

LEGAL RATIONALISM

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Law Professor R.E. Degnan of the University of California in the article on "Evidence" in the *Encyclopaedia Britannica* (circa 1970) stated that:-

"The law of proof is thus, somewhat paradoxically, a contest between human reason on one hand, and common sense on the other: its function is to balance the value of truth against the cost of attaining it."

POETIC JUSTICE?

To most lay people this is an astounding comment. They feel that **common sense** and **reason** are very *nearly* the same thing. One could say that common sense tells them so. If we seek to define them, to differentiate them, we may see what the major structural flaw in our legal system is. Referring to a dictionary for the meaning of **common sense** does not help, it just gives a common sense answer! One must use *reason* to get an answer.

We can do this by comparing the behaviour of a logical machine, such as a robot or computer, with a human. We tend to think of a child as a primitive adult, someone who has only learnt basic and simple skills. When we try to program a machine to behave the same way we find that the child's behaviour is much more complex, that it involves other things that we take so much for granted. This is because the obvious is so hard to state. In doing a simple task the child has a background knowledge of other things learnt in the past. These are a myriad of minor details. In contrast, the knowledge learned in becoming a professional in some areas of science can be reduced to about a hundred formulae. This is more or less the difference between rationalism and common sense.

Intuition is similar to common sense. In a dictionary it is defined as a "direct perception of truth, facts, etc independent of any reasoning process." This view of it as being divorced from reasoning has tended it to be regarded as something hocus-pocus in nature. In reality it is a subconscious form of information processing, a processing of all background information held in the subconscious memory. Just because it is not apparent in its working does not mean it is not rational in its functioning. If we wanted an analogous concept to relate it to computer processing, it would be akin to parallel processing.

Common sense includes the things or formulae we can state *plus* all the other background knowledge which is difficult to articulate in statements. The background knowledge can produce a 'gut' feeling which can incorporate those factors which are left out of purely rationalist thinking. Of course, there is a danger of relying on gut feeling alone and ignoring rationalism, as this too can produce gaps in efficient thinking, and thus produce illogical behaviour. Rationalism is fine if, and only if, it is tempered by common sense.

THE WHOLE TRUTH?

Consider this; if you were asked to make a decision about something after you were presented with the facts of the matter, but then found that you had *only* been given half the facts. You would anticipate that in such a situation there would be a high probability that you would make the wrong decision. This is what happens if you are forced to rely purely on rationalism to the exclusion of common sense. But this is what juries are asked to do every day in the courts. Juries are often told by the bench the findings they "*must*" make. They may be inclined to use their common sense in making decisions, but they are inhibited because they are not sure of what their rights are, the "*must*" implies that legal sanctions can be imposed on them. Or out of a sense of duty they may feel bound to decide only on the principles that have been prescribed for them. This is often compounded when jurors seek redirection in regard to legal definitions. Some members of the bench seem incapable of giving a plain English definition, and take refuge in the safety of just re-reading out the statute definition complete with all its legal jargon. Common sense must be made to permeate all the way through the legal juggernaut.

THE SUM OF THE PARTS

Rationalists take great pride in being able to break down a problem into as many component parts as possible, analysing these parts in isolation from each other, summing the answers and declaring the solution. This technique has its uses, but it must be recognised that it also has its limitations. Sometimes one cannot see the wood for the trees. A common sense approach would also call for a global view, where possible, even though sometimes it requires a greater degree of mental capacity than is used in the linear thinking of rationalising. Some things are inextricably intertwined, they may only have a *raison d'etre* when they are in combination. The only point to many laws is the dire consequences if those laws are not followed.

THE WHEEL OF FATE

An example of this is when a person is charged with dangerous driving causing death. Defence counsel often argue that every day many people drive like their client did, but that their client was *unlucky* enough to have someone get in his way. They argue that for the sake of consistency their client should not face any greater legal sanction than any of these other people who drove dangerously but *happened* not to have killed anyone. They are trying to separate the crime from the consequences. If the consequences were never likely to happen there would be no point in having the law in the first place. If we all drove by ourselves on our own private and protected race tracks, no one else would suffer the consequences of reckless driving, and there would be little point in having such a law, except to inhibit near-suicidal behaviour. But we do *not*, the consequences

do exist, and the law is *inextricably* connected with these consequences. Using rationalism to separate these, or even accepting such arguments, shows a deficiency in being able to apply logic.

