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Chapter 1

An introduction to law and legal reasoning

1.1 Introduction

This book is about the techniques that are available to lawyers when they are handling the law. In broad terms, the law itself may be found easily enough in *Acts of Parliament* (otherwise known as *statutes*), which are *primary legislation*; certain things done under the authority of Acts of Parliament, which are *secondary* (or *delegated* or *subordinate*) *legislation*; the decisions of the courts themselves, which collectively make up the common law; the system of European Community law; and, increasingly, the law developed in the European Court of Human Rights. However, the underlying theme of this book is that, whatever sources of law are being used, legal method, when properly understood, is very often a creative process.

1.2 Legal method as a creative process

The scope for creativity in legal argument is neatly illustrated by the story of someone who wanted know the result of adding 1.111 and 8.888. She began by asking a mathematician who said: 'The answer is obvious. It is 9.999'. She then asked an engineer who said: 'Well, strictly speaking the answer is 9.999; but engineering is a practical subject and for all practical purposes the answer is 10'. Finally, she asked a lawyer, who replied with a question: 'What do you want it to be?'

If legal method involved nothing more sophisticated than finding the right page of the right textbook in order to apply the rule to the facts, there would be no disputes beyond those as to what the facts were in each case. Plainly, however, arguments as to the law are commonplace. (Indeed, if they were not, no one would need to learn the skills of legal argument, and books such as this one would be neither written nor read.) While it is true, of course, that many important aspects of legal argument centre on the actual words of legal texts (legislation, cases, and so on), it will also be obvious that the argument may sometimes go beyond the texts themselves and include a variety of extrinsic materials. (See, in particular, page 296 in relation to English legislative interpretation.) What is less obvious, but no less important, is that legal reasoning

may, in practice, also depend upon other factors which lie beyond the scope of what most people would consider to be law at all. A brief consideration of the views of two legal theorists will illustrate the point.

Oliver Wendell Holmes (1841–1935) was one of the founders of the school of thought known as American Realism, the central tenet of which is that what actually happens in the courts is what really matters. Placing the emphasis on ‘law in action’ rather than ‘law in books’, Holmes says, ‘the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law’. (*The Path of the Law* (1897) 10 Harv LR 457.)

Furthermore, having stated what is probably his most famous maxim (‘the life of the law has not been logic, it has been experience’, which is found on the first page of his textbook *The Common Law*, published in 1881), Holmes puts the relationship between logic and experience thus:

‘The training of lawyers is a training in logic ... The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is an illusion, and repose is not the destiny of man. *Behind the logical form* lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.’ (Emphasis added. *The Path of the Law* (1897) 10 Harv LR 461.)

In other words, behind any *explicit* formulation of judicial reasoning there lies an *implicit* attitude on the part of the judge. For reasons which will become apparent when you have read pages 8 and 9, this implicit attitude may be called the *inarticulate major premise*. The difficulty in identifying inarticulate major premises is simply that they are inarticulate, and therefore their precise formulation by the reader involves guesswork. Nevertheless, there are cases in which the judges have obligingly articulated that which could easily have remained inarticulate. Two cases are instructive.

In *Bourne v Norwich Crematorium Ltd* [1967] 1 All ER 576, the issue was whether expenditure on a furnace chamber and chimney tower built by the crematorium company qualified for a tax allowance. This depended upon whether it was ‘an industrial building or structure’ for the purposes of the Income Tax Act 1952, and this in turn depended upon whether it was used

‘for a trade which consists in the manufacture of goods or materials or the subjection of goods or materials to any process.’

Stamp J said:

'I would say at once that my mind recoils as much from the description of the bodies of the dead as "goods or materials" as it does from the idea that what is done in a crematorium can be described as "the subjection of" the human corpse to a "process". Nevertheless, the taxpayer so contends and I must examine that contention.'

Given this as the judge's starting point, it is not surprising that the taxpayer lost.

In *R v West Dorset District Council ex parte Poupard* (1987) 19 HLR 254, Mr and Mrs Poupard had capital assets, but they were meeting their weekly living expenses by drawing on an overdrawn bank account. They applied to the council for housing benefit. This benefit was subject to a means test, and therefore the question arose as to whether the drawings were 'income'. If they were, the amounts involved were sufficient to disqualify the applicants from receiving assistance under the relevant Regulations. The council's Housing Review Board concluded that the drawings were income.

The High Court held that in each case it was a question of *fact* whether specific sums of money were 'income', and that this question was to be decided on the basis of all that the council and their Review Board knew of the sources from which an applicant for benefit was maintaining himself and paying his bills. The conclusion was that on the present facts the local authority and their Review Board had made no error of *law*, and had acted reasonably in reaching their decision.

In reaching his decision, Macpherson J, adopting an argument advanced by counsel for the local authority, said:

'The scheme [of Housing Benefit] is intended to help those who do not have the weekly resources to meet their bills, or their rent, and it is not intended to help comparatively better-off people (in capital terms) to venture into unsuccessful business and not to bring into account moneys which are regularly available for day-to-day spending, albeit that the use of moneys depletes their capital.'

Although the Court of Appeal upheld this decision (see (1988) 20 HLR 295), it will nevertheless be apparent that a court with different sympathies could have upheld, with equal or greater logic, the argument that the weekly drawings were outgoings, rather than income, because each drawing increased the drawer's indebtedness to the bank.

