COMMENT

THE SUCCESSOR BOOKS TO "THE PROVINCE AND FUNCTION OF LAW"

LAWYERS' REASONINGS: SOME EXTRA-JUDICIAL REFLECTIONS

When I was asked to review Julius Stone's *Legal System and Lawyers' Reasonings*[1] published in 1965, I regretfully had to decline. Professional reviewers no doubt often review books about subjects of which they have limited knowledge; but in a learned review that is not good enough. I have an acquaintance with the administration of our system of law in New South Wales, but what little I know of analytical jurisprudence, of Austin and particularly of Kelsen and Hohfeld, of Kantorowicz and Radbruch, I learned largely from this book's predecessor, *The Province and Function of Law*, and from its author's lectures on Jurisprudence at the Sydney University Law School.

However, it was then suggested to me that if I could not review the work I might still like to comment upon it. To this I willingly agreed, because it is in this first part of Professor Stone's trilogy that there appear, now in more elaborate formulation, those chapters on the relation of law to logic and on what the author has named "the categories of illusory reference" which have either intrigued or angered a generation of lawyers.

For it is interesting to reflect that *The Province and Function of Law* appeared first in 1946. Professor Rupert Cross has recently remarked that,[2] the Editor of the *Law Quarterly Review* could write in 1948: "The doctrine of precedent is more rigid today then ever before."[3] Yet at the same time as Professor Cross made that remark in 1966, he had to observe on the great difficulties of explaining the *modus operandi* of English courts in terms of that doctrine. And one of his conclusions was that one of the ways of understanding these difficulties would be to accept the thesis of Stone's 1946 work, now elaborated in *Legal System and Lawyers' Reasonings*, that the search for the single *ratio decidendi* of a case is a search for an illusory category, for something that cannot be found. Then last year, exactly twenty years from the date of the *Province and Function of Law*, came the announcement by the Law Lords in relation to decisions of the House of Lords (reported in *The Times* of 27th July, 1966) which in so many terms recognises those elements in judicial decision which go beyond logical deduction from existing rules and which involve judicial choice in the light of factors of justice or social need where rules of deductive logic give no single answer. In such a climate it is perhaps an understatement to say that the doctrine of precedent appears to have become rather less rigid.

Thus has the insight of men such as Holmes and Cardozo come to its fruition, and in the particular part of the subject book to which I turn that insight is demonstrated and elaborated. The real life of the law is not logic

[1] Sydney, Maitland Publications Pty. Ltd., 1964, xxiv and 454 pp. ($8.40 in Australia).
[2] (1948) 82 *L.Q.R.* 203.
[3] (1966) 64 *L.Q.R.* 41.

but is experience. The law develops not by deductive logic alone but largely from judicial choices. Such choices are found in situations where the legal result is determined not by logic operating on an existing rule of law as its premise. They are rather situations where there is a choice as premise of a proposition that may not be law before; or where there is choice between two or more legal rules, either of which would cover the facts, but each of which would yield a different result.

That even now there is some hint of heresy in this is demonstrated to me by the fact that I hasten to add that this approach does not at all deny the place of logic in the law. It only denies that *development in the law* as a result of judicial decision comes from logical deduction from existing legal propositions as premises to the exclusion of other processes of reasoning and thought. There is still a great number of cases where, once the facts are established, the legal rule to be applied is clear. The rule is applied to those facts by a logical process. But it is in the remaining number of cases that the law develops and it is here that judicial decision must of necessity leave the area of strict logical operation within *existing* law. That is not to say that judicial decision, when it develops the law, leaves the area of sound reasoning. Reasoning by logic is but one of the forms of reasoning which is acceptable to the reasoning man. The position is not made any easier by the common misuse of the word "illogical" as a pejorative to express disagreement with the other man's arguments. If one's conclusion is illogical in that sense of the word then *ex hypothesi* one's conclusion is unconvincing to the person who so describes it. It has nothing to do with the real logic of the argument.

