COMMENT

LAW, LOGIC AND LEARNING

BY J. J. BRAY*

This article is substantially the text of an address given at the University of New South Wales on the occasion of the Law Faculty Seminar Dinner on 9 May 1979. Dr Bray puts a point of view not often heard today, but one which provides much food for thought.

There is a pleasingly alliterative ring about this title, but there are other reasons than that for the choice. The lawyer has been traditionally supposed to be both logical and learned. "The law is the perfection of reason", said Sir Edward Coke, and to this day the advocate refers in court to his opponent as "my learned friend". I am going to suggest to you that the law is becoming less logical and the lawyer becoming less learned, and that the advocate and the solicitor of the future may be somewhat different creatures from their past and present counterparts.

I know that Holmes J. said that "[t]he life of the law has not been logic: it has been experience".[1] The exaggerated language of that dictum conceals an important truth, but it must not be taken literally. The content of the law is derived from many different sources and the blending process is never complete. The skilful diagrams of juristic science are always being blurred by legislative interference. Even within the closed system of the common law itself, different lines of precedent have often developed in isolation and their ultimate incompatibility has not been realised until they have come into headlong collision. Thus, the doctrines of consideration and estoppel have collided and the conflict has not yet been resolved. Can a creditor bind himself in the absence of a deed to accept a lesser sum in payment of a greater? Is not such a promise entirely gratuitous? On the other hand, if he so conducts himself as to lead the debtor to believe that he is not going to insist on his right to the payment of the difference and the debtor acts on that assumption, ought the creditor to be allowed to change his mind?

Despite these limitations, however, logic has up till now, both in the Anglo-Saxon and the Roman Law systems, played a great part in legal reasoning, a compelling part in the absence of some strong countervailing force such as a rule of positive law. Other things being equal, it has been thought that the law lays down normative rules for human conduct and that if by sound reasoning, often syllogistic reasoning, the instant case can be brought fairly within one of the rules and not

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[1] O. Holmes, *The Common Law* (1881) 1.

removed from it by some exception equally laid down by those rules, then *cadit quaestio.*

In an address entitled "Concerning Judicial Method", delivered at Yale University in 1955, the late Sir Owen Dixon declared the traditional common law view of the law and the role of an appellate court in expounding it.[2] He would have nothing to do with American theories of the subjectivity of judicial decisions or their predictability on personal grounds. Speaking of the role of a judge of the High Court, he said:

> Predictability means nothing to a judge in that situation. His decision is final and a knowledge that what his court will say as to the rule of law is regarded by others as part of a general question of predictability does not help him to decide what to do. Such courts do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision of the court will be "correct" or "incorrect", "right" or "wrong" as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness.[3]

He repudiated the notion that it is right "for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience".[4] Sir Owen went on to quote Parke J. (as he then was) in *Mirehouse* v. *Rennell*[5] to the effect that the common law consists in the application of the rules of law, developed by principle and precedent, to new sets of circumstances. The quotation continues:

> [F]or the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.[6]

It is apparent, I think, that the doctrine of *stare decisis* is losing its magic. Some time ago the House of Lords announced that it was abandoning the rule which it had firmly laid down in 1898, a rule regarded, when I was an undergraduate, as firmly enshrined in the Ark of the Common Law Covenant, that it was bound by its own decisions.[7] The High Court has not been slow to follow suit. It is no longer possible

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[2] O. Dixon, "Concerning Judicial Method" in *Jesting Pilate* (1965) 152.
[3] *Id.*, 155.
[4] *Id.*, 158.
[5] (1833) 1 Cl. & F. 527, 546; 6 E.R. 1015, 1023.
[6] *Ibid.*
[7] Practice Statement [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77.

for counsel to be confident of victory if he has a precedent directly in point from the court which he is addressing. He can still, I think, repose such confidence in a precedent from a court higher in the judicial hierarchy, but that position, too, may not endure forever.