Many people find that one of the most enduring pleasures of studying law is playing the game of 'hunt the inarticulate major premise', and you may often find that your reading of even the dullest of cases can be enlivened by trying to get behind the words and the legal doctrine in order to penetrate the mind of the judge as an individual.

Although judges very seldom acknowledge that their individual values and preferences may impact on their judicial decisions, there can be little doubt that they are aware of this fact, as Baroness Hale (who despite her sex is referred to as a Law Lord) indicated in a lecture given at City University on 30 April 2008, under the title of *Leadership in the Law: What is a Supreme Court For?* Having commented that the House of Lords usually functions through panels of five members (although it is worth interpolating that panels of seven and – occasionally even nine – are not unknown, and petitions for leave to appeal are heard by panels of three), Baroness Hale said:

‘Many, perhaps most, other Supreme Courts sit *en banc*. That is, all the judges sit on all the cases. This eliminates the risk that the selection of the particular panel to hear the case may affect the result. *We can all think of cases in which the result would probably have been different if the panel had been different*, although that raises interesting questions about how predictable the decision of any particular judge either is or should be. The listing is done in the judicial office and the allocation of judges to the panels is agreed with the two senior law lords in what is known as the ‘horses for courses’ meeting. The aim is to have those with the most relevant expertise together with some generalists. I cannot think that either the judicial office or the two seniors give any thought to the likely outcome of the case if X sits instead of Y. But even without sinister intent, the selection may affect the outcome.

‘This is solved by having us all sit. But it would halve the number of cases we could take. It is hard enough narrowing them down now and would be much worse then. It would also shift the focus to the appointments process. In other parts of the world, it clearly increases the desire of the politicians who make the appointments to fill the court with people of their own political persuasion. That does not happen here. Colleagues in the US are amazed that I do not know my colleagues’ politics. We have not had political appointments to the Law Lords for many decades and the risk is even less now that we are to have an independent Judicial Appointments Commission. But I doubt whether we shall change our practice of sitting in panels rather than *en banc*.’ (Emphasis added.)

The second theorist whose views may usefully be considered by way of an introduction to legal method is Ronald Dworkin (b. 1931). Dworkin shares a common starting point with Holmes, to the extent that both agree that the concept of rules provides an inadequate model of law in practice. However, he proceeds down a different route, placing great emphasis on what he calls ‘standards’, by which he means ideas which exist outside the texts containing the rules, but which go into the melting pot, together with those rules, when it is necessary to identify the law which is to be applied to a given situation. More particularly, Dworkin calls these standards ‘policies’ and ‘principles’.

'I call a "policy" that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). I call a "principle" a standard that is to be observed, not because it will advance or serve an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of reality.' (*Is Law a System of Rules?* in *The Philosophy of Law*, 1977, p. 43.)

An example of something which Dworkin would call a principle is the presumption against gaining advantage from wrongdoing, which is discussed at page 323.

Expanding on the idea of principles, and the way in which they work, Dworkin says:

'All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another ...

'Principles have a dimension that rules do not – the dimension of weight or importance. When principles intersect ... one who must resolve the conflict has to take into account the relative weight of each. This cannot, of course, be an exact measurement, and *the judgment that a particular principle or policy is more important than another will often be a controversial one*. Nevertheless, it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is.' (Emphasis added. *Op. cit.*, p. 47.)

Dworkin's concession that 'the judgment that a particular principle or policy is more important than another will often be a controversial one' is important in terms of the creativity of legal method. For example, in *R v R (Rape: Marital Exemption)* [1991] 4 All ER 481 (see page 141), the court had to choose between the principle which prohibits retrospective penalization, and the interest of a wife in preserving her own physical integrity by rejecting her husband's sexual advances. The court prioritized the latter, but in a less emotive context it may well have relied upon the former.

Since the insights offered by Holmes and Dworkin clearly diminish the significance of the plain words of the legal texts which are commonly thought to determine legal disputes, many people coming to the study of law for the first time are reluctant to acknowledge their truth. However, mature consideration makes it plain that (whether or not you find Holmes, Dworkin, or any other legal theorist convincing) *something* beyond the legal texts must come into play in legal reasoning, if only because a legal text which has generated sufficient disagreement to bring the parties to court will seldom have a single and indisputable meaning. In other words, legal texts have to be interpreted and not simply read.

Of course, interpretation is not unique to legal texts. Two examples from non-legal situations will illustrate the point.

First, consider two shops, one displaying a sign saying 'Pork Butcher', and the other displaying a sign saying 'Family Butcher'. You know, of course, that the first butcher specializes in pig meat, while the second does *not* butcher families. Yet *why* does one adjective qualify the activities of the butcher in terms of the meat sold, while the other does so in terms of the market served? The answer, as Goodrich says, is that the context is all-important.

Secondly, suppose a university is worried about the possibility of being held liable for breaches of copyright by staff using photocopiers when they prepare teaching materials. Accordingly, every photocopier in the university bears a warning notice, which explains the relevant aspects of the law of copyright, and is headed 'For the Attention of Every Single Member of Staff'. Are married members of staff entitled to ignore the notice?

We will consider the problems which arise in the context of interpretation in due course, but at this stage we must consider the form of legal reasoning.