I wish now to go back to what I said earlier about the change of climate between 1946 and today. I would suggest that the change between then and now is more apparent than real and that the real change has been in the willingness, first in the United States, then in England but hardly yet in Australia, to recognise the forces which operate and which have always operated in judicial decision. For this change in recognition writers such as Professor Stone must be regarded as largely responsible. Their work is an outstanding example of the influence which the academic lawyer over a period of time exerts not only in respect of particular aspects of law but also in respect of the broad approach to the judicial task. The effect of recent trends, culminating in the House of Lords' formulation, is to give franker recognition to the components involved in the appellate judicial process but not necessarily to have changed the current or direction which the course of decision has actually taken. The result may be an apparent affront to the doctrine of *stare decisis* but the affront is apparent only. In the future the force of previous decisions may be as great as or even greater than it has been in the past. If Professor Stone's thesis and proofs are accepted — and how upon the whole can they be disregarded? — then for centuries judges have exercised a creative choice in the making of decisions upon novel situations and they have exercised that choice upon the basis of factors of justice and social need rather than by any process of strict logical reasoning.

Now that this is coming to be openly recognised by the courts themselves what can be expected is not less certainty in the law but more certainty. My reason for saying this is that now the actual elements which go into the creative choice may be given direct expression and thereby the true scope of the decision may be able to be directly observed. Truly there may be less lip service to the past but that will mean a clearer approach to the future. There may be less of that pseudo-logical distinguishing of earlier cases, which the layman calls pettifogging. There may be a frank examination of the social factors involved. From that examination it may appear how far the earlier principle enunciated in the light of the factors really involved is applicable

to the new situation. Again I find it necessary to repeat that the principle once enunciated is applicable to the same situation whenever that situation re-occurs. That is the doctrine of precedent and that is where the result may be able to be reached in the particular case by a logical process. The rule has already been established and in such a case no new development of the law is involved. It is true that there is here an over-simplification in that an element of selection is involved in the determination that the existing rule is wholly applicable, but broadly what I have stated seems correct. How much better it would be if it were the bounden duty of every judge to analyse the factors of choice involved in each developmental decision and to describe as best he can the processes by which he makes the choice.

In a way it may be said that it is the purpose and effect of much of Professor Stone's work in Jurisprudence to take the magic out of law. Whether or not his conclusions are compelling or persuasive to any particular lawyer depends largely upon the importance which that lawyer consciously or unconsciously places upon the element of magic, the element of mystery and sometimes of revelation. At first sight the way in which the common law has developed, whilst at the same time it has been asserted that the progression has been based on logic, has an element of magic about it. There has been a magical alchemy. Factors compelling judicial choice have in the expression of reasons given place to language which would suggest a certain logical inevitability about the conclusion. In the way of true magicians the secrets were kept well hidden. This may not be fair because generally that ultimate of magic would be reached where the magician would be unaware that his alchemy had a magical quality about it. The magician would be caught in the spell of his own magic.

That the modern man should not be content to accept the old magic without digging, picking, pricking and probing is symptomatic of the present age. We are content to accept so little as self evident. Our behaviour and its motivation has for sixty years and more been the subject of a wealth of close and detailed scientific study so that the mind of man, although it is still a mystery, has been illuminated in many ways to all those students except the ones who have rigidly declined the illumination. Recently in the United States a psychiatrist, a lecturer in psychology at the University of California Medical School, wrote a book which he called *Games People Play*. Three thousand copies were printed and before long it became clear that 303,000 copies would not suffice to meet the public demand for the book. Why? No doubt because the public thereby got a passing insight into themselves — they recognised themselves as the players of the games which the writer set out to describe. The thesis of *Games People Play* is that if people can learn to recognise the games which they unconsciously play in relation to themselves and others they will attain a true control over their personal and social behaviour. They will attain a capacity for autonomy, for freedom of choice subject only to their own will, and they will attain these through a development of an awareness of themselves and the world around them and a spontaneity in themselves. They will (the thesis runs) achieve liberation from the compulsive need to play games in favour of a capacity for conscious choice of the wise or right course of behaviour.