Courts, I think, are now becoming willing to do openly what Sir Owen condemned, namely to abandon long accepted legal principle in the name of justice or of social necessity or of social convenience. Perhaps they always did this covertly when they could by making fine distinctions. However this may be, modern courts are increasingly tending to incur the reproach of Sir Owen in the same address in the following words:

> Indeed there is a fundamental contradiction when such a course is taken. The purpose of the court which does it is to establish as law a better rule or doctrine. For this the court looks to the binding effect of its decisions as precedents. Treating itself as possessed of a paramount authority over the law in virtue of the doctrine of judicial precedent, it sets at nought every relevant judicial precedent of the past. It is for this reason that it has been said that the conscious judicial innovator is bound under the doctrine of precedents by no authority except the error he committed yesterday.[8]

In other words, such a judge hopes that the doctrine of precedent will secure for the future a new rule which he can only lay down by defying the precedents of the past.

This tendency to judicial emancipation from the restraints of doctrine has its parallels in other fields. For example, the rules of pleading, which once so strictly bounded the lists of the forensic tournament and afforded such a variety of weapons for the jousting of the lawyers, have now become so relaxed that there is probably no departure from them which cannot be cured by amendment at however late a stage of the case, and in fact it is not unknown for the pleadings to be entirely redrawn after the decision in the light of the judge's reasoning. Instead of defining beforehand the issues about which the parties are going to fight they simply record *ex post facto* the court's perception of the issues about which they should have been fighting. So, too, the elaborate devices of the eighteenth and nineteenth century conveyancer are seldom called in play and the modern settlor and the modern testator are more concerned with fiscal avoidance than with extending the dead hand into the twentyfirst century.

Perhaps, just as the traditional scholastic logic has vanished from the schools of philosophy, so its legal analogue is, if not vanishing, at least dwindling in the courts of law. There may never be any more arguments like those in *Hales* v. *Petit*,[9] decided in 1561. Hales was a judge, one of

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[8] Note 2 *supra*, 158-159.
[9] (1561) Plowden 253; 75 E.R. 387.

the few judges who committed suicide. He and his wife were joint tenants of a leasehold. In the sixteenth century suicide was a felony complete at the time of death and the chattels of the felon were forfeited to the Crown and a leasehold was a chattel. Both Lady Hales' right of survivorship and the Crown's right to forfeiture came into existence at the moment of death. It was a contest for priority between two hypothetical and metaphysical events coming into existence from the same cause and at the same time. If such a point now arose, I am sure that the social utility and reasons of policy behind each rule would be prominently canvassed and perhaps such considerations would be decisive. If you want to know how the matter was argued in 1561 I refer you to the report in Plowden.

This is something of a digression. I return to the main stream of my argument. Not only are courts freeing themselves from the obligations of precedent and juristic logic, but also the legislatures are vigorously assisting the process of emancipation. In a number of departments of private law—property law, family law and commercial law—parliaments have substituted and are substituting judicial discretion for fixed rule. Examples no doubt differ from state to state but the phenomenon is fairly widespread. Consumer protection legislation supersedes freedom of contract in many common transactions. Tenants, borrowers, hire purchasers receive statutory protection. The relevant legislation is apt to confer wide discretions on courts to ignore the terms of the bargain between the parties. A Contracts Review Bill recently introduced into the South Australian Parliament, but not yet passed because of upper house opposition, gives the relevant court wide powers to modify contracts and to refuse to enforce contractual provisions on equitable grounds.

The motives prompting such legislation arise, of course, from the desire, a desire which few people would be found now to condemn, to protect the economically weak against the economically strong. The elephant is no longer to be permitted to dance amongst the chickens except in hobbles. Recently, however, the legislature has been extending judicial discretion to fields unrelated, or apparently unrelated, to the class struggle. In South Australia, for example, a recent amendment to the Wills Act 1936-1975 (S.A.) empowers the Court to grant probate of a will, even if it is not witnessed with the time-honoured formalities, if it is satisfied beyond reasonable doubt that it really represents the wishes of the testator. The *de facto* spouse has been given rights analogous to those of the *de jure* spouse and in the event of competition the Court is empowered to divide between them as it deems fit such assets as damages under Lord Campbell's Act or the spouse's intestacy share. To the best of my knowledge, the Supreme Court of South Australia has not yet been called upon to exercise in these matters a judgment which would, indeed, seem to be singularly appropriate to the

talents of Solomon. Spouses and descendants, of course, have been protected against the excesses of testamentary caprice since 1918 in South Australia by the Testator's Family Maintenance legislation, which has its parallels in all the other Australian States. It was, in my view, a bolder step to empower a court to interfere, not only with testamentary provisions, which may well be unjust or irrational, but also with the shares allotted by the law of intestacy, since that law reflects Parliament's idea of a fair distribution amongst the relations.