1.3 The form of legal reasoning

The classic pattern of legal reasoning follows what is known technically as a syllogism. Syllogistic reasoning takes the following form:

If $A = B$
 And $B = C$
 Then $A = C$

The first line is known as the *major premise*, the second as the *minor premise*, and the third as the *conclusion*. Taking a legal example, therefore, the pattern becomes:

It is an offence to exceed the speed limit
 Exceeding the speed limit is what the defendant has done
 It is an offence to do what the defendant has done

or, expressing the conclusion more directly, the defendant is guilty of speeding.

Essentially, therefore, syllogistic reasoning is perfectly straightforward. However, syllogisms assume that the major and minor premises exist, without giving any assistance as to how they may be formulated. Returning to the speeding example, it is apparent that we have:

a statement of law (the major premise),
a statement of fact (the minor premise), and
a conclusion (which results from applying the major premise to the
minor premise),

but it is equally apparent that we must establish both of the premises before we can reach the conclusion. Taking the minor premise first, the facts of a case will either be proved to the satisfaction of the court or agreed between the parties. In terms of professional practice, far more disputes involve questions of fact than involve questions of law. Therefore all competent practitioners need a good grasp of the law of evidence, so that they know how to go about trying to prove the facts on which they rely, and how to try to prevent their opponents from proving other facts. For the moment, however, we need say no more about the minor premise, although at the end of Chapter 2 we will return to some of the problems surrounding the distinction between 'law' and 'fact'.

The major premise will be formulated from those sources which the legal system accepts as being authoritative. In English terms, and for almost all practical purposes, this means Acts of Parliament and delegated legislation (see pages 66 and 72); case-law (see Part 2); European Community law (see Chapters 5, 15 and 20), and, to some extent, under the Human Rights Act 1998, parts of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see Chapter 6). Handling those sources, in such a way as to be able to produce a convincing formulation of the law, is a highly developed intellectual skill, which cannot be acquired quickly, easily or painlessly. However, one of the major purposes of this book is to ensure that those who are willing to persevere may equip themselves with a critical foundation on which to develop that skill.

In passing you will notice that you are now in a position fully to understand the Holmesian concept of the 'inarticulate major premise' (see page 4). Holmes' point is simply that the formal syllogism is all very well as far as it goes, but that the most important factor in determining the result of a case comes before the formal statement of the major premise, and is the judge's personal starting-point or *inarticulate* major premise.

At this stage it will be useful to examine some more generalized aspects of intellectual argument, so that legal method can be seen within the context of the broader field of intellectual endeavour, rather than as a thing apart.

1.4 Propositions and processes: truth and validity

It is useful to observe and to maintain the key distinction between the *truth of a proposition or conclusion* on the one hand, and the *validity of the process of argument* on the other. Some examples will illustrate the point. These examples will use incontrovertible scientific facts, simply because no one can feel strongly about such subject matter, and therefore no one will be distracted by considerations of what they think the position *ought* to be.

Speaking in round figures, it is true to say that the Sun is 93,000,000 miles from the Earth, and that light travels at 186,000 miles a second. It is also logically valid to say that if we know the distance between two points, and the speed at which something is travelling, we can work out the time taken for the journey by dividing the distance by the speed. Thus if *A* and *B* are 100 miles apart, something travelling at 100 miles an hour will take one hour to make the journey. Applying this to the figures given at the start of this paragraph, we can say that dividing 93,000,000 by 186,000 will give us the number of seconds which light takes to travel from the Sun to the Earth, namely 500. In this example we have applied a process of reasoning that is valid to facts that are true, and therefore we have inevitably come to a conclusion that is true.

However, it is also possible to produce a conclusion which happens to be true by applying valid reasoning to premises which are false. If I tell you that the Sun is 1,000,000 miles from the Earth, and that light travels at 2000 miles a second, dividing 1,000,000 by 2000 still produces the figure of 500 seconds. In this example the premises are false, but the process of reasoning (dividing one figure by the other) is valid. *Quite by chance* the conclusion happens to be true.

A third example shows that applying invalid reasoning to false premises may also produce a conclusion which happens, *purely by chance*, to be true. Suppose I tell you not only that the Sun is 5000 miles from the Earth, and that the speed of light is 0.1 mile a second, but also that the way to do the calculation is to multiply one figure by the other, rather than by dividing one by the other. This calculation still produces the figure of 500 seconds for the time taken by light to travel from the Sun to the Earth. As we know, this happens to be true. However, the premises are false and the argument is invalid.

In practical terms, the second and third examples illustrate a very common danger. If you see an argument which ends with a conclusion that you either know to be true or want to be true, it is easy to fall into the trap of assuming that the premises are true and that the argument is valid. Falling into this trap is particularly easy if the premises are drawn

from a field in which you lack expertise, and if you are less than skilled in identifying invalid arguments. In the vast majority of cases, of course, there will be no problem. Premises which are true will be used as the basis of arguments which are valid, and the conclusions which are reached will, therefore, also be true. However, good lawyers are constantly on the lookout for cases which embody false premises or invalid arguments, or both.

We must now consider three common methods of reasoning, and the limitations of each.

1.5 Methods of reasoning: *induction*, *deduction* and *analogy*

1.5.1 Introduction

Induction, *deduction* and *analogy* are all methods of reasoning which are commonly employed in a variety of contexts. We will look at each method in turn, and then place them in a legal context.

