THE ROLE OF THE JUDGE IN JUDICIAL INQUIRIES

The Rt. Hon. The Lord Nolan

I was invited to write this article by reference to the comparisons which might be drawn between the inquiry carried out by Lord Denning into the Profumo affair and the inquiries carried out by the Committee on Standards in Public Life while I was its chairman. By performing our roles in these inquiries both Lord Denning and I were taking our places in a long and continuing line of judges of all ranks who have been asked by the Government of the day to examine and report upon disputed issues, and our work needs to be seen in that context. As often as not these inquiries have to be carried out as a matter of urgency. More often than not the questions which they raise are the subject of acute political controversy. Invariably they attract publicity to an extent with which judges are not normally familiar. For all of these reasons they lie outside the customary, and, some might say, outside the proper role of a judiciary which strives to maintain a calm, measured, detached and, above all, impersonal approach to its work. I shall return to these weighty matters, but let me begin as I mean to go on with an anecdote.

Shortly after my Committee (if I may call it that, for shortness) was set up I was talking to Tom about it. As chance would have it the Committee had been allocated rooms at the back of the Treasury building which had been used by Tom himself when he was carrying out the Profumo inquiry (the same rooms, by another coincidence, had earlier been used by Peter Shore, a member of my Committee, when he succeeded George Brown at the Department of Economic Affairs, in its valiant but doomed attempt to outflank the Treasury. If walls could speak, what stories these walls could tell.)

Tom was principally and quite rightly concerned about the effect which my chairmanship would have upon my work as a Law Lord. But, he said,

> "I expect you will be able to do it mostly in the vacation. I did the Profumo report mostly in the long vacation."

This was true. He started the investigation on 24th June, 1963, and signed his report on 16th September, 1963.

That in itself was a remarkable achievement having regard to the scope and complexity of the report, of which I shall say more later. But it was typical of the speed and dedication which Tom had displayed throughout his career. I had to break it to him that my Committee had been asked to prepare our first report within six months (which we did) but that I expected to have to cut down heavily upon my judicial duties during that period.

Another respect in which my qualifications for the job bore little comparison with his lay in the fact that at the time of the Profumo inquiry he was already a celebrated national figure while I was relatively unknown. This was made perfectly plain to me on a dark October evening just after the announcement of my appointment when I faced a dazzling array of arclights on the Whitehall pavement outside the Cabinet Office. Sharply pointed questions were flung at me from shadowy figures behind the lights – "why were you chosen as Chairman?" (This was precisely the question I had been asking myself, and could only suggest that they asked the Prime Minister) and, even more pointedly, "were you the first choice?" (I have been told that I was, but if others had been offered the post and had refused it I thought at the time that they had shown a good deal more sense than I did). In Tom's case, no-one would have dreamed of asking either of these questions.

How had he achieved such a level of celebrity and admiration?

I can best answer that from my own experience, for I was one of the post-war generation of law students who grew up in the Denning years. I read law at Oxford under the guidance of that great lawyer and great tutor P. B. Carter. Knowing his pupils - or at any rate this pupil - to be lazy and easily bored he urged us to learn our law not just from tutorials and lectures, text-books and articles in the journals, but from the full reports of the decided cases. For him, Denning was a Don's Delight - a judge whose knowledge of law rivalled that of the academics.

I am bound to say that my fellow undergraduates and I found even the law reports to be less than irresistible as reading matter, but these were the years 1949-52 when the doctrine of equitable estoppel was in its robust infancy, generally acclaimed, occasionally deplored, later to be refined by Lord Denning himself, impossible to overlook by anyone who hoped to satisfy the examiners. *High Trees House* was high on our reading lists.[1] We liked the result, which seemed to us to be fair as between the parties to the case. We liked the simplicity of his language. We admired the erudition with which he brought well established authorities to bear in

[1] *Central London Property Trust* v. *High Trees House Ltd.* [1947] K.B. 130.

support of his reasoning. His distinctive mode of expressing his thoughts and explaining the facts had yet to develop into the unique Denning style with which we all became familiar in later years, of which Mr. Simon Brown, the Treasury devil as he then was, observed in his valedictory address on Tom's retirement, "sentences were short and verbs optional;" in which the parties concerned in the case were referred to by name, and not under the impersonal and unfeeling descriptions of "the plaintiff," "the defendant," "the third party" and so on.

> "Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights. He used to take the lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood. His nephew, John Joseph Beswick, helped him in the business."[2]

Who else but Tom Denning had ever begun a judgment like that?

