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THE RULE OF LAW AND LEGAL REASONING

Our instinctive response to the linkage of the rule of law and legal reasoning in the title of this session is that there is a connection. That notion was reinforced yesterday when we were told of the central role that the reasoned judgment plays in our respective legal systems. It all seems consistent with the notions of reasonableness and transparency that underpin out concept of the rule of law. But what do we mean when we speak of legal reasoning? Is there a particular form of reasoning that we can categorise as legal reasoning and, if so, what constitutes reasoning that we describe as 'legal'? And once we have identified it what has that to do with the rule of law?

I pose these questions in the context of a suggestion during yesterday afternoon's session that legal reasoning is necessarily prior to speaking about legal writing. At one level that is obviously so. The old adage about engaging one's brain before opening one's mouth is equally valid for the written production of words. At another level – the level of language and the basic fact that language is the medium through which

thought must be expressed – the structure of one's use of language, oral or written, is the necessary pre-requisite to the ability to engage in reasoning. Like the horse and carriage of the old song you can't have the one without the other.

Let me turn to the question whether there is something that we can properly characterise as legal reasoning or whether that is, as my late father in law would have said (and frequently did say) in regard to such concepts as 'military intelligence' and 'business ethics', an oxymoron. In exploring the notion I spent some time in the unfamiliar field of the philosophy of language and logic looking at the various different kinds of reasoning that experts recognise. If like me you are unqualified for this task – it formed no part of the curriculum in my commerce degree – one is rapidly out of one's depth paddling through murky concepts such as inductive reasoning, deductive reasoning, abductive reasoning, Socratic method, analogy, syllogism and even some murky concepts disguised, as Gibbon would have said, in the decent obscurity of a learned language – modus ponens and modus tollens. However, the one thing that emerged clearly was that all of these forms of reasoning are, in one guise or another, part of the daily reasoning process of lawyers. In that sense when we speak of legal reasoning we are speaking of the ordinary process of reasoning that is used in a variety of fields. It encompasses the various forms of reasoning that are in every day use in courts around the world.

What then qualifies as legal reasoning as opposed to any other kind of reasoning?

It seems to me that the answer to that question lies in three notions, process, proof and public acceptability in that order. Process has to do with the way in which we go about assembling the elements that are to be used in arriving at our legal conclusion. For the practitioner and the judge that is the necessary starting point and it weaves together several disparate threads. The primary one is obtaining, presenting and selecting the factual material from which the legal question is derived. One of the huge contrasts between academic law and the law encountered in practice is that the academic can work backwards from the problem that they wish to teach or discuss to the factual basis that is the necessary background to the problem. The practitioner and the judge must approach the matter from the other direction. And legal reasoning goes wrong when that is not done. Perhaps the primary source of problems for the practitioner, or the enthusiastic judge seeking to write a ground-breaking judgment, is to disregard or overlook the inconvenient facts and give undue weight to the convenient facts, in order to create a scenario in which they can pursue whichever legal hobbyhorse it is that they wish to ride. I instance the *Stranham-Ford* decision in which the general enthusiasm to break new ground and write a judgment on the problem of assisted dying led to everyone, until they arrived in the Supreme Court of Appeal, disregarding

or overlooking the fact that there is no point in an order authorising a medical practitioner to assist someone to die when they are already dead.

We have spoken much in this conference about the desirability of identifying the key issue in a case at the outset and keeping that firmly in mind throughout both the forensic process and the judgment writing process. That is obviously dependent on the facts, but there is then a process of reasoning that must take place in order to identify that question. For the practitioner it may go something along the following lines. What does my client want? Why does my client want that? Who do they want it from? Why will that person or body not give it to them? What does the law say? Why should the law say that my client should have what they want? And so on and so forth. I suggest that the root of many cases failing is that the lawyers did not engage in this reasoning process, but stopped at the first question and very possibly did not even reach that question, because they thought they knew better than the client what they wanted. That is always a recipe for disaster and proof, if one needs it, that if one asks the wrong question, one will usually arrive at the wrong answer.