1.5.2 Inductive reasoning

The process of *inductive reasoning* involves making a number of observations and then proceeding to formulate a principle which will be of general application. This form of reasoning is typified by the methods of experimental science, where if the same thing happens repeatedly it is assumed that there is a principle which ensures that it will always do so. So, if I drop a heavy object and a light object from the same height at the same time, and they reach the ground together, *and this happens on a large number of occasions*, I can conclude that the acceleration due to gravity is a constant, and does not depend on the weight of the objects concerned.

The potential weakness of inductive reasoning is that, however many observations support the conclusion, there remains the possibility that some other observations may refute it. In terms of legal method, this weakness is represented by the doctrine of *per incuriam*, which deals with the situation where a relevant legal authority is overlooked. This doctrine is discussed at page 163.

1.5.3 Deductive reasoning

The process of *deductive reasoning* involves stating one or more propositions and then reasoning your way to a conclusion by applying established principles of logic. Deductive reasoning is typified by the

mathematical method, where propositions are asserted and then used as the basis of reasoning. Thus, if $A = B$ it follows that $2A = 2B$, and that $A - B = 0$, and so on.

There are two potential weaknesses of deductive reasoning: the premises may be false and the reasoning itself may be invalid, as illustrated in the examples previously given, based on the speed of light. A specifically legal example of invalid deductive reasoning may be found in *Ward v James* [1965] 1 All ER 563 (see page 15).

1.5.4 Reasoning by analogy

The process of reasoning by analogy involves saying that, if a number of different things are similar to each other in a number of different specific ways, they are, or should be, similar to each other in other ways as well. This process may be seen operating in the doctrine of precedent, which requires that cases with similar facts should be treated as being similar in law.

The problem with reasoning by analogy is to identify which points need to be similar, and how similar they need to be. This is pursued at some length in Chapter 9 in the context of identifying the *ratio* of a case.

1.5.5 The legal context

Judges seldom use technical vocabulary such as *induction* and *deduction*, but a notable exception may be found in the speech of Lord Diplock in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294. The case raised the question of whether one party owed a duty of care to another in the law of negligence, which explains some of Lord Diplock's precise observations. However, the general tone of the passage is clearly of more general application.

'The justification of the courts' role in giving the effect of law to the judges' conception of the public interest in the field of negligence is based on the cumulative experience of the judiciary of the actual consequences of lack of care in particular instances. And the judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care.

'The method adopted at this stage of the process is analytical and inductive. It starts with an analysis of the characteristics of the conduct and relationships involved in each of the decided cases. But the analyst must know what he is looking for; and this involves his approaching his analysis with some general conception of conduct and relationships which *ought* to give rise to a duty of care. This analysis leads to a proposition which can be stated in the form: "In all the decisions that have been analysed a duty of care has been held to exist wherever the conduct and the relationship possessed each

of the characteristics A, B, C, D, *etc.*, and has not been found to exist when any of these characteristics were absent”.

For the second stage, which is deductive and analytical, that proposition is converted to: “In all cases where the conduct and relationship possess each of the characteristics A, B, C, D, *etc.*, a duty of care arises”. The conduct and relationship involved in the case for decision is then analysed to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in the case for decision.

But since *ex hypothesi* the kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will lack at least one of the characteristics A, B, C, D, *etc.* And the choice is exercised by making a policy decision whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration. The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as was used in approaching the analysis. The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations imposed by the former definition which are considered to be inessential. The cases which are landmarks in the common law ... are cases where the cumulative experience of the judges has led to a restatement in wide general terms of characteristics of conduct and relationships which give rise to legal liability.

Inherent in this methodology, however, is a practical limitation which is imposed by the sheer volume of reported cases. The initial selection of previous cases to be analysed will itself eliminate from the analysis those in which the conduct or relationship involved possessed characteristics which are obviously absent in the case for decision. The proposition used in the deductive stage is not a true universal. It needs to be qualified so as to read: “In all cases where the conduct and relationship possess each of the characteristics A, B, C and D, *etc.*, but do not possess any of the characteristics Z, Y or X, *etc.* ... which were present in the cases eliminated from the analysis, a duty of care arises”. But this qualification, being irrelevant to the decision of the particular case, is generally left unexpressed.’ (Original emphasis.)

1.6 Legal practice and legal scholarship

1.6.1 Legal practice

In practical terms the legal enterprise often consists of advising clients how they may best use the law to achieve their objectives. These objectives vary widely, but it is worth identifying some of the more common possibilities, spanning a range from the wholly non-contentious, in the sense that they are highly unlikely ever to go to court, to the wholly contentious, in the sense that they are already the subject of legal proceedings in court.

Matters such as making a will are almost always non-contentious, as are straightforward conveyancing transactions. Even matters such as

these, however, are potentially contentious, in the sense that the court may subsequently have to adjudicate upon the validity or effect of the will, or on the rights and obligations of the parties to the conveyancing transaction. Conversely, the parties often settle contentious matters by agreement, because they perceive it to be in their best interests to do so. As Jesus said in the Sermon on the Mount:

‘If someone sues you, come to terms with him promptly while you are both on your way to court; otherwise he may hand you over to the judge, and the judge to the constable, and you will be put in jail. I tell you, once you are there you will not be let out till you have paid the last farthing.’ (*The Gospel according to St. Matthew*, Ch. 5, vv. 25–26.)

