety of commercial contexts, Lord Denning was often prepared to uphold the validity of exemption clauses, sometimes more so than his colleagues”.

[150] See the main text accompanying below, notes 165-168.

[151] See Denning, *The Road to Justice*, above, note 42 at 98.

[152] *Ibid.*

[153] For early decisions, see *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 938 and *Sze Hai Tong Bank Ltd v Rambler Cycle Co* [1959] AC 576. See also Denning, *The Family Story*, above, note 25 at 174-175. Professor Atiyah refers to the *Karsales* case as the “decisive case, perhaps” in the genesis of the doctrine of fundamental breach as a rule of law: see Atiyah, above, note 93 at 43.

[154] See *Suisse Atlantique Société d’Armement SA v Rotterdamsche Kolen Centrale* [1967] 1 AC 361; see also above, note 144. The leading decisions in this phase of the development of the doctrine include *Wathes (Western) Ltd v Austins (Menswear) Ltd* [1976] 1 Lloyd’s Report 14; *Harbutt’s Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447; and *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69.

[155] [1980] AC 827. See also above, note 146.

[156] See Denning, above, note 142 at 25.

[157] [1975] 1 QB 326. Professor Furmston terms *Lloyds Bank Ltd v Bundy* as “[o]ne of the most stimulating and controversial initiatives by Lord Denning in the field of Contract Law”: see Furmston, above, note 149 at 75.

[158] See [1975] 1 QB 326 at 339.

[159] See *eg, per* Lord Scarman in the House of Lords decision of *National Westminster Bank Plc v Morgan* [1985] AC 686 at 707-708.

[160] See [1975] 1 QB 326 at 337, *per* Lord Denning MR.

[161] These include duress of goods, unconscionable transactions, undue influence, undue pressure and salvage agreements: see generally *ibid* at 337-339. A notable omission is economic duress, but this is due to the fact that its modern beginnings can be traced to a couple of years after the decision in *Lloyd’s Bank Ltd v Bundy* itself: see, in particular, *Occidental Worldwide Investment Corp v Skibs A/S Avanti (The Siboen and the Sibotre)* [1976] 1 Lloyd’s Report 292 (noted, J Beatson, “Duress by Threatened Breach of Contract” (1976) 92 *Law Quarterly Review* 496).

[162] See above, note 158.

[163] See Denning, above, note 25 at 210-211.

[164] See Dockray, Lomnicka, Lee & Fortin, above, note 124 at 141.

[165] See Denning, “Restraining the Misuse of Power”, above, note 70 at 7 (emphasis added).

[166] *Ibid* at 8 (emphasis added).

[167] See *ibid.*

[168] See The Hon Mr Justice Denning, “What We Owe to the Church” (undated typescript on file with the Hampshire Record Office), 3 (emphasis added). See also above, note 96.

[169] [1975] 1 QB 326.

[170] See *eg*, A Phang, “Undue Influence — Methodology, Sources, Linkages” [1995] *Journal of Business Law* 552 at 570-574 and, by the same author, “Economic Duress: Recent Difficulties and Possible Alternatives” [1997] *Restitution Law Review* 53 at 63-64, “Tenders, Implied Terms and Fairness in the Law of Contract” (1998) 13 *Journal of Contract Law* 126 at 137-140; as well as A Phang & H Tjio, “The Uncertain Boundaries of Undue Influence” [2002] *Lloyd’s Maritime and Commercial Law Quarterly* 231 and, by the same authors, “Drawing Lines in the Sand? Duress, Undue Influence and Unconscionability Revisited” [2003] *Restitution Law Review* 110. This would also meet the objection that there is no element of wrongdoing involved.

[171] See Mason, above, note 111 at 12-13.

[172] And see Atiyah, above, note 93 at 45: “Lord Denning has never had much love for the doctrine of privity.”

[173] See Denning, “The Universities and Law Reform, above, note 9 at 261-262. See also above, note 96.

[174] [1962] AC 446. The dissenting judgment of Lord Denning in the *Midland Silicones* case has been described as one “which must have caused [him] more pain than any other”: see Schmitthoff, above, note 8 at 104. But see now the view of Atiyah, below, note 181.

[175] See Lord Scarman, *Book Review* (1979) 95 *Law Quarterly Review* 445 at 445.

[176] [1966] 1 Ch 538 (where Lord Denning attempted, *inter alia*, to utilise section 56(1) of the Law of Property Act 1925). Cf Sir Alfred Denning, “The Need for a New Equity” (1952) 5 *CLP* 1 at 5 and 7. See also, by the same author, *The Family Story*, above, note 25 at 208-209.

[177] See [1968] AC 58.

[178] [1975] AC 446.

[179] [1980] 3 All ER 257. There have been developments in the Australian and Canadian contexts as well: see *eg*, the Australian High Court decision of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 and the Canadian Supreme Court decision of *London Drugs Ltd v Kuehne & Nagel International Ltd* [1993] 1 WWR 1.

[180] [1962] AC 446; and see above, note 174.

[181] See Atiyah, above, note 93 at 42.

[182] See *Privity of Contract: Contracts for the Benefit of Third Parties* (HMSO, Law com No 242, Cm 3329, July 1996). See also A Burrows, “Reforming privity of contract: Law Commission Report No 242” [1996] *Lloyd’s Maritime and Commercial Law Quarterly* 467. See also Phang, above, note 120 at 778-779 for a brief overview.

[183] [1950] 1 KB 671. See also Denning, *The Changing Law*, above, note 24 at 60-62 and Sutton, above, note 93 at 145-148.

[184] [1950] 1 KB 671 at 692-693 (emphasis added).

[185] See *eg*, *Associated Japanese Bank v Credit du Nord* [1989] 1 WLR 255 and *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016.

[186] See generally A Phang, “Common mistake in English law: the proposed merger of common law and equity” (1989) 9 *Legal Studies* 291 at 293-297 and 297-301 with regard to the similarity between (and even identical nature of) both linguistic formulations and results in the leading cases, respectively.

[187] See generally *ibid* at 301-306.

[188] See generally Denning, “The Need for a New Equity”, above, note 176.

[189] See *ibid* at 9.

[190] The decision in question is *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, which held that its previous decision in *Solle v Butcher* [1950] 1 KB 671 was inconsistent with the House of Lords decision in *Bell v Lever Brothers, Ltd* [1932] AC 161, and ought therefore not to be followed. For my critique of the *Great Peace Shipping* case, see A Phang, “Controversy in Common Mistake” [2003] *The Conveyancer and Property Lawyer* 247.

[191] And see Atiyah, above, note 93 at 47: “[N]o judge has been more willing to find a remedy in cases where he considers that any element of illegality is merely technical ... or where one of the parties is entirely innocent of any moral wrongdoing”.

[192] See generally RM Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) and, by the same author, *Law’s Empire* (Harvard University Press, 1986).

[193] [1938] AC 586.

[194] Suicide, however, is no longer a crime in England: see The Suicide Act 1961. See also Denning, *The Family Story*, above, note 25 at 186-187.

[\[195\]](#) See Denning, *The Road to Justice*, above, note 42 at 97. See also Denning, above, note 142 at 20-21 and, by the same author, *The Family Story*, above, note 25 at 99-100.

[\[196\]](#) See the main text accompanying above, note 151.

[\[197\]](#) See the main text accompanying above, note 152.

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