Articles

THE LAW MAKING PROCESS

From the writings of Holmes to those of Pound and Cardozo the desire for a creative judiciary has always been discussed in terms of its rendering the law uncertain and eliminating even nominal adherence to the doctrine of separation of powers. The doctrine of precedent, rigidly applied, has been assumed to be the one safeguard which precludes the judges from assuming the role of lawmaker. To those who would restrict judicial initiative, the doctrine of precedent is lauded as being the only means of assuring certainty and of preserving to the legislature the function assigned it by Montesquieu. To those who favour so-called judicial creativity, the doctrine of precedent has become the thorn which restricts the potential lawmaking function of the judiciary and the separation of powers is dismissed as an example of nineteenth century political philosophy which can have no real merit in the light of modern day government by executive.

In fact both of these attitudes rest on a basic misunderstanding of the lawmaking process. A careful scrutiny will, it is submitted, show that only in a system which adheres rigidly to the binding force of precedent can the judges make law. No matter how enlightened and desirable a particular judgment may be, it cannot be law and the judge who made it cannot be said to have exercised a lawmaking function unless the judgment is rendered by a court whose judgments become binding as precedents. Hence, only in a system which adheres to the doctrine of precedent can the judiciary assume the role assigned to the legislature by the doctrine of separation of powers.

Before any analysis can be entered into regarding the lawmaking process referred to above, certain basic terms which are inherent in such analysis must be defined.

For the purpose of this paper law can be simply defined as a system of rules of general application imposed by or accepted by public authority. This definition avoids the obvious problems arising out of Austin's use of the sovereign command and is sufficiently broad to encompass Public International Law and Constitutional Law.

As far as the doctrine of precedent is concerned Blackstone's general enunciation is sufficiently accurate for our purposes:[1]

> 'For it is an established rule to abide by former precedents where the same points come again in litigation; as well to keep the scale of

1. 1 Blackstone's Commentaries 68-71.

> justice even and steady and not to waiver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent is now become a permanent rule which is not in the breast of any judge to alter or vary from according to his private sentiments."

In effect then, Blackstone is saying that a decision, by the operation of the doctrine of precedent, has the effect of becoming "a permanent rule". Further, because this rule under that doctrine must be abided by "where the same points come again in litigation", its application by the court is required to be general in nature rather than arbitrary or whimsical. Further still, because this rule of general application is required to be accepted by and imposed by the courts under the terms of the doctrine of precedent, we inevitably arrive at the following situation: an initial decision when operated upon by the doctrine of precedent becomes a rule of general application imposed by and accepted by public authority.

If we return to our basic definition of law given earlier it becomes apparent that for a particular decision to become law it must be followed as a precedent. In other words only through the operation of that doctrine can a decision become law — become a rule of general application. It thus becomes immediately obvious that to suggest that judges assume creative functions as law-makers in a system which regards precedents as merely authoritative rather than binding is to suggest an impossibility. It is to equate a persuasive force with an incontrovertible rule.

The next proposition which must be dealt with is as follows: if the judges cannot create law except within the framework of the doctrine of precedent, does it necessarily follow that our common law which has developed within this framework is judge-made law. To answer this, one must examine the process by which the judge arrived at the initial decision which based the precedent and became law. If that decision is the creation of a judge, then his creative activity coupled with its acceptance as a precedent has resulted in the formation of a law. If on the other hand the judge assumed no creative role in arriving at the initial decision, then, of course, the common law is not judge-made law.

Sir Matthew Hale in advocating the latter course states:[2]

> "The decision of courts of justice . . . do not make a law properly so called (for that only the King and Parliament can do); yet they have great weight and authority in expounding, declaring and publishing what the law of the kingdom is . . . and though such decisions are less than a law, yet they are a greater evidence thereof, than the opinion of any private persons, as such, whatsoever."

2. Hale, History of the Common Law, 5th ed. 141.

This view is the basis of Blackstonian theory and was put forth by Backstone as follows:[3]

> "These judicial decisions are the principal and the most authoritative evidence that can be given of the existence of such a custom as shall form part of the common law . . . ."

Austin refers to this as,

> "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges."[4]

Despite the general trend today toward complete acceptance of Austin's position on this question, there is still the odd defender of Blackstone about, the most notable probably being Professor Hammond who in his edition of Blackstone[5] makes a serious effort to defend Blackstone's discovery theory by paralleling judicial decisions *qua* law with scientific theory *qua* scientific truth.

The battle will probably continue on in futility. Yet this seeming game of words is important for on its outcome will stand or fall a large portion of our political and jurisprudential theory. There can of course be no definite outcome for Blackstone's "miraculous something, made by nobody" is incapable of being proved to exist or not exist.

If Blackstone is correct, the initial judicial decision is not created — it is discovered. Despite its becoming a weighty precedent and, for all practical purposes law, it is not judge made law. If on the other hand the initial decision is an act of judicial creativity and initiative not emanating from some pre-existing source then, when operated upon by the doctrine of precedent, the source of that law must be the judicial initiative which based it.

Montesquieu, in setting forth his doctrine of the separation of powers as the basis for individual liberty gave to the legislators alone the task of creating law, "the national judges are no more than the mouths that pronounce the words of the law, mere passive beings . . . ."[6]

Thus it can be seen that in any judicial system where precedent is considered binding and which adheres to the doctrine of the separation of powers some such device as Blackstonian discovery is necessary. It becomes imperative that the initial decision subsequently rendered law not be an act of judicial creativity. The judges must be "mere passive beings".