It seems to me that a deal of Professor Stone's *Legal System and Lawyers' Reasoning* is devoted to studying the games which lawyers, especially appellate judges, play. The conclusion which is perhaps implicit, but which I wish to make explicit in different terms, is this. If only lawyers became accustomed to recognising and analysing the games which they do play, then they in turn might be freed from any compulsion to play them. This might be reflected, in their decision-making, by a readier capacity to recognise the degree of freedom to choose among alternatives which they often have. As they thus

attained an awareness of what they are doing, and how they are doing it, some of the games might even become unnecessary.

All these questions on the nature of the judicial process are far from being academic, even if it be assumed that the study of any aspect of law can be so described to discerning persons. A most important conclusion from this work is that in those cases where choices are being made the reasons for choice should emerge as searchingly as the imperfect human mind working under imperfect conditions, can achieve. If the search leads into areas which require acknowledgment of the impact of general notions of justice and social needs that, too, should be frankly stated and elaborated. I do not think a change in the manner of judicial expression, moving away from mere formal reliance on attempted syllogism or "analogy" from existing rules of law, would result in less certainty of the law. In my view it would result in greater certainty. Linguistic refinement of concept (much less mere verbalisation) is no substitute for social reality; it can, indeed, result in fineness of distinction which makes it ever more difficult to predict a course of judicial decision. On the other hand, an overtly imprecise concept can yield a degree of certainty in application, provided the reasons for choice are also made as overt as we can. The test of reasonableness and unreasonableness may often yield more certainty than many rules of law couched in terms of apparent precision and decisiveness.

In the law of negligence the uncertain test of reasonableness gives much more predictability of outcome for a particular case than can be found when such a prediction must be based on some rules of law, in the conditions to which the games which lawyers play have reduced these rules. I would mention the putative rules relating to *res ipsa loquitur* and "the last opportunity", not to speak of some aspects of the interrelations of "duty", "negligence", "remoteness" and "foreseeability" in the same branch of law. On the uncertainty which has resulted from the attempt to express these developments in terms of formal reasoning and logical deduction from pre-existing propositions of law, one can only conclude that the less said the better.

The law which seeks certainty in reasoning, which attends to verbal distinction while ignoring or affecting to ignore social reality, becomes truly uncertain in the sense that it becomes increasingly impossible to predict the course which decisions are likely to take. It is only as the area of choice becomes recognised and the factors operating to determine that choice are also then recognised, that one can feel any assurance upon the likely course of legal decision. This may not have been of such great importance in a society where the law-makers constituted by and large a single socially conscious group, as it surely is in the pluralist society which we now have.

Professor Stone admits, in large measure, the place of logic in legal reasoning; but he reaffirms his conviction that legal reasoning in appellate decision-making cannot and should not and never has been limited to the application of formal logic to existing legal propositions. It may be said that this is an expression of a view which can be generally accepted by lawyers, and it is true that the frequent references to the empiricism of English law lend support to a view that the place of logic has never been exaggerated. Such an approach conceals the real difficulty. If courts' reasoning cannot be reduced into logical form then the reasons lie outside logic. If the decisive reasons for legal result lie outside formal logic, and yet an attempt is made to explain them merely in terms of formal logic, there will be rationalisation. That the law is not logical is often readily admitted. What is seldom done is to say what is the basis of legal reasoning if it is not logical, or to identify precisely the non-logic elements in the legal reasoning. If reasoning not strictly logical is presented in language as if it were merely logical then the reasoning of the judgment can be torn to shreds by any formal

philosopher even if he has no knowledge of the law. Indeed it is probably true to say that the lawyer is not generally trained in logical reasoning in the strict sense. His method of reasoning is traditionally schizoid. It is often a glorification of rationalisation.

One who in his private affairs cannot think clearly, but reaches his conclusions from a motivation or by a process of reasoning at variance not only with his professed motivation, but also with what he believes his motivation or process of reasoning to be, may receive sympathy and understanding. He does not receive our approval or praise (unless indeed we are in similar case and our rationalisation is identical with his). A lawyer who frames his reasoning as if his conclusion is logically compelled, when its motivations or processes are finally uncontrolled by logic, is indulging in rationalisation in this less worthy sense. I do not see why this should deserve any more praise than such rationalisation by an individual in his private affairs.