Beswick v. *Beswick* came before Tom when he was Master of the Rolls in 1966, (his judgment was, of course, later upheld, though on different grounds, by the House of Lords) and although the words which I have quoted are one of the best and most familiar examples of the Denning style they are typical of his judgments in less well known cases, both earlier and later. His biographer, Iris Freeman reminds us that in *Barclays Bank Limited* v. *Inland Revenue Commissioners,*[3] where Lord Simonds told the House of Lords that "this appeal once more demands your Lordships' consideration of Section 55 and Section 58 of the Finance Act 1940," Denning said: "My Lords, Tom Shipside died on December 15, 1955. The question is whether, during the last five years before his death, he 'had the control of' a company called T. Shipside Limited: for the amount of estate duty depends on it."[4] In one of the few tax cases in which I had the pleasure of appearing before him, *Morisis Products Limited* v. *Commissioners of Customs and Excise*, and which turned on the construction of an extremely obscure section in the Purchase Tax Act 1963 Tom began his judgment by saying simply "The question in this case is: what is the Purchase Tax payable on ice cream, ice lollies and the like?"[5]

His direct and uncomplicated approach to the facts of the case before him, in terms which could be readily understood not only by the lawyers but by the parties and by the lay readers of his judgments, has greatly

---

[2] *Beswick* v. *Beswick* [1966] 1 Ch. 538 at 549.
[3] [1961] A.C. 509.
[4] See Iris Freeman, *Lord Denning* (Hutchinson, 1993) at p.255.
[5] [1969] 3 All E.R. 1096.

influenced both his own generation and younger generations of judges. Of all the contributions which he has made to the development of English law I think that this must rank amongst the highest.

The other truly outstanding personal quality which Denning brought to his work was his courtesy. I had sensed something of it from the attitude which his judgments displayed towards the parties in the case, treating them as human beings and not merely as characters described in the pleadings, but it was only when I came to the Bar and saw him in action that I became fully aware of its importance. It must be remembered in this connection that most of the judges on the Bench in my early days at the Bar were much tougher, much stricter, much more intolerant of any form of human weakness than their successors have become. I do not criticise them for that. They had grown up in the shadow of two world wars, in one or other of which many of them (like Denning himself) had been in action. This country had survived those wars by toughness of character and strictness of discipline. The country expected the judges to counter the crime wave which followed the second world war by firm enforcement of the law and of its penalties, and the judges duly obliged. We of later generations are in their debt for that. But in the interests of justice and fairness - and, which is equally important, the public perception of justice and fairness in the courts - there was room for a more patient and understanding approach to the anxieties of litigants in civil cases, and, for that matter, to the shortcomings of young and inexperienced Counsel, whose inexperience and nervousness might lead them to jeopardise their clients' case. Denning was one of the first to accept the need for a more sympathetic approach in these cases, and one of the most successful in giving effect to it. He was particularly good with litigants in person, who often felt a burning sense of injustice and were unable to comprehend why the law, of which they had no knowledge, did not provide a remedy. Possibly the homely Hampshire accent in which Denning addressed them was a help here. It certainly seemed to become more pronounced in these cases. What mattered most, however, was the skill with which he helped them to articulate their grievances, and with which he briefly explained why (as was almost always the case) the law could not assist them. However disappointed they were, I doubt if anyone ever left Denning's court without feeling that he had had a fair hearing. That could not be said of some of his brother judges.

This courtesy is one of the most remarkable and attractive features of Tom's personality. It is a characteristic of his private as of his public life. For many years now my wife and I have taken our two oldest grandsons, Tom Hume and Henry Morris down to The Lawn once or twice a year at Tom's invitation to fish the beautiful stretch of the Test which runs through his land. He calls them Tom the philosopher, for obvious reasons, and Henry the soldier, after

the profession of Henry's father, and takes a great interest in their progress and ambitions. We are always welcomed with every circumstance of hospitality and consideration, but it does not stop there, for when we write our "Thank you" letters we almost invariably receive "Thank you" letters from Tom in reply - although sadly now they have to be written by Peter Post, his devoted clerk, on his behalf. I suspect that this quality of courtesy and thoughtfulness has helped Tom to retain the affection and friendship even of those who were most strongly critical of some of his judgments. I was delighted to see that the fishing book which Tom has maintained since he moved to The Lawn shows Gavin Simonds as a regular visitor.

His courtesy is not to be confused with weakness, let alone with tolerance of misconduct. No-one could be more eloquent in his denunciation of those whose behaviour falls below his own high standards.

