# SUGGESTIONS FOR JUDGES (*)

Joseph C. Pitt

Legal systems are today faced with a danger that must be met if they and the formal structure of society as we now know it are to survive. The danger is that they are no longer considered useful. The younger generation, university students and their ever so slightly older brothers, display a well founded cynicism with the adequacy of the institutions their fathers built to handle the problems and injustices with which they are now faced. Often confusing the actions of particular members of the legal profession with the character of the system in general, they see the law as a device designed to maintain the *status quo*. Unless it can be shown that the law is not only open to change, but that the effecting of change is possible within the law, they are justified in arguing that the system itself must be radically altered or, perhaps, destroyed.

The older generation sits back, complains about the impatience of youth, and suggests that the way to change the system, if indeed the system needs changing, is to proceed through the available institutions and trust in the all healing powers of the Law. The Law, the fathers argue, is the method to use and the institution to be defended, since without it a well ordered society would crumble. The legal system is a safeguard against both anarchy and tyranny. This appeal to the law as the source of stability usually brings with it an accompanying mythology about the "majesty" of the law, the role of justice, and the importance of maintaining the traditions that in some undefined sense "are" the Law.

To suggest seriously such an analysis is to create a paradoxical situation, one which ultimately will result, if it already has not, in the rejection of the idea that social change can

(*) I am indebted to Richard Bronaugh, Robert Muehlmann and Glenn Pearce for criticisms and helpful comments on earlier versions of this paper.

peacefully occur. For how can the law serve both as the source of stability in society and at the same time also serve as a major medium for social change? On the 'traditional' view the law, *i.e.*, a legal system, functions as a social stabilizer by providing a formal structure for the settling of disputes and the challenging of abuses of authority. One characteristic of this structure is that it provides a large degree of predictability with respect to how the system will work. Yet to argue only for this analysis is to view the law as a static object in the midst of change. By itself this is not sufficient reason to reject such a view. On the other hand, if the law is not responsive to changing social conditions and values then its role as an arbiter of social conflict is hard to appreciate. But to argue that disregard of the past is necessary is, obviously, equally unhappy.

A way to resolve the paradox is to drop the senseless rhetoric about the Law and to face the situation as it really is. Aside from the immediat benefit of relieving the defenders of "the system" of the difficulty of describing the law in one set of terms and practising it in another, this could convince the impatient that they really can use the law to achieve their goals. In this paper I offer an analysis of the legal system which I hope is a start toward a more realistic view of the law. The approach I have chosen concentrates on the problem of the justification of judicial decisions; I wish to emphasize the "political" (I use the term widely) dimension of legal reasoning.

The problem of justifying judicial decisions cannot be solved apart from a theory of legal systems which recognizes the importance of the fact that decisions are made by judges. This is not merely Holmes' well taken point that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" ([1]). It is rather that judges are role players in a goal-oriented social institution. In conjunction with this suggestion, it is assumed that an adequate system of justification requires an appeal to rules of some type. One final point in this brief description of what is described in some detail below, is that the justification for the use of rules is the principle of utility in some suitable form.

Let us begin by acknowledging that judges appeal to rule-like statements in making decisions. But, this is only one dimension of what they do (2). They also appeal to the soundness of the reasoning and argumentation which is designed to show that certain analogies hold. They also appeal to facts. With regard to the rule-like statements there are several problems which must be solved before proceeding. There is, first, the issue of how to explicate "rule-like". The force of the rule-like statements also has to be settled. Finally there is the problem of the justification for the decision, that is, in what sense are rules involved in justification. I will consider each of these points in order.

(1) There are a number of options open to us in determining the nature of rule-like statements. They can be viewed as commands, in the Austin-Kelsen tradition. They can be viewed as descriptions, or they can be viewed as weakly normative claims in the sense of prescriptions for action. This list is not intended to be exhaustive, it merely attempts to pick out the more traditional, if not plausible, candidates.

Even though it requires a certain amount of argumentation, I choose the third alternative mentioned above as the sense of "rule" I wish to use. My thought is that it captures the spirit of the system suggested below. If considered as commands this analysis of rule will be unacceptable because it raises the unanswerable problem of equipping judges with the authority to give commands, as opposed to other types of authority. To speak of rules as descriptions is also unacceptable because it is not at all clear how descriptions alone can be used to justify decisions. The full sense of the interpretation I have chosen will become clearer as we continue.

(2) Having hurriedly settled on a general account of the nature of a rule, *i.e.*, rules are weakly normative statements, prescriptions for acting which are to have a sense of authority but which are not absolutely binding, the next problem is to account for the force of these rules. That is, an explanation is required of the sense in which they are prescriptive.

In keeping with the general principle of using the actual practises of judges as a guideline it must be recognized that

the rules in question are formulated by judges. The immediate problem then is to account for the authority by which judges can formulate these rules. Unless some explanation is forthcoming it will not be necessary to discuss the prescriptive dimension of the rules. However, before an explication of the type of authority judges have can be given, a few things must be said about the legal system in general.