That theme of process being a central characteristic of legal reasoning runs through every aspect of litigation and I leave it there in order to pass on to the issue of proof. We probably spend little time pondering over the hallowed trio of proof beyond reasonable doubt, proof

on a balance of probabilities and prima facie proof. But, it seems to me that they lie at the core of our notion of legal reasoning. The reason is that they set the standard by which we measure the outcome of much of our legal reasoning. In any trial the reasoning and arguments have to lead us to that level of conviction and a failure to adhere to those standards is a failure of legal reasoning. Of course when we are dealing with a purely legal question those standards do not come into play, but I suggest that there is similarly a standard that legal arguments have to reach in order for them to be adopted. The first level case is where there is an existing body of law that applies to the legal problem. Then the choice is between applying that law, or departing from it by a process of distinguishing, qualifying or overruling. Each of those raises a question of the standard to be applied. How different must this case be from previous cases in order for it to be characterised as distinct? What are the grounds for importing a qualification? When does a court overrule? Most jurisdictions formulate norms or standards by which judges answer these questions and the legitimacy of their answers will depend upon the conformity of the reasoning process with those standards.

Then one comes to higher level legal problems where the question is not covered by existing authority and the challenge is to decide whether to extend an existing rule or to refuse to do so – both of which are law-making functions. The essential characteristic of such decisions if they

are to be regarded as legitimate is the reasoning process that leads to the extension or the refusal to extend. Why is this case classified as falling in the same category as the earlier ones, or why is it different? When one is dealing with legislation what are the contextual factors that serve to draw it within or exclude it from the statutory net? On what policy factors has the judge relied in arriving at a conclusion one way or the other and are those factors legitimate, factually based and reasoned or a matter of predilection and prejudice?

That conveniently brings me to the third element of public acceptability. Legal reasoning has to speak to three different communities and take a form that satisfies all three. The primary community is the parties to the litigation. The reasoning must satisfy them at least that they have been fairly heard, their arguments fairly considered and the outcome, even if adverse, is within the acceptable range of outcomes for that kind of litigation. Then it has to satisfy the legal community. Depending on the court that makes the decision the interested legal community will consist of the lawyers for the parties; any potential appellate court; other lawyers who may have to consider and take account of the decision and possibly, when dealing with judgments reported in the law reports, the legal academic community. Finally the legal reasoning has to be acceptable to the general body politic. It has to satisfy the other branches of government that it is within the area of competence that the

particular society regards as the judiciary's responsibility in accordance with their conception of the separation of powers. It also has to be broadly acceptable to the community at large otherwise there is a serious risk that the court's orders will not be enforced. In our modern democracies where courts wield a great deal of power they are dependent upon public support to withstand pressures from the other branches of government and if that support is damaged or weakened so is the authority and standing of the courts. In other words the court must be perceived as fulfilling its proper and limited role in ordering society. It does not matter that its decision is unpopular, provided it is perceived as having been arrived at within the court's proper sphere of action and by a process that is publicly acceptable. When that perception is damaged, as the late Ronald Dworkin wrote shortly before his death when he said that the drum roll of 5:4 decisions in the US Supreme Court was leading to a growing public perception that the court was no longer a legal but a purely political actor, the idea of legal reasoning is undermined. And undermining legal reasoning undermines the role of the court and ultimately the very idea of the rule of law.

Let me try to draw these threads together. Legal reasoning is the product of a process. It is reasoning that has to meet normative standards that we refer to as proof or, on purely legal questions, has to occur within the normative framework that we apply to the determination of legal

questions. Finally it is reasoning that has to satisfy broad standards of public acceptability. And when it does that it provides the foundation upon which we can claim that our societies are founded on the rule of law. When any element of that triad is damaged or broken; when courts do not follow process; when proof is disregarded; when courts do not conform to public and constitutional understanding of their proper role and function, the rule of law is damaged. And that is why legal reasoning is so important and clear, detailed and open judicial exposition of the judgment process is so vital. Its absence, or concealment, or any failure to undertake the process in accordance with stated and publicly available norms and standards, destroys the foundations upon which the rule of law is established.

Thank you.