By the time when he was asked to investigate the Profumo affair, Tom had established his reputation with the legal profession and with the public as a man of fairness, of independence, gifted with clarity of thought and clarity of expression, a man with a wide experience and knowledge of the law, and an equally wide experience and knowledge of the strengths and weaknesses of human beings. There was one other qualification which he brought to the task and that was his experience of having carried out a previous inquiry at the request of the government. On that occasion he had been chairman of a committee charged with examining the administration of the divorce law. The committee had been set up in 1946 as a result of the vast increase in the number of divorce petitions consequent upon the war and the intolerable delays which the parties were suffering.

The Committee's terms of reference were to examine divorce procedures and report:

> "what procedural reforms ought to be introduced in the general interests of litigants, with special reference to expediting the hearing of suits and reducing costs and to the Courts in which such suits ought to proceed; and in particular whether any (and if so, what) machinery should be available for the purpose of attempting a reconciliation between the parties, either before or after proceedings have been commenced."

It is to be noted that the Committee was not concerned with extending the grounds upon which divorce could be obtained: its primary job was to speed the process by which divorces could be granted under the existing law. Its response was prompt, unanimous and simple. In its first report, which was presented to Parliament by the Lord Chancellor in July, 1946, only one month after the committee had been set up, it recommended that

the period of six months between the *decree nisi* and the *decree absolute* should be reduced to six weeks. Its second report, presented in November of the same year, recommended that the trial of divorce cases should not be restricted to the High Court, but should also be carried out by County Court judges sitting as Commissioners. Its final report, published in February of 1947, less than eight months after its appointment, recommended the setting up of a Marriage Welfare Service to afford help and guidance both before and after marriage. This final recommendation was the closest to Denning's heart. It led to the formation of the National Marriage Guidance Council, of which Denning became the president in 1949, a post which he retained until 1983. It reflected the views of the whole committee who said in their final report:

> "We have throughout our inquiry had in mind the principle that the preservation of the marriage tie is of the highest importance in the interests of society."

It is not surprising that the work of the Committee appears to have commanded widespread praise of the contents of its report and of the judge who was its chairman. Like many other great judges he had started his judicial life in the Probate, Divorce and Admiralty division (now the Family Division) where he had spent nearly two years before being transferred to the King's Bench Division in January, 1946, and so he was familiar with the subject matter of the Committee's investigations. The inquiry had no party political implications. It required no substantive changes in the law. It called for a chairman who could guide his colleagues to a conclusion combining principle with pragmatism. Above all it called for a rapid solution to be found for a pressing public need. The qualities required for these purposes were perfectly combined in Denning the man and Denning the judge. In the case of anyone else it would be a matter almost for incredulity, but in the case of Denning it seems perfectly natural to record that on 18th July, 1946, when barely a month into the inquiry, he gave his judgment in the *High Trees House* case.[6] Bearing in mind the calls upon his time I suppose it is just as well - though again in anyone else one would find it astonishing - that the judgement was given *extempore.*

The Profumo inquiry was a very different kettle of fish. It took place, as I have said, in the summer of 1963. By then, Denning had completed his switchback ride from High Court to Court of Appeal to House of Lords and then back to the Court of Appeal and had established himself as Master of the Rolls. Although he was not so well known to the public as he became after the Profumo report many of his judgments had already attracted the

[6] *Supra* n.1.

headlines. For example, in February of that year, in company with Lords Justice Donovan and Danckwerts, he had dismissed the appeals of two journalists, Mulholland and Foster, against their committal to prison for contempt of court.[7] The contempt lay in their refusal to disclose the sources of information which they had published about Vassall, a young civil servant at the Admiralty who had passed secret documents to the K.G.B. Vassall was a homosexual, and it was rumoured, though as it turned out without any justification, that he had had an improper relationship with one of the Government Ministers at the Admiralty.

The Vassall affair formed part of the background to the crisis of public confidence which led to the setting up of the Profumo inquiry. The central facts, it will be remembered, were that John Profumo, had had a brief affair with a prostitute called Christine Keeler in the second half of 1961, when Profumo was Secretary of State for War. Subsequently it emerged that Christine Keeler was associating with a Russian spy at the same time. Profumo, when challenged about the matter, made a personal statement in the House of Commons denying any improper association with Christine Keeler. He was unable to maintain the denial, and promptly resigned. The case was attended by all sorts of wild rumours about threats to national security, and about bizarre sexual misconduct in high places. In much the same way as in the summer of 1994, when there was a wave of public unease about sexual and financial scandals in government circles, a crisis arose not only for the Government itself but for the maintenance of confidence in the probity of public life.

Denning's terms of reference were extremely wide. They were:

> "To examine, in the light of the circumstances leading to the resignation of the former Secretary of State for War, Mr. J.D. Profumo, the operation of the Security Service and the adequacy of their co-operation with the Police in matters of security, to investigate any information or material which may come to his attention in this connection and to consider any evidence there may be for believing that national security has been, or may be, endangered and to report thereon."