Although this passage does not reflect the English distinction between civil and criminal law (see page 34), the sentiment remains clearly applicable. More recently, and more authoritatively from a legal point of view, Lord Mackay LC said: ‘The interests of justice are, in my opinion, served by the promotion of early settlements’. (*O’Sullivan v Herdmans Ltd* [1987] 3 All ER 129.) Furthermore, the Woolf reforms of civil procedure, which came into effect in April 1999, are based on the principle that the parties to a dispute will regard legal proceedings as a last resort.

Of course, if you are cynical, you may recall the famous *Punch* cartoon of two farmers arguing over ownership of a cow. One farmer was pulling at the head and the other was pulling at the tail, while the lawyer was sitting happily in the middle, milking the cow. On the basis of this you may concede that early settlements may be in the interests of the parties and even in the interests of justice, but still harbour a lurking suspicion that they may not be in the interests of the lawyers. However, there are two reasons why virtually all practising lawyers would agree that this would be taking cynicism too far.

First, the outcome of litigation is never cut and dried, so clients may well be wise to settle, thus avoiding the element of chance.

Secondly, competent lawyers offering the sort of expertise which the market demands should seldom be short of work, and a case which is settled provides an opportunity for the lawyers to devote time and energy to the affairs of their other clients. In practice, therefore, many lawyers spend much of their time on work which neither the lawyers nor their clients think will ever go anywhere near a court, or on work which is directed at resolving disputes without the necessity of court proceedings. Bearing this in mind, you may well wonder why this book, along with the vast majority of other legal textbooks, places so much emphasis on what the courts will and will not do. The answer is straightforward.

One element which contributes to the advice which any lawyer gives to any client is the lawyer's perception of how, *if it ever comes to it*, the court will look at the legality of the client's position. This comment is not intended in any way to underestimate the importance of the many other elements, such as identifying the client's objectives and relating them to relevant legal possibilities, which go to make up good lawyering in practice, but it is intended to recognize the harsh fact of life that where the law is involved the courts are always at least potentially involved as well. And it follows that a good grounding in the techniques which the judges use is an invaluable foundation on which to build the habit of thinking like a lawyer.

1.6.2 Legal scholarship

There are many different models of legal scholarship, reflecting substantial variations in the degree of emphasis placed on sociological, economic and political factors. However, Feldman provides a useful version of a traditional model of scholarship in general:

'It is the attempt to understand something, by a person who is guided by certain ideals, which distinguishes scholarship both from the single-minded pursuit of an end and from diletantism.

'The ideals include: (1) a commitment to employing methods of investigation and analysis best suited to satisfying that curiosity; (2) self-conscious and reflective open-mindedness, so that one does not assume the desired result and adopt a procedure designed to verify it, or even pervert one's material to support a chosen conclusion; and (3) the desire to publish the work for the illumination of students, fellow scholars or the general public and to enable others to evaluate and criticize it.' (*The Nature of Legal Scholarship* (1989) 52 MLR 498.)

While it is important to recognize that a willingness to indulge in self-criticism is an integral part of scholarship, it is equally essential to emphasize the need for self-confidence. More particularly, it is important to be willing to criticize received wisdom where its foundations are, and can be demonstrated to be, defective. The judgment of the Court of Appeal in *Ward v James* [1965] 1 All ER 563 provides a suitable example.

The background to the case was a general feeling among lawyers that juries were not making a very good job of assessing damages in personal injuries cases. This led Lord Denning MR, with the full agreement of the other members of the court, to two conclusions. First, juries should not normally hear personal injuries cases. Secondly, where there are special circumstances which justify the participation of a jury in such a case, the jury's role should be restricted to determining the facts, rather than extending to the assessment of damages.

However, if we remind ourselves of the premise from which the argument starts (juries are not very good at assessing damages in personal injuries cases), the only conclusion we can validly draw is that they should not assess damages in such cases. In other words, the court's conclusion that they should normally have no role at all is simply illogical. For example, in a typical case arising from a road traffic accident, a jury composed of ordinary motorists may be particularly well equipped to decide whether the quality of the defendant's driving was up to the standard required of the reasonable driver. Admittedly, if the defendant is found liable it may well be better for damages to be assessed by the judge rather than by the jury, but this is a long way from excluding juries altogether.

1.7 Law and Justice

1.7.1 Introduction

Having seen that there are wide variations of approach to the question of the nature of *law*, you will not be surprised to discover that there are also wide variations to the question of the nature of *justice*. Two comments from opposite ends of the spectrum will be instructive.

Alf Ross, a member of the Scandinavian Realist school of jurisprudence, says:

'To invoke justice is the same thing as banging on the table: an emotional expression which turns one's demand into an absolute postulate'. (*On Law and Justice*, 1958, p. 274.)

More optimistically, Tenzin Gyatso, the fourteenth Dalai Lama of Tibet, regards it as an inescapable truth that: 'In the end, the innate desire of all people for truth, justice and human understanding *must* triumph over ignorance and despair'. (Emphasis added. *Freedom in Exile*, 1991, pp. 88–9.)

The heart of the matter, of course, is that in many cases there will be different views as to what actually are the requirements of justice.

