4-1963

Logic in the Law

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H. L. A. HART, John Wisdom, Stephen Toulmin, and O. C. Jensen are all professional philosophers who have been interested in the task of characterizing legal reasoning. As a lawyer who shares the belief that philosophers are peculiarly equipped to perform this task, it is my hope that the following polemical remarks will further arouse such interest.

In an essay on " Logic in the Law ", included in the recent collection, *Oxford Essays in Jurisprudence*, the editor, Mr. A. G. Guest, joins the many lawyers and jurists who have exposed the persistent misuse of the concept of logic embodied in such phrases as ' the life of the law has not been logic : it has been experience ', and ' some assume that the law is a logical code, whereas all must acknowledge that the law is not always logical at all '. Such phrases frequently appear as criticisms of reasoning in particular cases. Guest cites several examples, including the following :

> . . . in the case of *Whiteley* v. *Chappel*, the accused was charged with having ' personated a person entitled to vote '. It was proved that he had filled in a voting paper in the name of a man who was dead. He was acquitted of the offense charged. This decision is frequently cited as a glaring example of ' automatic ' reasoning. The use of ' dry logic ' is contrasted unfavourably with a judicial discretion based upon discovering the true intent of the legislature. But the issue in this case was simply one of the interpretation of the words ' personating ' and ' entitled to vote '. It was, in fact, one of semantics (p. 180).

Guest properly insists that the unsoundness of the foregoing decision should not be explained in terms of an " abuse of logic " Logical considerations apparently did not affect the choice of premises, and the move from premises to conclusion was not logically faulty. However, Guest's comments on the decision might, in either or both of two ways, mislead those interested in accurate characterization of the " logic " of legal reasoning. First, one should not interpret Guest's comments to mean that when a court's job is to decide the legal " interpretation of words ", no abuse of logic is possible. Under our system of law, judges are committed to the *stare decisis* principle that like cases are to be decided similarly, and most judicial opinions accordingly reflect this commitment, either explicitly or implicitly. Therefore, if an earlier case involving the same issue as the *Whiteley* case had been decided against the defendant, the decision in the latter case would have been inconsistent with the principle of *stare decisis*. " Inconsistent " does not exhaust the logician's meaning of " illogical ", but in as much as it is one significant criterion for the use of the latter concept, it is not inappropriate to say that " logical " considerations may affect the choice of legal premises, and, therefore, that an " abuse of logic " is possible in cases such as *Whiteley* v. *Chappel*. Secondly, should the routine, though very important, judicial task of deciding the legal meaning of

words be characterized as " one of semantics "? Such characterization suggests at least the possibility that issues of interpretation are to be resolved on the basis of linguistic usage. Though a " wooden literalness " does characterize the reasoning of some judicial decisions (*e.g.* the determination of the meaning of " person " in *Whiteley* v. *Chappel*), many lawyers and judges would agree that the legal meaning of concepts should be determined primarily on the basis of other factors such as the purposes of the rule or provision in which the concept appears, relevant social policies, and decisions in similar cases.

Another objection to the use of logic in the law which Guest considers misconceived or unfounded is that logic is of little value to judges and lawyers, since they often arrive at their conclusions intuitively and thereafter formulate their reasoning (p. 187).

An obvious criticism of this view and one which Guest does not state explicitly is that those psychological processes which are intuitive may be precisely the ones most in need of logical scrutiny. No good lawyer or judge relies on intuited conclusions. The next step is always to test these conclusions by examining the relevant authorities. At this stage, logical processes may be used, usually without identifying them as such, to expose inconsistencies and to test assumed logical relationships between legal propositions and authorities.

One of Guest's criticisms of the view that there is no role for logic if the reasoner's psychological processes are largely intuitive, is that since some fields of law such as real property " are very largely devoid of any moral or social ideals ", there is not, in such fields, any " intuitive generalization to which resort can be made " (p. 187). Presumably Guest intends to suggest that in such fields some process of reasoning, as opposed to intuition, is required, and that as this process may be deductive in character, logic will, to that extent, be relevant. Here Guest appears to join those whom he is criticizing by erroneously assuming that the use of logic in the law depends on the character of the psychological processes which may be subjected to logical appraisal. That Guest assumes this is most odd, especially inasmuch as he recognizes that " there has to be a reasoned justification of the decision made " (p. 187). Guest's second criticism of those who see no role for logic where the relevant psychological processes are intuitive, is in some respects similar to the aforestated criticism that such processes may be precisely the ones most in need of logical scrutiny. He states that :

> In his selection of competing propositions and in his consideration of the propriety of subsuming a particular case under a certain general rule, a judge is not, of course, guided by logic. He is guided by insight and experience. But in his application of the proposition selected, and in his testing of its implications before he adopts it, he uses a deductive form of reasoning in order to discover its potentialities. The directive force of a principle may be exercised along the line of

> logical progression, and a judge must always keep in mind the effect which his decision will have on the general structure of the law (p. 188).

Although some of the foregoing remarks are true, some are not, and some are otherwise puzzling. What, for example, is the difference, in a legal context, between " subsuming a particular case under a certain general rule ", and " application . . . [to a particular case] . . . of the proposition selected "? Moreover, is it true that " in his selection of competing propositions . . . a judge is not, of course, guided by logic " ? What does Guest mean by "guided by logic "? It has been demonstrated that logic, in a most common sense of that word, may play a significant role in the selection of premises relevant to the decision of particular cases. If judges committed to the *stare decisis* principle decline to decide in accordance therewith, their reasoning is, in that respect, illogical, though their decisions may be sound from other points of view. Guest's remarks here are all the more puzzling in view of the fact that at later points in his essay he states both that :

> In the dialectic of the law, logic has an important part to play at a stage when a suggested rule has to be tested in order to discover whether or not its adoption will involve the contradiction of already established legal principles (p. 195).

and that :

> not [sic] can it ever be said that logic will help us to discover what propositions should be selected or what their true content should be (p. 197).