The issues were, of course, highly charged politically: the Opposition saw the affair as a chance to bring the Government down. From everyone's point of view, it was essential that the inquiry should be completed quickly. Possibly this was the reason why the Prime Minister took the most unusual

[7] *Attorney-General* v. *Mulholland; Attorney-General* v. *Foster* [1963] Q.B. 477.

step of asking Denning to conduct it alone, without the support of a committee.

As might have been expected of Denning, the requirement for speed was amply satisfied. Although he heard about one hundred and sixty witnesses and studied numerous written memoranda he completed the report, as I have mentioned, in less than three months. This time, though, even he could not find time to dash off a revolutionary *extempore* judgment in the *High Trees House* manner. But the price paid for such speed, and for Denning's solitary role, was that he alone had to make crucial findings of fact, and where necessary to apportion blame, without allowing those concerned any of the safeguards which attend a criminal or even a civil trial. He could not adopt the course followed by Sir Richard Scott when performing a somewhat similar role in the Arms to Iraq inquiry, of giving the parties notice of the adverse findings which he was minded to make against them, and allowing them full scope to defend themselves.

From the outset Denning was acutely conscious of the difficulties which he faced. When accepting the Prime Minister's invitation to undertake the inquiry he said:

> "It is a great responsibility with which you have entrusted me - and I feel very apprehensive of my ability to carry it out. All I can say is that I will do my best very faithfully to perform the task."[8]

In the event his report was generally favourable and reassuring about both the Security Service and the Government. Anticipating the criticisms that might be made, he introduced the report by explaining his approach to disputed matters of fact in these terms:

> "When the facts are clear beyond controversy, I will state them as objectively as I can, irrespective of the consequences to individuals: and I will draw any inference that is manifest from those facts. But when the facts are in issue, I must always remember the cardinal principle of justice - that no man is to be condemned on suspicion. There must be evidence which proves his guilt before he is pronounced to be so. I will therefore take the facts in his favour rather than do an injustice which is without remedy. For from my findings there is no appeal."[9]

---

[8] See Lord Denning, *The Due Process of Law* (Butterworths, 1980) at p.68.
[9] *Ibid* at p.71.

He added:

> "To those who in consequence will reproach me for 'whitewashing,' I would make this answer: while the public interest demands that the facts should be ascertained as completely as possible, there is a yet higher public interest to be considered, namely the interest of justice to the individual which overrides all other. At any rate, speaking as a judge, I put justice first."[10]

The report was well received by the public generally. An enormous number of copies was sold. This is, perhaps, hardly surprising because it makes very entertaining reading. But in addition most people were glad to be reassured and to have their confidence in the machinery of government restored. They trusted Denning's integrity. No-one could seriously suggest that he would be capable of a "whitewash."

Such criticisms as have been made of the report are of two kinds. The first was the criticism which Denning himself had been at pains to acknowledge and forestall, namely that an inquisitorial procedure, rapidly carried out, ran the risk of causing injustice to those criticised. The second was of the more general nature that whenever the government of the day asks a judge to carry out an inquiry into a politically sensitive subject, it compromises the independence of the judiciary. I would not, for my part, accept this second ground of criticism as a general proposition, still less in relation to the Profumo inquiry. Plainly the situation demanded an independent inquiry, and who better to carry it out than a senior and respected judge, noted for his independence of mind? No doubt those looking for a stick with which to beat the government were disappointed by his conclusions, but no-one in his right mind could have suspected Denning of reaching them in order to lend a hand to a government in trouble. In his *Landmarks in the Law*, written twenty years later, Tom described the Profumo inquiry as his most important case.[11] I agree with that, and if I may be allowed the comparison, I believe that the inquiry of my committee into the Standards of Conduct in Public Life was my most important case.

I, too, was subjected to the criticism that I was becoming more closely involved in party political matters than was seemly for a judge. In April, 1996 Sir Richard Scott and I were the joint target of an attack by *Living Marxism* under the headline "Judges Rule - the Law Lords Hammer the Tories - and democracy." I was impressed to see *Living Marxism* rushing to the defence of the Conservative Government - precisely similar

[10] *Ibid.*
[11] (Butterworths, 1984) at Part Thirteen.

criticisms had come from the extreme right wing - but I was not persuaded by the argument. My critics seemed to overlook the fact that I was chairman of a committee which included senior members of each of the three main political parties, and whose reports were all unanimous. Neither the government which appointed me, nor the opposition parties which supported my appointment, ever sought to influence me in any way. I found it an enormous help to be able to bring to the post of chairman the standing of a Law Lord, and my membership of the House of Lords provided invaluable access and accessibility to Westminster and Whitehall, but I never felt that my independence was in any way compromised. Nor, I am sure, did Sir Richard Scott. British judges have all sorts of faults, but I really do not believe that susceptibility to political influence is one of them. In some other countries it may take a brave judge to give a decision against the government of the day. In this marvellous country, all that happens if a judge gives a judgment against the government is that he gets rather a good press, and quite possibly promotion.