Suppose, for example, that a thief steals my property and sells it to you. Suppose also that you acted in good faith, with no suspicion that the property was stolen. Does justice require that you return the property to me, on the basis that the act of theft cannot have destroyed my legal title to it? Or should you be allowed to keep the property, on the basis that you paid for it? Theoretically, the parties who suffer loss in such cases will be able to sue the thieves, but this is only realistic if the thieves are found and they have enough money to enable them to pay damages. Both these conditions will seldom be satisfied, and typically

neither of them will be. It follows, therefore, that the law has to choose who stands the loss, and that the facts present no self-evident conception of justice to assist in the making of that choice.

Nevertheless, judges do commonly speak of justice, even if only in Ross's table-banging, justificatory sense. This leads us to the question: *what is the relationship between law and justice?*

1.7.2 Law and justice: some judicial perspectives

There are many ways of thinking about justice and deciding what the courts will (or will not) be willing to count as being just in any given situation. It would be unrealistic to try to discuss all the possibilities here, but two possibilities will suffice to indicate the range of possible approaches.

One approach is to consider the economic facts of life. For example, when asking whether a particular liability *should* exist, those who favour an economic approach will take into account factors such as whether imposing liability would deter people from engaging in activities which would be beneficial to economic activity generally. Matters which may be relevant when answering this question include whether insurance cover in respect of the liability would be available at reasonable cost and, if so, whether the burden of paying for it should be on potential defendants or on those whom they harm.

Another approach is psychological in nature. For example, the defence of provocation is effective to reduce murder (which carries a mandatory sentence of life imprisonment) to manslaughter (which carries a maximum sentence of life imprisonment, but no minimum whatsoever). The essence of provocation is a sudden and temporary loss of self-control, caused by the victim's conduct. A court which is considering a plea of provocation must ask itself whether the defendant's response to the victim's conduct was reasonable. This raises a particular difficulty where a woman who has been subjected to domestic violence over a period of time finally loses her self-control in response to something which is, in itself, relatively trivial. Can the court take account of the history of violence as well as the immediate cause of the loss of self-control? The courts now accept that the victim's whole course of conduct can be relevant, but before they felt able to come to this conclusion they had to be persuaded that *battered wife syndrome* is a form of post-traumatic stress disorder, and that, therefore, it could be just to uphold a plea of provocation in these circumstances.

The nature of justice may be fascinating but it is not a distinctively legal topic, nor is it one on which lawyers have any uniquely valuable

perspective. After all, and pursuing the two possibilities we have just considered, few lawyers are equipped by education or training to evaluate the competing arguments of economists or psychologists. Most practising lawyers are, therefore, usually content to rely on the *due process* model of justice. According to this approach, provided the relevant law has been administered impartially, by the appropriate court, it follows that justice has been done.

In *Air Canada v Secretary of State for Trade (No 2)* [1983] 1 All ER 910, Lord Wilberforce said:

‘In a contest purely between one litigant and another ... the task of the court is to do ... justice between the parties ... There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not and is known not to be, the whole truth of the matter; yet if the decision has been in accordance with the available evidence, and with the law, justice will have been fairly done.’

In *R v Secretary of State for the Home Department ex parte Cheblak* [1991] 2 All ER 319, Lord Donaldson MR put his view of the matter thus:

‘And it is the law and the rule of law which governs all. Judges take a judicial oath “to do right by all manner of people after the laws and usages of this Realm without fear or favour, affection or ill will” ... Justice is not an abstract concept. It has to have a context and a content. The context is provided by the facts underlying particular disputes. The content is the law.

‘In individual cases injustice can arise from two quite different sources – human fallibility on the part of the judges or tribunal members and defects in the law. Human fallibility can never be eliminated, but its effects can be and are reduced by dedicated professionalism and by the system making provision for appeals. Defects in the law can be remedied by changing the law, but not by departing from it, an approach which would end by producing far more injustices than it cured. Judges are exhorted by commentators to be “robust”. If what is meant is that judges should be very ready to re-examine the law in novel or changed circumstances, I agree that judges should indeed be “robust” and I hope that we are. But if what is meant is that in cases which arouse their sympathy, of which the present could well be one, they should depart from the law, I must disagree.’

The doctrine of the rule of law is outlined at page 65, and its significance is a major theme implicit throughout this book. However, for the moment we must put judicial comments such as these into context.

One important aspect of the problem is that the concept of justice functions at two very different levels. Both Lord Wilberforce and Sir John Donaldson MR were concentrating on justice at the level of decisions in individual cases. (This may be thought of as being the *micro* level.) But justice also operates at the level of the legal system as a

whole. This may be thought of as the *macro* level. Crucially, the interests of justice at these two levels may conflict with each other. So, for example, while it may be desirable to give judges an element of discretion in individual cases, it is also desirable that legal outcomes should be predictable. Yet it is obvious that increasing the degree of predictability must reduce the potential scope for the exercise of discretion in individual cases. This simple truth needs to be fully understood, because it underlies many of the problems which arise in legal method.

If I ask you whether the law should be rigid, or whether the courts should have the power to do what they think is right in the circumstances of each case, most of you will probably opt for the courts doing what they think is right in the circumstances of each case. (You may find yourself in some difficulty if I then ask you how the courts are to decide what they think is right in the circumstances of each case, but for the moment we will let that pass.) However, if I ask you whether people should be able to know the legal consequences of their conduct in advance, so that they may modify their conduct accordingly, or should they have to wait until after the court has decided the case arising from their conduct, most of you will probably opt for being able to know the legal outcome in advance. The problem is, as a moment's thought will show, that the two answers which I have indicated as being probable are in fact self-contradictory.