JUSTICE AUTOPSIED

Another noticeable use, or misuse, of legal rationalism is in rape cases. When looking for mitigating or aggravating circumstances in determining sentences, the bench may break up the act into separate components. Thus, in a recent case a judge deemed it to be a mitigating factor that the victim was unconscious and therefore supposedly suffered less, although the cause of her unconsciousness was the severe bashing she received at the hands of the rapist. By separating out what should be an inextricable connection he was in effect rewarding the offender. If it is kept in mind that mathematics is only a *branch* of logic, and the legal profession can only deal with simple arithmetic in cases like these, it shows how deficient they are in logical thinking. The bashing of the rape victim should have negated the mitigation factor of unconsciousness. That is, it is not just a matter of *adding* to or *subtracting* from the sentence according to components, but that some components are *multiplicative* in nature. Thus, the bashing should have meant the mitigation factor of unconsciousness should have been multiplied by zero, or even a negative number, so that there is no mitigation and if anything, only aggravation.

INFINITE WISDOM?

Of course, even where the justice system incorporates multiplication into its calculations, it is still limited in its horizons. It tries to assign a finite value where none may exist. Given a maximum penalty by the legislature, members of the judiciary will then try to envision various crime scenarios of different intensities. They will say that the case before them is not the worst possible case,, and that the maximum penalty must be reserved for this "*mythical*" **worst** possible case. Let us consider some hypothetical situations to see how this "myth" explodes. Consider two women, the first has had her only infant child raped and murdered, the second had two infant children, both of whom were raped and murdered. The rationalist would say to the first mother that she has only suffered half the trauma and grief of the second, and so the offender should only suffer half the penalty. This illustrates where this multiplicative logic gives a false answer. If you were to ask most mothers to list the worst possible things that could happen to them, they would agree that losing a child in that way would be on the top of the list. If one were to give a value for the degree of discomfort it would cause, the answer would be infinity. It is possible to multiply, divide, add to and subtract from infinity, but the resultant value is still infinity. One therefore cannot treat justice like a supermarket item and discount the value or magnitude of certain offences. From the victim's point of view, some legal reasoning appears to show that the legal profession has come up with a new meaning of the concept of **unreal** numbers when it comes to calculating sentences.

FANTASTIC SYSTEM?

The legal system often leaves victims baffled by its outcomes and the way it relates to reality. To the outsider it appears to have its own logic. One can draw an analogy between it and a fantasy novel. As long as the story maintains its own internal logic, it is of no consequence if it does not relate to the logic of the real world. Many of its practitioners, like other professionals, pride themselves on their use of logic. It should be kept in mind that the justice system is a bureaucracy. When bureaucrats insist on applying bureaucratic rules where common sense should apply, it is because it is a refuge for their incompetence, or because they are in a corrupt environment, or both.

It is sometimes claimed that some people only use logic as a way to justify their otherwise irrational behaviour. In a sense this is quite true and even applies to those who consider themselves very logical. For example, a machine that works purely on logic such as a computer has no ambition, aim or goal. The only objective of its operations is the aim of the person who operates it. One can demonstrate this by considering the difficulty of programming emotions into machines. One could program a machine to *simulate* the **behaviour** of emotions, but to actually program a machine to *feel* emotions, to *feel* pain and the state of distress would be rather difficult. Our perception of pain is related to our emotional state. We can ignore lower levels of it in emergency situations. Drug users on 'angel dust' can feel pain, but it doesn't bother them. Similarly, prescribed drugs can act as depressants.

This implies that emotion is related to biochemical messages, whereas logic is more in the nature of electrical messages. When we are angry it affects our thinking; it makes us think differently. We use logic to justify the way we feel. What we feel produces an outcome, logic provides a pathway to it. Pathways that are habitually used manifest themselves as attitudes. Hence, a person with a misogynist attitude will rationalise his negative behaviour towards women. If a member of the bench has an egocentric attitude, he may ignore common sense and seek decisions which will make a name for himself. It is as though emotions provide a chemical wash over our logic circuits, making short-circuits along pathways not otherwise used, as though it were a switching device. That we have evolved to have this shows that the emotional response can be appropriate in some circumstances, that it is necessary and inherent for our survival. Furthermore, that what gives a *motive* is *emotive*. Any belief or faith is emotional rather than logical. Even logic relies on axioms; things that cannot be proved but have to be taken on faith. Paradoxically, even though faith and logic are opposed to each other, they also *depend* on each other.

We must recognise this relationship, and the arrogance of those who consider themselves to be only logical, and question the *motives* behind their actions. The legal system is run for the *convenience* of the members of the legal profession rather than the needs of the people, and it is time for the people to reclaim *their*

law. It is peculiar that in a democracy we have unelected members on the bench who are not held as accountable as are other important positions in the machinery of government. Mechanisms must be established that will give victims more input, so that they are not regarded as something only incidental to the legal process. Their rights are ignored while the criminals, the "*victors*" over the victims, are given the spoils in having their rights vigorously defended at every turn.

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