The right to automatic divorce after separation for twelve months has for practical purposes restricted the area of conflict in the matrimonial court to questions of the custody of the children and the division of the property of the spouses, and these questions are to be decided by the Court without regard, or primary regard anyhow, to matrimonial fault. No doubt the interests of the children have been regarded, and rightly regarded, for several decades as paramount over the merits of the spouses, but that the ceremony of marriage should subject the property of each spouse to a mortgage of indefinite amount and uncertain application in favour of the other is a juristic novelty. It is not that we have introduced some scheme of community of matrimonial property, such as exists in some Roman Law systems. In such systems the rights of the spouses are definite and ascertainable in accordance with fixed rules, as are the definite fractions of the estate of the deceased to which the relations are entitled unless they have forfeited or compounded their rights. In such systems the spouses on the one hand and the testator on the other know more or less where they stand. This, however, is alien to the genius of Anglo-Saxon legislation. We prefer to give courts a vague discretionary power to interfere with the ordinary rules of intestacy and the ordinary property rights of the spouses and no one can say in advance how that power will be exercised.

I want to emphasise that I am not to be understood as denouncing all these changes. I am concerned with description, not denunciation. A few years ago the English courts rejected with indignation the suggestion that they had been empowered by Parliament to administer what was contemptuously called palm tree justice, the justice which is traditionally administered in Eastern societies by the *cadi* sitting in the city gate. It seems to me, however, that the Australian judge is going to have to assume more and more the role of the *cadi* in the gate whether he likes it or not. If we look for a moment to the history of the great parallel system to the common law, the system of Roman Law—about which I will have something to say later—a similar process is to be observed at work.

Jolowicz in the last chapter of his *Historical Introduction to Roman Law*[10] has this to say concerning the post-classical law which culminated,

[10] H. Jolowicz, *Historical Introduction to Roman Law* (2nd ed. 1952).

of course, in the codification of Justinian. I quote various discontinuous passages:

> There is less formalism and less rigidity. . . . There is throughout an insistence upon equity as opposed to "strict" law, no longer in the restrained manner of the classical jurists, who conceive of *aequitas* as the principle of justice pervading the whole law, but with an arrogant impatience of legal subtleties. Hence the constant interpolation of such phrases as *benigne tamen dicendum est* followed by a statement reversing the decision given by the classical jurist. These hard cases in fact often make bad law, for the Byzantine lawyer is not always capable of doing anything more than reversing the decision which he finds inequitable; he cannot put a new principle in place of the old.
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> Closely connected with this reverence for equity is the tendency of legislation to protect those whom it considers weak against those whom it considers strong, even at the expense of general security and credit.[11]

> Together with this "humane" attitude of the law, there is also often found an almost pathetic confidence in the power of legislation to do away with evils of an economic character by mere prohibition, and a taste for excessive regulation by statute of matters to which fixed rules can hardly, by their very nature, be applied with success.[12]

De nobis fabula narratur. Of course, not all departments of the law have been subjected to this erosion of fixed legal principle by judicial discretion. The criminal law remains comparatively untouched. Parliament has not yet conferred a discretion on courts to declare anything to be a crime which they think to be socially undesirable. Fortunately, courts still construe penal, fiscal and regulatory legislation fairly strictly. But in the traditional fields of private law, the law of property, of contract, of inheritance, of family right, the process to which I have referred is busily at work, though, of course, its operation still leaves large areas untouched. Nevertheless, the areas where the process is active are precisely those to which juristic science has in the past devoted most attention, and it may well be that the traditional skills of that science are entering a period of partial eclipse and that the lawyer of the future will be more of a social engineer and less of an analytical jurist than the lawyer of the past, or, so far as my own generation and its immediate successors are concerned, the law of the present.