In judicial decision a purported reliance on mere logical argument from existing legal rules in a situation which really compels choice, is often an escape from the somewhat awful responsibility of interpreting the community to itself, a responsibility which judges in our own system of law have always had. The logical framework is a retreat into symbolism or even ritual, and the need for this retreat must not be underestimated in any objective study of the judicial process.

Upon the subject of judicial choice an example, which is at the same time both simple and profound, is that referred to by Professor Stone at page 282 of his work, the judgment of Sir Owen Dixon in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales (No. 1)*.[4] May I respectfully be permitted to say that Sir Owen combined in his judgments a profundity in the recognition of the social needs and factors involved in any particular case with a great capacity to analyse the past course of the case law upon any particular subject matter. The one element in his judgments without the other would have made him much less great as a lawyer. Constantly, however, in his addresses and extra-judicial writings he sought to apply a brake or curb on any tendency of courts to allow a regard for social considerations to outweigh what he accepted as a proper regard for the course of past decision. There is an ambivalence in the writings of Sir Owen Dixon which has been well described by Mr. A. R. Blackshield in his review of Sir Owen's collection of writings, *Jesting Pilate*.[5] This situation makes all the more interesting the approach of Dixon, C.J. in *Hughes & Vale (No. 1)*. Consistently for over twenty years he had, dissenting, expressed the view that the State Transport Acts contravened Section 92. In *McCarter* v. *Brodie*[6] he had joined the minority and had reiterated his view that the Acts were invalid. In *Hughes & Vale (No. 1)* the question again came before the High Court and its different constitution resulted in three judges apart from the Chief Justice affirming the validity of the legislation and three judges determining that it offended against Section 92. Dixon, C.J. therefore had the deciding voice. On the one hand he might adhere to the views which he had expressed time and again in the cases over the previous twenty years. On the other hand, however, there was the principle of *stare decisis*, the application of which would lead him to follow the decision of the High Court in *McCarter* v. *Brodie*.

This situation exemplifies in a rather simple way the nature of the judicial choice which Professor Stone insists upon throughout those chapters in his book on which I have here particularly reflected. Dixon, C.J. chose to apply the doctrine of *stare decisis* and thereby to reach a different end

[4] (1953) 87 C.L.R. 49.
[5] *The Sydney Morning Herald*, 15th March, 1966.
[6] (1950) 80 C.L.R. 432.

result from that which he had reached in the earlier cases. I do not myself believe that such a choice could have been made in what might be described as a legal vacuum. I think that it is inevitable in such a situation of choice that a judge will have regard to many factors which cannot be brought within the strict field of logical deduction from existing legal rules, including the rules of precedent, whether or not these are expressed in the judgment. The application of the principle of *stare decisis* did not inevitably lead to the conclusion that the High Court should adhere to its majority decision in *McCarter* v. *Brodie* since that Court is not bound by its previous decisions. On the other hand that principle was one which was quite appropriate to be applied in the circumstances. Against its application was a strong conviction of the invalidity of the law which had been expressed over the years and which was reiterated in the judgment in *Hughes & Vale (No. 1)*. I will not presume to suggest the many considerations which may have operated upon the mind of Dixon, C.J. in making the choice in that case. I refer to it only as an example of the choice which had to be made, and which must constantly be made, though usually in less clear cut form.

It has been my experience when discussing the nature of the judicial process with those who are inclined to think that the application of logic to legal rules is pivotal that they regard those persons who propound a contrary view as wishing to cast aside all restraint and all guide lines in judicial decision. Nothing could be further from the truth. It is true that some individuals have at times propounded views which would seem to go to such extremes. A reading of Professor Stone's work, however, makes it clear that the "steadying factors" as he calls them (and as he approves of them) are strong and various. At page 287 after quoting Lord Wright's words that a good judge is one who is the master, not the slave of the cases, Professor Stone writes, "And conversely, as Holmes once wrote: 'Philosophising about the law does not amount to much until one has soaked in the details'. What this means is that choice must be made from among alternatives (though these may be very wide) arising within the authoritative materials of the law." The authoritative materials of the law are many and varied and they provide the steadying factors in the choice-making which is a constant function of the appeal courts.