If each answer considered individually appears to be right, but both cannot co-exist, the most obvious solution is to seek a compromise in terms of finding a balance which combines an acceptable degree of predictability with an acceptable degree of flexibility to deal with individual cases. The focus, therefore, is simply on what 'acceptable' means in this context. There is, of course, no definitive answer to this question, since it involves matters of judgment and, as Alexander Pope said, albeit in a different context and before the substantially levelling effects of quartz technology:

"Tis with our watches as our judgments, none
Go just alike, yet each believes his own."

(*An Essay on Criticism*, 1711.)

Unfortunately, any rigorously rational approach to the relationship between predictability and flexibility can, in some cases, lead to those who argue for predictability being criticized on the basis that they lack compassion for defendants. However, this criticism is not limited to this context. For example, in *The Damages Lottery*, 1997, Atiyah presents a sustained argument against the basis of the prevailing system of

compensating people who suffer personal injuries as the result of accidents. In the preface to the book, he says (at pp. vii–viii):

‘I entirely accept that sympathy and compassion have their proper place. Those who care for the accident victim, even public officials like police and doctors, must provide their services with due regard for the emotional needs of accident victims. But legal and social structures, which deal with hard cash, must be subjected to rational discussion from time to time, and that kind of discussion is hindered rather than helped by emotional responses.’

Some people intuitively recoil from the emotional detachment which this view represents. Similarly, some people will feel that anyone whose arguments are based on emotional arguments is detached from the reality of what makes a legal system work. Finally, some people conclude that the solutions which cause least dissatisfaction in the real world are likely to be compromises which are reached by seeking a middle way between opposing points of view which are clearly and forcefully articulated, rather than by having all those who are involved in the debate muddling along what they imagine to be the middle way from the outset.

But irrespective of the thought processes which the courts apply when seeking to strike a balance between law and justice, there is one basic and inescapable point. In any situation involving two competing but incompatible positions, both cannot be fully satisfied.

Finally, it would be misleading to suggest that lawyers do not care about justice (or, at least, about their view of what justice is). More particularly, when a specific legal rule results in a large number of decisions which are widely regarded as being bad, one consequence is that lawyers will wish to keep re-arguing the point whenever possible, in the hope that they will be able to employ legal method in ways which will persuade the court to re-interpret, or even abandon, the old rule and develop a new one. As Lord Nicholls put it in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2007] 4 All ER 657 (which is discussed at page 191), ‘[51] Legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again’.

1.7.3 The need for a real dispute

You will recall (from page 18) that, in *R v Secretary of State for the Home Department ex parte Cheblak* [1991] 2 All ER 319, Lord Donaldson MR said that ‘the facts underlying particular disputes’ provide a context for the administration of justice. This comment is important not only for itself, but also because it reflects a very deep-seated idea of English law.

The courts are not happy unless they are dealing with real disputes, based on real facts, where the outcome will actually matter to someone in real terms. Two kinds of case are likely to fall foul of this attitude. First, there are cases which involve purely hypothetical points. This category is of little significance in practice because, even if anyone tried to start proceedings, it is extremely unlikely that the court would allow the matter to proceed to a hearing. Secondly, and more importantly in practice, there are those cases where there has been a real dispute but the parties have been overtaken by events in such a way that the dispute has effectively evaporated.

The dispute in *Ainsbury v Millington* [1987] 1 All ER 929 involved rights of access to a council house. After the proceedings had started, the council terminated the tenancy, and so there ceased to be any real substance to the dispute. Lord Bridge cited with approval the words of Viscount Simon LC in *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469:

‘I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing *lis* [i.e. a piece of litigation] between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in his favour without in any way affecting the position between the parties ... I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.’

Returning to *Ainsbury v Millington* itself, Lord Bridge went on to say:

‘It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

‘Different considerations may arise in relation to what are called “friendly actions” and conceivably in relation to proceedings instituted as a test case ... Again litigation may sometimes be properly continued for the sole purpose of resolving an issue as to costs when all other matters in dispute have been resolved.’

The practice of the courts in going beyond what is strictly necessary in order to dispose of a live issue between the parties is discussed again in Chapter 14. For the moment, though, it must be emphasized that Lord Bridge’s indication of the types of cases in which ‘different considerations may arise’ is not exhaustive. More particularly, in *R v Secretary of State for the Home Department ex parte Salem* [1999] 2 All ER 42, Lord Slynn

added cases involving public authorities and questions of public law, before going on to say that in such cases a court has

‘a discretion to hear the appeal... The decisions in the *Sun Life* case and *Ainsbury v Millington* ... must be read accordingly as limited to disputes concerning private law rights between the parties to the case.’

But even in these cases

‘the discretion ... must ... be exercised with caution and appeals which are academic should not be heard unless there is a good reason in the public interest for doing so, as, for example (but only by way of example) where a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated, so that the issue will most likely need to be resolved in the near future.’

Subsequently, in *Bowman v Fels* [2005] EWCA Civ 226, [2005] 4 All ER 609, the Court of Appeal added a further category of exceptional cases, namely those involving matters of private law where it is in the public interest for the court to decide important and difficult questions as to the interpretation of recent statutes, even though the parties have settled their dispute without the need for a court hearing.

