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Denning: The Road to Justice

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THE ROAD TO JUSTICE. By *Sir Alfred Denning*. Toronto, Canada: Carswell Co. 1955. Pp. viii, 118. \$1.90.

In *The Road to Justice* Sir Alfred Denning has produced a highly readable little book, directed to the layman rather than the lawyer, in which he treats a theme of as great controversy as it is of importance in the homely, pragmatic manner which has always characterized the pronouncements of the greatest English judges. Avoiding abstract questions, the ends which justice is designed to achieve and the criteria by which it should be assessed, his thesis is to show the importance of individual men, the legal profession and the judiciary in particular, in securing justice, and how their sense of rightness and fair play has enabled justice to be done in a number of actual cases. It has long been recognized that the role of the judiciary is many times almost legislative. This book accepts that fact and points out one of its advantages—that with a profession with the highest standards the courts can be courts of justice as well as of law. Moreover, because of this legislative role of the judiciary, lawyers are bound to concern themselves with justice, and cannot shrug off responsibilities by claiming to have their hands tied by the law in cases involving manifest injustice.

The book is broadly divided into sections treating procedural and substantive aspects of justice. Under the former the rules of law are discussed which ensure that a fair trial shall be observed free of any kind of prejudice, and also the qualities necessary in the profession to ensure that these rules of procedure are not just empty, derisory formalities. This is the most interesting section of the book. It frankly recognizes that justice is not to be found in dry theory or the metaphysical conclusions of legal philosophers, but depends in the end on the human process in the courts, the extent to which *suam cuique tribuere* can become an actual fact and not merely a legislative platitude. Some interesting comparisons are made here between practice in the English courts and the canons of ethics of the

American Bar Association. Of necessity the discussion, fortified by a few particular examples, is rather short, but it is a discussion the importance of which in the general context of justice cannot be over-emphasized. Broad standards of integrity rapidly become meaningless unless continually fought for and tested. But there are no new standards; it is still the same original ones, the value and necessity of which must be ever appreciated anew, and from which the lawyer must always be wary that his conduct does not decline. In this section not only are the positive virtues needed in a lawyer enumerated, but the traditional charges are also met.

The section dealing with aspects of justice in the substantive area of the law brings together a number of varying subjects: the law relating to the press, freedom of contract, freedom of association, and the protections of the tort law against injury. The book was compiled from a series of lectures given in South Africa, Canada, and the United States, all countries with constitutions containing provisions for the safeguarding of civil liberties. One of the interests of this section lies in showing how civil liberties are protected in England by the ordinary law of the land, administered by watchful and constructive judges. The procedural protections dealt with in the first part of the book and the substantive protections of individual rights dealt with in this part afford a protection which, while not preserved constitutionally against infringement, offers a safeguard to the individual similar to that afforded by the Bill of Rights in the United States Constitution. In this respect the book is in effect an exegesis of a text of Dicey, who in discussing meanings he attaches to the expression "the rule of law" with reference to the English Constitution says, "We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution." Now we see in this book how this still remains true, and besides how closely its continuing validity depends on the integrity of those who administer the law.

The sections concerning the substantive area of the law are brief and must be read with the author's qualification in mind: "The task is not done as well as I could wish because of other calls on my time." But in places it is questionable whether the brevity is not conducive to misconceptions. The premise that law should be just is at the foundation of all legal thinking. But the manner of achievement of justice through law has led to more controversy, perhaps, than in any other field of thought. The notion of law is that certainty and predictability can be achieved by the enunciation of certain rules. The objection to this is that in some cases strict application of these rules will lead to injustice. On the other hand if the strict application of the law is relaxed to avoid injustice, then the

particular rule involved will no longer be applicable with certainty and its character will have become distorted. This will not be so, however, if the cases where justice requires a departure from the normal rule can be distinguished by certain criteria. But what are these criteria whereby the cases where the rule can be relaxed in favor of justice can be determined? This is the basic question, the answer to which is so controverted.

The argument of this book is that justice is administrable by the courts as well as the legislature; the author then defines his concept of justice, and finally shows how it is, or should be, applied in a certain number of actual cases. The definition of justice given is the following: "It is what the right-minded members of the community—those who have the right spirit within them—believe to be fair." It is only fair to add that this is preceded by the qualification: "That question (what is justice) has been asked by many men far wiser than you or me and no one has yet found a satisfactory answer." It may be submitted that it is because of this latter point that predictable rules of law, working justice on the whole, have been preferred to the arbitrary sympathies of judges in admittedly hard cases. But in all events the suggested definition does no more than amplify the first thesis of the book that the courts are places of justice as well as law. It completely fails to establish any helpful criteria, other than that of counting heads, and making sure that they are the right heads at that.

In a book of this brevity the absence of a prolonged and arid discussion of the nature of justice would be forgiven, in fact even praised, if the remainder, that part dealing with practical cases, gave some sort of solution in itself. The area devoted to procedure shows how the pursuit of certain maxims and ideals can and has achieved justice even in spite of considerable opposition. But in the area of the substantive law much of the discussion seems deficient. This is not to suggest that many of the reforms and principles that are urged may not be highly desirable. What is rather questioned is whether their character is such that they should be introduced into the law through the courts by a more arbitrary judicial treatment of precedent than that to which we have been accustomed, and that in the name of justice as well. How are we to view proposals for reform to be worked out by the judiciary in view of the strong opposing arguments in each case? The truth is that there is what we may call legal justice and what we may call social justice. To incorporate the latter into the former would be a manifest intrusion into the legislative function. It would be the equivalent of incorporating Herbert Spencer's "Social Statics" into the American Constitution, which Holmes so trenchantly decried. Because some questions of justice are reserved for the legislature, it does not mean that the courts are abdicating their function. The evolution of predictable rules is as important a function as the modification of those rules to suit new needs. The pity is that the author has weakened his case by seeking to make it appear too strong. The valuable contribution of this book lies in its disclosure of human interests which, while not

automatically worthy of protection in the name of justice, do deserve strong consideration. But if it is in the course of litigation in the courts that these interests appear, it is in the legislature that the means of protecting them must be worked out. And no one will deny that the interests discussed here are important, and the case for them is well and succinctly put. It is a challenging book, and raises many questions. The use of justice as a frame of reference is a little misleading. Holmes wrote to Wu, "I am tickled by the 'healthy sense of justice' business. I have said to my brethren many times that I hate justice, which means that I know that if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms." Sir Alfred Denning is not shirking thinking in legal terms; his contribution to English law already disproves that. But the question is whether the justice he asks for should be achieved through the courts. It is submitted that it would be against the traditional divisions of English Government for it to be done so. But while the manner advocated is criticized, the substance of the plea is good.

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