In re Vandervell: The Jurisprudential Aspects

For more than a quarter of a century Lord Denning has been delivering judgments of revolutionary impact on the common law world. At times his views have prevailed and at other times he has suffered monumental rebuffs at the hands of fellow judges. Often the quality of his decisions has been questioned and, indeed, a quick reading of a random selection of his judgments could give one the impression of inconsistency, haste, and even capriciousness. A careful reading would (it is submitted) reveal a "golden thread" and show Lord Denning not only as a thoughtful judge but as the most important practical exponent of a major school of jurisprudence.

It is fortunate that Lord Denning at times explains his approach. One of the clearest explanations is very recent: *In re Vandervell's Trusts (No. 2)*.[1] It would be unwise to view any single judgment as Lord Denning's "testament", but so lucid and frank is this new *Vandervell* case that it is certain to be quoted for many years to come. It certainly merits the attention of any lawyer interested in jurisprudence.

The occasion for Lord Denning's judgment was a "trusts" case. The "trusts" aspect of it is not relevant to this discussion, save to note that Lord Denning could have decided in the same way on purely technical grounds. In an earlier case,[2] Mr Vandervell had attempted to create a trust without entirely disposing of the equitable interest. The House of Lords held that there was a resulting trust for him and taxed him on it. The present case resulted from his disposal of the equitable interest that had previously resulted to him without the formalities prescribed by section 53 of the *Law of Property Act*, 1925.[3]

The Court had to decide whether the resulting trust was a beneficial interest subject to section 53 of the *Law of Property Act*, 1925, or merely a beneficial interest of last resort capable of being displaced by any reasonable and clear disposition. Lord Denning opted for the second alternative and this was certainly a reasonable decision. Moreover, other technical grounds were mentioned by Lord

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[1] [1974] 3 W.L.R. 256 (C.A.).
[2] *Vandervell Trustees Ltd.* v. *White* [1970] 3 All E.R. 16 (H.L.).
[3] 15 & 16 Geo. V, c.20, s.53 (U.K.).

Denning in support of Mr Vandevell's trusts.[4] While this would have sufficed to dispose of the matter, Lord Denning chose to open his hand. Speaking of the maxim "hard cases make bad law", he said:

> But it is a maxim which is quite misleading. It should be deleted from our vocabulary. It comes to this: "Unjust decisions make good law": whereas they do nothing of the kind. Every unjust decision is a reproach to the law or to the judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it.[5]

That Lord Denning meant "equity" and not "Equity" is obvious from his sarcasm a few paragraphs before:

> Even a Court of Equity would not allow him to do anything so inequitable and unjust.

Thus, though law and justice are distinct concepts, Lord Denning presents them as inextricably linked. Law implies justice and has a built-in mechanism to provide it.

The argument that will inevitably be raised against Lord Denning is that of certainty. If *In re Vandervell (No. 2)* is accepted, then (it could be said) no man will know his rights without a protracted and costly lawsuit. But to this one could answer that this certainty is a myth. If it were not, litigation would be a rare phenomenon. In particular, where men have what they feel to be "just" causes, they oftentimes refuse to acquiesce in their lawyers' pessimistic "technical" opinions and persist in the hope that the courts will do what is right.

A more serious objection could be raised on the basis of "fact". A critic of Lord Denning could claim that (as Lord Denning very well knows) courts do render "unjust" decisions and do so not from spite or ignorance but in recognition of established legal "rules" that force them to those conclusions. Here, the most significant dispute in today's jurisprudence is reduced to practical terms.

A positivist, whether of the school of Kelsen or Hart, would insist that (save for very limited undecided issues) there is an ascertainable body of rules or norms. He would, furthermore, add that it is the judge's duty to ascertain and apply these rules or norms. There may be times when ethical duties demand a different decision of the judge, but that is outside the scope of law, lawyers, and legal philosophers.