There is an interesting discussion of these factors in reference to Karl Llewellyn's "The Common Law Tradition". It is worth referring to some of them and I quote from Professor Stone's book at pages 321-322:

> Karl Llewellyn provided in his *The Common Law Tradition* (1960), shortly before his lamented death, an impressive documentation of the thesis that where formal logic ceases to be compelling, judicial decision need not become irrational and uncontrolled. Characterising as the "Grand Style" or the "Grand Manner" what has here been called "the creative judicial approach", he insists (as we have done) that judicial reasoning even when it seeks just and socially desirable results, may be cogent even when it is not logically compelled. . . .
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> He sees it, above all, as "the application of reason and sense to spotting the significant type-situation and diagnosing the sound and fair answer to the type-problem" . . . because this leads to "unceasing judicial review of prior judicial decisions on the side of rule, tool, and technique", it leads to "good" and "flexible" rules. And the recognition of the duty and freedom to do "justice *with* the rules but *within* both them and their whole temper" leaves scope for both initiative and sense of responsibility of the judge. . . .
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> We are, indeed, taken a little further than this, by linking such notions as used by Llewellyn with what he termed "steadying factors" in appellate courts, which help us to predict their decisions. With patience

and insight going beyond what has been previously bestowed on the matter, Llewellyn was able to list fourteen "clusters" of such operating factors. For instance, he says, the members of appellate courts are all law-trained and therefore law-conditioned. They *see* things and significances "through law spectacles"; and they *think* like lawyers. Further, they are conditioned not merely to law, but to the particular legal tradition of their own country. Again, it is accepted that "the context for seeing and discussing the question to be decided is to be set by and in a body of legal doctrine", including not only its rules but its "concepts, ideals, tendencies and pervading principles"; and decision strives for consonance "with the language and also with the spirit of some part of that body of doctrine". Moreover, "the doctrinal materials are properly to be worked with only by way of a limited number of recognised correct techniques"—"recognised" both consciously and unconsciously. And overall there is "an ingrained deep-felt need, duty, and responsibility for bringing out a result which is just". At least these four if Llewellyn's fourteen "steadying" factors are relevant not only for *predicting* judicial reasoning (for which he offered them) but also as a guide to wisdom in judgment, even when they do not compel.

If these are among the factors which govern and regulate the constant choices between alternative courses which are being made in appellate courts then, indeed, the ground is not so unsure as is often feared. At the very least it must be rather surer than efforts to find the path for legal development by *mere* operations of logic on existing legal rules.

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HUMAN LAW AND HUMAN JUSTICE[1]

Julius Stone's new work on law and justice is an elaboration of 176 pages in his widely acclaimed *The Province and Function of the Law*. This magistral work has, since its appearance in 1946, achieved a solid and permanent place among the jurisprudential masterworks of this century. Supported by an imposing learnedness, as was its predecessor, the present work constitutes, in the author's intention, the second in a trilogy of which the third, *Social Dimensions of Law and Justice* is described as seeking "to illuminate, from the standpoint of the social sciences . . . the full complexity of problems which confront modern democratic governments in seeking to use law as an instrument of social control orientated (sic) towards the achievement of justice . . ."; in short, a large part of the field of political science, theory and philosophy. The present book by contrast is concerned with what this writer prefers to call "philosophy of law". Indeed, the book follows a pattern

* The Honourable Mr. Justice Jacobs is a Judge of Appeal of the Supreme Court of New South Wales.

[1] Sydney, Maitland Publications Pty. Ltd., 1965, xxiii and 415 pp. ($8.00 in Australia). The work is provided with a bibliographical index, an index of names and one of subjects (called a general index and very well done), as well as a long list of abbreviations. There is some divergence between this list and the bibliographical index; for example, the writer's *The Philosophy of Law in Historical Perspective* is listed in the former, but does not occur in the latter, so that the latter cannot be relied upon for tracing all the references to a particular author; it is, however, a small defect in comparison to the great help which these several indexes provide. That help is further reinforced by an elaborate analytical table of contents (7 pages) which enables the reader to orient himself quickly and to find particular topics.