The law, however, exists for the good of the citizens and not merely as an arena for the display of juristic virtuosity. The tendencies to which I have referred are undoubtedly inimical to the security of business transactions and the ability of the man of property to regulate the future of his affairs with some confidence that his decisions will prevail.

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[11] *Id.*, 519-520.
[12] *Id.*, 521.

But perhaps these considerations are not as important as we have always thought them to be. It may be that the community as a whole would be better served by confiding the settlement of disputes between citizens to the general instinctive sense of fair play and justice of the tribunals than by fettering them with fixed rules. I say that it may be. I think the success of such a system would depend on the supply and the selection of a sufficient number of judges of extraordinary percipience, prescience and patience. Given elementary powers of reasoning it is much easier to apply fixed principles to the decision of a dispute than to devise an ideal solution for each individual case.

But I repeat that although as a former advocate and judge I naturally regret the eclipse of juristic reasoning, I agree that this is not a decisive consideration. And the eclipse is only observable in certain areas and it is only partial in the areas where it exists. Moreover, it is likely that a judge trained under the older system will have regard to traditional principles in the exercise of his discretion. It would not be safe for the neophyte to act on the assumption that logic can be entirely thrown overboard.

I turn from logic to learning. Until recently the law, as I have said, has been regarded pre-eminently as a learned profession. I will not multiply quotations. Sir Walter Scott said, "[a] lawyer without history or literature is a mere mechanic, a mere working mason: if he possesses some knowledge of these he may venture to call himself an architect".[13]

There was a time, of course, when a knowledge of the classical languages was a prerequisite for entry to an English or Australian university and when it was impossible for anyone to get a degree in law from such a university without some training in Roman Law, including a study of the original texts. The advantages of some knowledge of the history of the law have often been recommended. The epigraph to each volume of Sir William Holdsworth's *History of English Law* is a quotation from Roger North in the following words: "To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law".[14]

And for those who think it is an advantage to know what any particular intellectual discipline is trying to do and to consider what it ought to be trying to do, some knowledge of the various philosophies of law which have been advanced from time to time and of the rules of other systems of law is desirable.

Roman Law, Legal History and Jurisprudence have figured in the legal curriculum in most university law courses in common law countries

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[13] W. Scott, *Guy Mannering* (1906) 259.
[14] R. North, *A Discourse on the Study of the Laws* (1824) 40.

until comparatively recently. I do not say that all three have always appeared, but even when one of them, such as Legal History, has been formally absent a great part of its content has normally been included in other courses. It is only in the last few decades that a sort of sociological invasion of the law curriculum has made such enormous inroads.

I find it difficult to speak with becoming moderation about some of these changes. They are indeed observable in other branches of learning as well. The birthright of the humanities has been bartered for a mess of tasteless computer-concocted pottage. Emulation of the contemporary prestige of the physical sciences has led to an attempt to apply their methods to studies where they are entirely inappropriate. Excessive concentration on the contemporary scene deprives the student of necessary perspectives, so that he is given no touchstone by which to distinguish the more enduring from the less enduring and the comparatively permanent from the fleetingly ephemeral. The same process which has turned English into a study of contemporary literature and History into a study of contemporary politics is turning the study of the law into a branch of contemporary sociological theory and practice. I regard these changes as deplorable, and I will not disguise my view that the academics in the humanities in the recent past have displayed insufficient courage or insufficient perception and have weakly opened the gates of the citadel of which they were the guardians to the hordes of triumphant barbarism.

In Adelaide we still retain Jurisprudence, Legal History and Roman Law as optional subjects and as options, moreover, to the choice of at least one of which certain advantages are attached. I do not imagine that this will last much longer. It should not be necessary before an audience like the present to defend the value of those subjects. Nevertheless I will advance a few trite and well-worn propositions.

The purpose of an academic law course is not to fit the student for immediate legal practice. He needs and receives some form of practical training in addition. Nor can a law course be expected to cover instruction in every department of law. Not all branches of the law are equally susceptible of academic treatment. What the law course should do is to give a training in legal method and an exposition of fundamental legal principle. If that is competently done and thoroughly absorbed, it should not be difficult later for the practitioner to get up any unfamiliar branch of the law if and when the occasion arises. He will know where to look for the relevant rules and how to understand and evaluate them when he has found them.

