

... It seems to me that in considering whether they are acting unreasonably or not there are many considerations to be borne in mind besides those expressly mentioned by the minister. There is the mandate itself which the council believe they have obtained from the electorate.

... All things considered, I do not find any evidence on which the minister could declare himself satisfied that they had acted or were proposing to act unreasonably.'

The Lord in question was Lord Denning. He wasn't delivering judgement on the GLC councillors this time, but on the Tameside councillors, whom you may remember. They were the newly elected Tories who were trying to halt their Labour predecessors' move to comprehensive education; the Secretary of State for Education had deemed their conduct unreasonable and ordered them to get on with the changeover; the appeal courts, Denning in the van, held that no minister could deem such conduct unreasonable.

Consistency has never been one of Denning's failings. The Clay Cross councillors, whom you may also remember, had in 1974 pointed out to Denning that *they* had been elected on a manifesto pledging no rent increases. Manifesto indeed, said Denning:

'The councillors made this excuse: they claimed that they had been elected mainly on their hous-

LORD DENNING

And the Lord said:

'... The new council — that is, the local authority — rely on the result of the May election. They say that the issue was put plainly before the electorate. The new council consider that they have a mandate for postponing the old council's proposals and that they are morally bound to honour that mandate if they can legitimately do so.

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ing policies and had pledged not to carry out any measures such as were contained in the Act. They considered therefore, that they had a clear moral obligation to carry out their pledges.

... To my mind their plain obligation, moral as well as legal, was to carry out the duties imposed on them by law. They do not escape this obligation by saying that they were elected for the purpose — by electors to whom they gave false pledges — pledges which they knew or ought to have known they could not fulfil.

The principal virtue which the English legal system has traditionally boasted is its consistency. A system of binding precedent requires the courts to apply identical principles of law to all cases without regard to the consequences. Anatole France long ago pointed out one aspect of the principle in a class-divided society:

'The law in its impartial majesty forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal bread.'

Denning is obsessed with its obverse — that equality before the law implies equal treatment for all those who claim their rights, including students, squatters, prisoners, immigrants, trade unionists, socialists ... in fact the whole army of subversives who invade the secure world of the good and godly as the wild-wooders invaded Toad Hall. In our generation it is Denning, with a few stalwart yeomen at his back, who has taken it on himself to drive them from the seat of justice.

In order to overturn a principle as fundamental as the law of precedent, it has of course been necessary to invent a counter-principle. Denning himself puts it this way:

'Whenever there is a choice, choose the meaning which accords with reason and justice.'

Very fair, if you happen to share Denning's view of what is reasonable and just. But Denning's opinions on the questions which come into his court have been more and more openly displayed in recent years as illiberal, authoritarian, racist and reactionary.

The problem for socialists is that most of what Denning says about the system of precedent is true:

'The principles of law laid down by the judges in the 19th century ... are not suited to the social necessities and social opinion of the 20th century. They should be moulded and shaped to meet the needs and opinions of today.'

Where the ways part is when it comes to deciding what today's needs and opinions are. Denning, naturally, thinks they are his and those of his class. Increasing numbers of citizens beg to differ, as case by case it becomes more plain that Denning's reputation as a liberal and a friend of the oppressed is a stalking horse for some of the most benighted views and attitudes to be found in modern Britain.

Denning has been on the bench now for well over 30 years. In his first spell in the Court of



Appeal during the 1950s he was responsible for some impressive breakthroughs in the law, bringing a number of aspects of it into line with what any rational person would regard as the requirements of justice. It is during the 1960s and 1970s that his judgments have come to sound more and more like *Daily Telegraph* leaders and to read more and more like *Sun* editorials, as his appeals for 'reason and justice' are broadcast to the public from the bench. Lawyers, who by and large consider him now to be an embarrassment, generally put it down to the obduracy of old age. But a look back will reveal that Denning's social and political barometer has been functioning admirably over the years, and his notions of reason and justice have become increasingly repressive as the needle has moved over to 'stormy'. In the 1960s, for instance, in the wake of Donovan, he was prepared to temper union-bashing with a serious attempt to incorporate strikes within the law (in order to control them, to be sure). Since the rejection of 'In Place of Strife' and the opposition to Heath's Industrial Relations Act, he has seen that the chips are down: for ten years now Denning's judgments and writings have openly crusaded both against trade unions and against the legislation passed to protect them from the judges.

In that same period, litigation to assert or protect certain basic rights for squatters, students, immigrants and prisoners has time after time foundered on Denning's unconcealed bigotry. A sort of flexi-law has developed, a process of reasoning which, instead of going down the traditional road from facts to law to result, starts from the desired result and proceeds via a suitably highlighted version of the facts to whatever proposition of law, old or new, is necessary to sustain the foregone conclusion.

Denning continues to set the labour movement a series of short term problems, many of them acute but all of them soluble by constitutional means. It is worth pondering, also, whether he does not pose some troubling long term problems. The judges administering the law of a socialist society might well be expected to be handed a minimum of written law and left

to get on with the job of deciding each case as reason and justice demanded. Denning's reign in the Court of Appeal raises some nagging doubts. If there is to be no precedent and little fixed law, the judge's own opinion of the right result becomes unassailable. Hand it to a jury and, however popular the decision, it will be even less regulated by the law. One of the most taxing jobs of a socialist society is going to be the translation of today's half-empty slogan of equality before the law into a reality. Without principle and consistency, can there be such equality? And is a card-carrying Comrade Denning necessarily going to be the right way to achieve it?

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The Polish Crisis

The declaration of martial law in Poland on December 13 dashed the hopes for a historic compromise discussed in this issue in the article on Poland, which went to press on December 1. The analysis of Poland's political and economic crisis made in it still retains its validity. The authoritarian scenario outlined there has now come about with power passing into the hands of a Military Council. With the introduction of draconian penalties for strikers, the suppression of trade union rights and activities, and the imprisonment without charge of a considerable number of Solidarity leaders, the process of democratisation initiated by the workers' struggles of August 1980 has been rolled back.

The escalation of social tensions immediately preceding this was ushered in by the decision of the PUWP leadership to introduce emergency legislation including a temporary ban on strikes. Faced with the loss of gains granted in the Gdansk Agreement, the Solidarity leadership responded with a policy of confrontation, threatening to organise a national stoppage and a national referendum about establishing a provisional government.

Poland, tragically, has now entered a new and dangerous stage of military rule, the consequences of which will become clearer in the following days and weeks, and which will require analysis in a subsequent issue of *Marxism Today*.

Monty Johnstone, December 14