So the danger that I see to the appointment of judges to carry out inquiries is not the loss of judicial independence. The danger that I see is that it exposes the individual judge to a much wider range of attack than that to which judges carrying out their normal role are subject. Of course judges are always open to lay as well as to professional criticism if they pass sentences which seem much too lenient or much too severe, or if they make foolish or unnecessarily offensive remarks in the course of trials. That is a criticism of their performance in the job which they are trained and paid to do, and is perfectly proper and healthy in a free society. But a government inquiry may take the judge into perilous and uncharted waters. One has only to consider some of the subjects which judges have been asked to investigate to appreciate the near impossibility of the judge reaching a conclusion which will escape condemnation from one or more of the parties concerned. One thinks of Lord Widgery and the original "Bloody Sunday" inquiry, Lord Wilberforce and miners' pay, Lord Diplock and Lord Scarman on the Northern Irish troubles, Lord Scarman again on the Brixton Riots, the late Lord Taylor and subsequently Lord Justice Stuart-Smith on the Hillsborough tragedy, to name but a few. Increasingly, the judge concerned is likely to suffer intrusive examination of his personal life as well as of his public performance. Occasionally, the judge's report is rejected by the government. This happened to no lesser figures than Lord Devlin over his report on the Nyasaland Riots and Lord Radcliffe over his report on "D" notices. All or any of these factors may have the effect of damaging, even if only temporarily and unfairly, the reputation of the individual judge and thus reducing public confidence in the judiciary generally.

It is perhaps also worth mentioning the personal effect upon the judge himself and upon his family of attacks from the public and the media. Tom and I were relatively lucky in this respect, because both his inquiry into the Profumo affair and my committee's inquiry into Standards in Public Life enjoyed general public support. I have mentioned the type of criticism made of the Profumo inquiry (to which might be added Lord Hailsham's description of it - though not of Tom's performance - as "a ghastly error") but a more measured approach is to be found in the remarks of the Salmon Royal Commission on Tribunals and Inquiries in 1966 which said:

> "Lord Denning's report was generally accepted by the public. But that was only because of Lord Denning's rare qualities and high reputation. Even so, the public acceptance of the report may be regarded as a brilliant exception to what would normally occur when an inquiry is carried out under such conditions."

I, for my part, was at various times the target of a wigging from Sir Harry Wiggin, a thunderbolt from the Thunderer, a Philippic from Andrew Alexander in the *Daily Mail*, and an accusation by Sir Bernard Ingham of supporting the Labour Party, but I suffered little in the way of personal wounds. But three years of media scrutiny, albeit generally fair and friendly, was more than enough for me. I would find it intolerable as a permanent feature of my life.

It is also worth mentioning the burden which the appointment of judges to hold such inquiries places upon their colleagues and upon the administration of justice generally. For example, the establishment of Law Lords was raised from ten to twelve at the time when Lord Woolf was working on *Access to Justice*, and I had taken on my Committee chairmanship, but bearing in mind that the House of Lords normally sits as two judicial committees of five on each working day the regular absence of two members puts a strain on the remainder, all of whom have outside responsibilities of their own of one sort or another. The position has not improved. Lord Saville has barely sat in the Lords since his appointment, because he has been engaged upon the new "Bloody Sunday" inquiry, and will remain so engaged for at least another year. Lord Justice Phillips, who is to become a Law Lord in the place of Lord Lloyd in January, 1999 is expected to remain wholly committed to his B.S.E. inquiry until next summer at the earliest. Such appointments are an expensive use of judicial talent. If overdone - as many thought they were overdone in the case of Lord Radcliffe - they may diminish the quality of our judge-made law. And, of course, there is no shortage of distinguished men and women from

other walks of life who are eminently suited to undertake important inquiries in the public interest.

When all that is said, however, there will always be inquiries in which judicial qualities are particularly valuable. In these I have no doubt that Her Majesty's judges can and will continue to play their part, however distasteful and disagreeable the task may be. At the end of *What Next in the Law* Lord Denning said:

> "Someone must be trusted. Let it be the judges."[12]

It is up to the judges to shoulder the burden of that trust.

[12] (Butterworths, 1982) at p. 330.