3. 1 Blackstone's Commentaries 68-71.
4. 2 Jur. 4th ed. 655.
5. At pp. 213-216.
6. 1 Spirit of the Laws 1900 ed. 159.

In an effort to avoid Blackstone, who is not fashionable at the moment, and yet circumvent the conflict which otherwise arises when the tenets of the doctrines of precedent and separation of powers are to be reconciled, some writers have recently sought to modify the terms of Montesquieu's doctrine. Mr. Justice Kitto, of the Australian High Court, states the following:[7]

> "In an article in Chambers' Encyclopaedia, Mr. C. H. Wilson points out that the separation of powers is not so much about the separation of functions as about the separation of functionaries. He refers to the fact that legislation, administration and judicial decisions are different stages of the same power or function, namely, the making of rules which regulate the behaviour of citizens in that broadly the legislature makes laws of most general application with sovereign authority, the civil departments make laws of a more concrete application and with a limited and derived authority, and the courts make laws of the most concrete kind of all, namely judicial rulings binding upon specific persons, within an authority still more strictly circumscribed."

This position, at least insofar as it relates to the judicial authority, is completely untenable, for, as has been shown earlier, what may be a mere judicial ruling binding upon the parties before the court in fact becomes a law of general application as a precedent, the effect of which is to give the judge a legislative authority as broad as that of the legislature, limited only by those specific realms in which the legislature has sought to exercise its sovereignty by enacting legislation. Even in this latter area the effect of judicial legislation on parliamentary legislation cannot be minimized.

It would appear, therefore, that every nation which has the doctrine of separation of powers written into its constitution, and the courts of which nation feel themselves bound by the doctrine of precedent, ought heartily to endorse Blackstone's logic for, fiction though it may be, it is a form of fiction which cannot be disproved. To deny Blackstone's theory and yet purport to adhere to the separation of powers and the doctrine of precedent is to leave oneself in a position which is not logically tenable.

The current call for creativity though is not so much a denial that what exists at present is judicial legislation as it is a desire that what exists at present be altered, be it an alteration of judicial legislation or otherwise. It is a call for overrulings. The position has been taken that what exists at present, what is known as the common law, is judicial legislation. It is necessary to ascertain the effects of judicial overrulings on the common law. Would the ability of the courts to overrule precedents render them any the less law. The answer to this is obvious. So long as the

7. 1954, 90 C.L.R. 353, 381.

precedent is binding on the courts, i.e. until a precedent has been overruled by a court of competent jurisdiction, that precedent remains law. By analogy, the mere fact that Parliament has the power to repeal or amend its enactments now in force in no way lessens their present status as the law of the land and until such time as they are repealed or amended they are law. The parallel in the field of judicial legislation is self-evident. If parliamentary action were ever to reduce itself to the state of pure expression of whim and arbitrary pronouncements, its enactments could no longer be said to be law — for these enactments would not then form a system of rules of general application. So too if judicial overrulings were ever to become so arbitrary and numerous as to preclude the existence of underlying rules of general applications, then whatever these pronouncements might be, they would not be law. But between these two extremes of no overruling and no rules there exists a vast area where judicial repeal and amendment is feasible if not desirable without in any way destroying the status of judicial legislation as such.

So, too, if one chooses to take the Blackstonian view and regard precedent as of evidentiary value only rather than as law, overrulings and new discoveries are certainly possible.

> "Yet this rule (the rule that precedents must be followed) admits of exceptions where the former determination is most evidently contrary to reason, much more if it be clearly contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law . . . Upon the whole, however, we may take it as a general rule 'that the decisions of the courts of justice are the evidence of what is the common law'."[8]

But, while both views of precedent admit of overrulings, both do not admit of prospective overrulings. Mr. Justice Cardozo,[9] one of the first advocates of prospective overruling gave the following enunciation of this doctrine:

> "The rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because its repeal might work hardship to those who have trusted to its existence."

It is significant that Mr. Justice Cardozo used the word "repeal" in this statement, for prospective overruling by its very nature can only be used where it is assumed that the precedent which is to be overruled is law and that the law ought to be changed. For, if what is to be overruled is not law and never was the

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8. 1 Blackstone's Commentaries 68-71.
9. 55 N.Y. State Bar Assn. Reps. 263, 296.

law, then, whatever reliance the parties before the case might have placed on the inadequate precedent, for the court to apply that precedent would be for the court to abdicate its function by applying something other than the law. Furthermore, by Blackstonian theory the law which is now "discovered" is and always has been the law which governed men's actions though the courts may not have declared it so to be. Thus, in fact, it would follow that despite an overruling, the new declaration is merely declaratory of the law which was in force if not enforced at the time of the act in question and no other rule could possibly be applicable.

Cardozo's doctrine requires that what was propounded by the courts at the time of the act was law, perhaps bad law, but nonetheless law. His view further requires that his declaration as to the law to govern future cases also be law. In other words, Cardozo sees not one absolute law discovered by the courts, but a law created by the judiciary and subject to judicial repeal or amendment but nonetheless being law for the time being.

It is in all probability fortuitous that the lawmakers of our world do not concern themselves with such vacuous problems as the logical compatibility of the doctrines of precedent and separation of powers; for if they did to any practical extent one or the other would have to be sacrificed. In practice, the doctrine of precedent allows judicial creativity checked and balanced by the realization that, imperfect as the practised separation of powers may be, the prime legislative role rests with the legislature and not the courts. So too, prospective overruling is being practised by the courts with increasing regularity and a blind eye is being turned to what this might mean in the light of Blackstonian theory. If jurisprudential schemes and their logical consistency were to dictate the practical functionings of our courts of law the end result would be considerably neater and in all probability far less just.

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