It would be interesting to learn how Guest would reconcile these two statements.

Guest objects to the assertion that the process of " drawing generalizations from the cases . . . involves the use of inductive logic " (p. 188). He identifies scientific reasoning with inductive reasoning and states that " the object of scientific inquiry is discovery ; the object of a legal inquiry is decision " (p. 188). Hence, the judge should not be viewed as predicting that " he will decide one way or the other on the strength of his observations " (p. 189). As Guest's essay is entitled, " Logic in the Law ", he presumably does not wish to exclude from consideration the reasoning of lawyers who advise clients. Their job *is* often one of prediction, and though their work is in several ways dissimilar to the work of scientists, the analogy to induction is here much less inexact. The lawyer does often use " discovered " cases as bases for rejecting or adopting hypotheses as to what a judge is likely to decide.

Guest puts the following hypothetical case :

> Let us take the words of a penal statute, in this case the Representation of the People Act, 1949, s. 52 : ' Any person shall be guilty of an offence if, at a parliamentary or local government election, he fraudulently takes out of the polling station any ballot paper.' Here the legal process consists in the application of a fixed and ascertained rule

> to the facts of a particular case. The section of the statute constitutes the major premiss, the minor being ' X (the accused) at a parliamentary or local government election fraudulently took out of a polling station a ballot paper '. This, it will be seen, comprises the words of the indictment. If the minor premiss is true, the offence is made out and X will be found guilty. . . (p. 182).
>
> In the appellate courts . . ., counsel expect that the judges will be able (or unable) to apply the language of the major premiss to that of the minor, and to reach a conclusion. In the lower courts, however, the words of the statute may be quite simply and literally applied to the case in hand (p. 183).

Guest then states that " It is this process of application which has been termed deductive, and we are concerned to inquire whether or not it is also logical " (p. 183). Guest's usage is odd, inasmuch as it suggests that reasoning may be deductive though not logical in character. Be that as it may, he suggests three " difficulties " in the way of describing such reasoning as logical. The first is that legal propositions are normative rather than fact-stating, and the general logic of norms has not yet been worked out. However, he concludes that this " difficulty " is not of major significance, " for it is a social fact that we do thus reason from the general norm to the particular instance " (p. 185). Guest appears to suggest, though this is not entirely clear, that there are two additional " difficulties " that stand in the way of classifying such reasoning as logical. These are that logical concepts have " no real existence in the world of nature ", and that careful inquiry must be made to determine whether such concepts are used in the same sense in premises and conclusion. Surely, these are not sound reasons for refusing to consider such reasoning as logical in character. What is suggested here is also true of the time-worn illustration of one type of syllogistic reasoning : " All men are mortal, Socrates is a man, therefore Socrates is mortal." " Mortal " has no real existence in the world of nature. It is also important that " mortal " be used in the same sense in the premises and conclusion.

Guest states that he agrees with the views of Professor John Wisdom expressed in the following passage drawn from his well-known essay, " Gods ": [1]

> *In courts of law* it sometimes happens that opposing counsel are agreed as to the facts and are not trying to settle a question of further fact, are not trying to settle whether the man who admittedly had quarrelled with the deceased did or did not murder him, but are concerned with whether Mr. A who admittedly handed his long-trusted clerk signed blank cheques did or did not exercise reasonable care, whether a ledger is or is not a document, whether a certain body was or was not a public authority.
>
> In such cases we notice that the process of argument is not a *chain* of demonstrative . . . [deductive] . . . reasoning. It is a presenting and representing of those features of the case which *severally*

[1] In *Logic and Language*, ed. by A. G. N. Flew, pp. 187-206.

> *co-operate* in favour of the conclusion, in favour of saying what the reasoner wishes said, in favour of calling the situation by the name by which he wishes to call it. The reasons are like the legs of a chair, not the links of a chain (p. 195, Flew volume).

It is useful to distinguish between reasoning used to establish relevant premises (legs of the chair) for legal conclusions and the processes of reasoning from such premises to such conclusions. At least with respect to the process of establishing the " legs ", it has been demonstrated that deductive logic may be used. Professor Wisdom's analysis is, however, peculiarly insightful insofar as it emphasizes the multi-factored character of much legal reasoning, and implicitly recognizes that the logical relationship between these factors and the conclusions they support should not be forced into a deductive mould.

Guest also aligns himself with the principal theses of E. H. Levi embodied in his book : *An Introduction to Legal Reasoning*. Guest is principally interested in Levi's insight that since much legal reasoning is analogical, the form of such reasoning may therefore be described in Aristotle's terms as " neither like reasoning from part to whole, nor like reasoning from whole to part, but rather reasoning from part to part, when both particulars are subordinate to the same term, and one of them is known " (p. 190). Guest quotes Levi's view that :

> The problem for the law is : When will it be just to treat different cases as though they were the same ? A working legal system must . . . be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in common brings into play the general rule (p. 191).

This way of putting " the problem " is especially relevant in those fields of law in which case authority is plentiful and *stare decisis* important.

To conclude, neither Guest's analysis nor mine examines all of the problems of characterizing legal reasoning. Although it would be rash for either of us to claim finality for our analyses, it may not be rash to hope that these will ignite some flickers of interest among those best qualified to judge.

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