Roman Law is the only rival of the common law in the Western tradition. It should be studied on a comparative rather than a purely antiquarian basis. It is instructive to see how a different society, a very different society, dealt with fundamental legal problems such as arise under any developed system of law. Our own system can be seen with a

clearer and more instructed eye: the ephemeral and idiosyncratic features of it can be distinguished from its fundamental principles and problems. The elementary books, like the *Institutes of Gaius* and *Institutes of Justinian*, and still more those of the subsequent European commentators, tried to do what the common law has never tried to do, that is to map out the whole field of law and to classify the various rules into appropriate genera and species or, to vary the metaphor, under appropriate heads, sub-heads and sub-sub-heads. Analytical jurisprudence attempts the same thing in a more modern way. There is room for thought in the reflection that, whereas an elementary textbook or a digest in the Roman Law tradition will start off dividing law into public law and private law, and private law into the law of persons, the law of things and the law of actions, and the law of things into the law of property, the law of succession and the law of obligations, and the law of obligations into the laws of contract, quasi-contract, delict and quasi-delict, an English compendium of law can only classify the law on the alphabetical principle and start off with Actions and finish with Workmen's Compensation.

In practice I have found the Roman Law categories helpful in classifying and identifying the problem under consideration. In a few cases I have actually been able to call in aid rules of Roman Law.

In the common law system itself the older authorities often cannot be understood without some knowledge of legal history. The decisions of courts administering the common law in the days before equitable principles and equitable defences were allowed in such courts often have to be approached with great caution. The old system of pleading explains many decisions. The difference between trespass and case has not yet lost all its importance. Even now contingent remainders, executory devises and the like occasionally raise their heads. I remember with what awe and delight I greeted at the Bar a will, the construction of which seemed to involve the rule in *Shelley's Case*.[15] If it is said that when such unusual problems arise they can always be referred to an expert, one of the answers is that if you think the law began in 1945 or even in 1914 you may not recognise that the problem exists until it is too late. It is salutary to remember that the English courts have held that an action for negligence lies against a solicitor who does not recognise an entail when he sees one, or know how to bar it before his client's death if he does recognise it.

I have already referred to the desirability of the lawyer knowing something about the philosophy of the law he is going to apply in practice. Here I feel more assured of a sympathetic hearing. The contemporary assumption, of course, is that the aims of the law are and ought to be utilitarian and egalitarian. I am not here concerned to

[15] (1581) 1 Co. Rep. 936; 76 E.R. 206.

dispute that philosophy, which to a large extent I share, but it is important that it should be understood that it is not beyond dispute and that other doctrines and other ideals have from time to time been advanced.

It is often contended by those who concede that a law course should not be confined to purely professional and technical instruction that modern sociological studies are capable of supplying the cultural and humanistic content formerly given by the classics, Roman Law, Jurisprudence, Legal History and the like. They are not. In my opinion such studies have no cultural value whatsoever. They may well have a considerable utilitarian value, but with that I am not at the moment concerned. They are incapable, I repeat, of emancipating the mind from the tyranny of the here and now and giving the necessary perspective to enable contemporary problems to be assessed in the light of all that has happened since Pharaoh and not merely in the light of all that has happened since Ford.

I am aware that I am a voice crying in the wilderness on this matter. The operations of the Zeitgeist will in all probability be as triumphant in the immediate future as they have been in the immediate past. But I am not the vassal of the Zeitgeist, nor compelled to bow down in its courts or ingeminate its incantations, and I will at least deplore if I can do no more.

Well, then, it looks as if the lawyer of the future will be more like a sociologist, a statistician, a social engineer, if you like, than the lawyer of the past. Perhaps that is as it should be. I say perhaps. If, indeed, the society of the future is to be the regimented, bureaucratic, computer-controlled apparatus that has sometimes been feared, no doubt the lawyer will be shaped to fit it. I hope, however, for better things, both for society and for the profession.