A natural lawyer of a Thomistic or Blackstonian bent would be tempted by the opposite conclusion and would propose that there are "laws above the law" which command a judge to do "ultimate

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[4] *E.g., Milroy* v. *Lord* (1862) 4 De G.F. & J. 264; equitable estopped.
[5] *Supra,* f.n.1, 264.

justice". The difficulties with this view are its vagueness, the impossibility of agreement on just how "ultimate" the application of the super-law is to be, and the lack of a modern, secular basis on which to place it. One cannot deny the immediate attractiveness of pure natural law, but not all are prepared to make the necessary leap of faith.

Lord Denning may be prepared to make the leap. If he is, he cannot be criticized, for it is a perfectly justifiable thing to do. However, a new theory has appeared and it promises to be a most powerful vindication of Lord Denning's approach and a convincing philosophical answer to positivism without requiring too breathtaking a leap.

In 1967 Ronald Dworkin, then seemingly a positivist, began to chip away at Professor Hart's impressive positivist edifice composed of a brickwork of rules with an occasional gap left for judicial discretion. Dworkin introduced a new element into the framework and called it a "principle".[6] According to the theory, judges never had unfettered discretion. Their duty was to decide according to undefined principles which included justice, fairness and other similar concepts.

At first, this was viewed as a minor amendment to the positivist thesis, but Dworkin's later article[7] put an end to such explanations. The principle superseded rules. Dworkin expressed his view as follows:

> Indeed, I want to oppose the idea that "the law" is a fixed set of standards of any sort. My point was rather that an accurate summary of the considerations lawyers must take into account, in deciding a particular issue of legal rights and duties, would include propositions having the form and force of principles... .[8]

He approved of reference by judges to "moral principles that underlie the community's institutions and laws, in the sense that these principles would figure in a sound theory of law...".[9] Ultimately, each judge's duty was to the basic principles of his civilization and to fairness among mankind. One could probably accept this in an attenuated form without adopting the "natural law" implications, but this would dilute the theory unnecessarily. Dworkin illustrated a "real" natural law, showing how certain principles are (and must be) applied in real courts. He avoided the traditional natural law pitfall of postulation followed by a theoretical exegesis while manag-

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[6] Dworkin, *The Model of Rules* (1967-8) 35 U. Chi. L. Rev. 14.
[7] Dworkin, *Social Rules and Legal Theory* (1972) 81 Yale L.J. 855.
[8] *Ibid.*, 886.
[9] *Ibid.*, 890.

ing to satisfy and explain man's intuitive insight that law is, to a large extent, just and fair.

Lord Denning's decision in *In re Vandervell (No. 2)* is the practical illustration of the "principle" at work. His Lordship does not ask himself theoretically, "What is the law?". That is a question for a sociologist, an historian or a "legal prediction" computer. Lord Denning asks, "What is *my* duty in this case?", and finds that his duty is to apply certain rules within a broad framework of principles which include the rules of justice and equity.

Should Professor Dworkin's views be put into practice and Lord Denning's practices be generally accepted? It is submitted that they should be.

Philosophically, the positivist attitude appears to be an attempt to steer a middle course between pure realism (*i.e.*, observing the law as a "scientist") and some sort of acceptance of our intuitive notions of justice. It often depends on the isolation of rules and norms and on the imposition of a "duty" to obey them. But the scientifically observable "laws" need not be correlated to any judicial duty. To note that most judges tend to behave in a particular way is very different from saying that a given judge has a duty to behave in that way. Therein lies the weakness of much positivist thought.

Another familiar positivist assumption is a "closed system", a "game of law". There are rules of the game and these must be obeyed. Dworkin has argued convincingly that law (as life) is not a game. One can try to fit in rules by scientific observation, but to declare them binding is to make a leap of faith more radical by far than that required by the old "natural law".

Quite apart from philosophical questions, a Denning view of Judgeship appears most desirable. Man has an intuitive notion of justice and both the courts and the lawyers have, over the centuries, acquired an unsavoury reputation for quibbling over technicalities which frustrate justice. If respect for law is to increase in our rather troubled times, then man's natural quest for justice must be accepted in our courts. *In re Vandervell's Trusts (No.2)* welcomes it; it is to be hoped that all courts follow Lord Denning's example.

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