The issue in the case was whether the Proceeds of Crime Act 2002 imposed upon solicitors a duty to disclose to the authorities their suspicions that their clients had been involved in money laundering. The court was influenced by the fact that the issue involved a matter of law which did not depend upon a detailed consideration of the facts, and which was, moreover, of general concern to the solicitors’ profession at large and was, therefore, destined to come before the court relatively soon in any event.

1.8 The political element in judicial decision-making

Judges are appointed by the state in order to perform certain public functions within the body politic. Nobody could sensibly dispute, therefore, that their activities are, in a broad sense of the word, political. However, the practical consequences of this statement are less clear. More particularly, as Chapter 14 shows, a variety of factors may come into play when a judge is deciding whether it is appropriate to develop the law by means of judicial decision-making.

John Griffith, a distinguished academic with avowedly left-wing sympathies, gave one view of the judicial role in a book which first appeared in 1977:

'Judges are concerned to preserve and to protect the existing order. This does not mean that no judges are capable of moving with the times, or adjusting to changed circumstances. But their function in our society is to do so belatedly ...

'That this is so is not a matter for recrimination. It is idle to criticize institutions for performing the task they were created to perform and have performed for centuries.' (*The Politics of the Judiciary*, 5th edn, 1997, p. 342.)

To describe judicial shifts of opinion as 'belated' is less than flattering, but Lord Devlin, a former Law Lord, writing long after his retirement, put substantially the same point, although he did so in more generous terms:

'I am not one of those who believe that the only function of law is to preserve the *status quo*. Rather I should say that law is the gate-keeper of the *status quo*. There is always a host of new ideas galloping around the outskirts of a society's thoughts. All of them seek admission but each must first win its spurs; the law at first resists, but will submit to a conqueror and become his servant. In a changing society (and free societies that are composed of two or more generations are always changing because it is their nature to do so) the law acts as a valve. New policies must gather strength before they can force entry; when they are admitted and absorbed into the consensus, the legal system should expand to hold them, as also it should contract to squeeze out old policies which have lost the consensus they once obtained.' (*The Judge*, 1981, p. 1.)

Finally, and pausing only to repeat the comment that the role of the judges in developing the law generally is discussed in Chapter 14, a word of caution may be appropriate. The judges are not uncommonly criticized for being drawn from a relatively small pool of people, many of whom have similar social backgrounds, as a result of which it is suggested that they all think alike. Take for example, the following passage, which is emphasized by the use of italics in the original:

'[The judges of the Divisional Court, the Court of Appeal and the House of Lords] have by their education and training and the pursuit of their profession as barristers, acquired a strikingly homogeneous collection of attitudes, beliefs and principles, which to them represent the [public] interest.' (Griffith, *op. cit.*, p. 295.)

What comments such as this leave wholly unexplained are the common occurrences of appeals being allowed and dissenting judgments being delivered. It may be that Baroness Hale's italicized comment in the passage quoted at page 6 more accurately catches the truth of the matter.

Summary

- ▶ Legal method involves using reasoning and language to achieve practical results. When properly understood, it may be seen to be a creative process.
- ▶ Legal method involves factors drawn from outside the legal texts themselves.
- ▶ Legal reasoning is syllogistic in nature, involving propositions in the form of a *major premise* (which is a statement of *law*) and a *minor premise* (which is a statement of *fact*) leading to a *conclusion* (which is a statement of the *legal outcome*). Legal method is concerned with formulating the major premise.
- ▶ In legal reasoning, as elsewhere, propositions and conclusions may be true or false. Reasoning may be valid or invalid. In general, valid reasoning will produce a conclusion which is true, and invalid reasoning will produce a conclusion which is false. However, a conclusion which is true may appear to result from reasoning which is invalid; and a conclusion which is false may appear to result from reasoning which is valid.
- ▶ The process of *inductive reasoning* involves making a number of observations and then proceeding to formulate a principle which will be of general application. The process of *deductive reasoning* involves stating one or more propositions and then reasoning your way to a conclusion by applying established principles of logic. The process of *reasoning by analogy* involves saying that if a number of different things are similar to each other in a number of different specific ways, they are, or should be, similar to each other in other ways as well.
- ▶ Seeking to achieve the clients' objectives is the principal aim of legal *practice*. However, in legal *scholarship* the emphasis falls on developing a critical understanding of legal principles.
- ▶ There are many views of justice as a concept. In practical terms, however, justice needs both a context and a content. According to Lord Donaldson MR, the context is the factual situation giving rise to the case, and the content is the law which is applicable to that factual situation.
- ▶ The courts are generally reluctant to entertain cases where there is – or where there no longer is – a dispute between the parties, but they will sometimes do so.
- ▶ Since law is an inescapable aspect of the body politic, it necessarily follows that law is political in nature.

Exercises

- 1 What is Griffith's view of the way judges function? How similar is it to Lord Devlin's view.
- 2 What is meant by an *inarticulate major premise*?
- 3 What does Dworkin mean by *standards*?
- 4 Distinguish between *truth* and *validity*.
- 5 What does each of the following mean: *sylogism*; *induction*; *deduction*?
- 6 How is the idea of 'due process' relevant to the relationship between law and justice?
- 7 What is the English courts' approach to hypothetical disputes involving abstract questions of law?

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