The legal system is characterized as a goal-oriented institution. The aim of such a system is to function as the means for the resolution of conflict by (a) reasoned argument and (b) the consideration of certain key values in the society, e.g., justice, the survival of the state. It is composed of diverse parts and there are many different types of roles to be played in the system, *e.g.*, judges, clerks, officers of the law, etc. But despite its complexity, the crux of the system lies in the judicial decision. We view the decision as the entire statement — reasons, reasoning and conclusion of the judge. The manner in which decisions are argued for will be the greatest factor in determining the success or failure of the system. In this case, then, the men responsible for the decision, the judges, take on the responsibility for the success of the system. That is, in accepting the role of a decision maker and all it entails, a judge is placed under an obligation to the system. One way to exercise that obligation is for a judge to act in such a way as to strengthen the system in terms of what he views the role of the system to be. In turn, one way this can be accomplished is for the judge to suggest that certain methods of reasoning or general methodological aproaches be followed in the making of future decisions. These suggested practices are described in the rules contained in the *ratio decidendi,* which contains all the necessary reasons for a particular decision. That is, the rules of law are descriptions of practices which judges suggest should be followed if, in their view, the goals of the system are to be met.

The judge obtains his authority to create rules through the following considerations. As such, the only authority the judge has is the authority to decide cases. This by itself is not enough to allow him the extra authority to create rules. The

very need for rules cannot be explained unless the law is conceived to be a progressing developing system whose goal is stability of the society. The judge obtains his authority to create rules only when the law is viewed as such a goal-directed social institution. There are two types of authority being discussed here. The first is the authority to decide cases, which is granted through some external source. The second is the authority to create rules. This latter form is obtained by considering the role of the judge, and the nature of the system together. The judge has the responsibility for the success of the system and this responsibility entails an obligation to act so as to achieve that end. Given that the stability of the system is essential to its success, one type of action he can perform is to suggest, among other things, generalized procedures to be followed by other judges.

The source of the judge's authority to make rules has been described. But before an analysis of the force of the rules is possible some indication of their character is needed. There is no intuitive objection to using the structural analysis suggested by Gottlieb as a criterion for a rule. In order for a statement to quality as a rule it must provide.

1. an indication of the circumstances in which the rule is applicable;
2. an indication of that which ought, or may, or must be, or not be concluded or decided;
3. an indication of the type of inference contemplated: whether under the rule it is permitted, required or prohibited;
4. an indication that the statement is indeed designed to function as a rule or inference-warrant ([3]).

One of the reasons for giving these structural requirements is that this eliminates the need to talk about rules as "ought" statements. The use of ought-language suggests too restrictive a role for the judge, namely one of moral authority. While issues of a moral nature do sometimes enter the picture they

are not the primary consideration. In this light we would do best to avoid ought-language altogether.

We can now turn to the question of the force of these rules. We have described rules of law as weakly normative in that they are suggestions of general practices to be followed. They are directed to other judges for their consideration and yet, as suggestions, are absolutely binding on no one. That is, that a judge has made a suggestion is not a conclusive reason for another judge to use that suggestion. There are certain practical considerations which might favor using rules formulated by other judges, but again these are not binding.

Let us distinguish at this point between the rules and other reasons contained in the *ratio*, and the reasons for using a particular rule or set of rules which reasons are not explicitly contained in the *ratio*. The reasons mentioned in the *ratio* are *internal* reasons. They are important to the logic of the particular decision. The practical reasons are *external* reasons, and these pertain to the legal system. As an example of external reasons consider the following. Once a rule has been rejected by an appeals court, that rejection does not close the issue. The lower court could continue to use the rule and continue to have its use rejected on appeal. The rationale behind not reusing such a rule is tied up with the general integrity of the court and the sheer need of economy of action in the system. Both of these are practical considerations. Again, the choice of what rule to use is a practical decision which is made on the basis of external reasons. These are based on what the judge wants to do in the context of what the system can do and what effects a decision based on a given rule will have throughout the system.

Intimately tied to the choice of rule is the case of amending or rejecting established rules. This occurs in situations where the old rule is "dated" in some respect and is again a case of external reasoning. Hodgson's conditions for restricting the scope of a rule, for the most part, are acceptable as a criterion for amending old rules.

> The suggestion was that it should be possible for a later judge to assert that the judge who formulated the rule would not

> have wished it to apply to these situations, on the grounds that (a) they are different in a material respect from that before the court when the rule was formulated; (b) the judge did not expressly consider these situations or the feature which distinguishes them; and (c) either (i) existing case-law covered these situations, or (ii) existing or subsequent case-law could usefully be extended to do so, especially if because of the material difference mentioned in (a) the application of the rule to them would be manifestly harmful or unjust.[4]

But to these conditions we should add the qualifications that such operations are instituted *because* of practical considerations. These might bear on the usefulness of the system itself, or on the individuals involved, but in each case the issue is one which takes its justification from the practical problem of making the system work.

As noted above, one of the considerations which can operate in the decision to use rules is the issue of safeguarding the integrity of the court. This is perhaps the most important dressing of the system. Its success in its role as a conflict-settler depends to a large degree on the extent to which judicial decisions are accepted as impartial. One characteristic of impartiality is that if a case tried in court X were tried in any other court the decision should be the same. When the court loses the appearance of impartiality then it cannot function as a means for settling disputes within a *legal* system. This dimension of impartiality is a partial unpacking of the stabilizing function of the legal system. With this gone the decision will be considered more of a vote on one "side" of the conflict than an impartial weighing of the facts. It is in this respect that the legal aspect of the system degenerates into a political factor. This very practical point becomes an important value operating in the judge's consideration to change well established rules or to create new ones. The legal system should not become a political system, or a pawn of it. The decisions it reaches while having social implications are, nevertheless, legal in character.

Judges qualify rules for two purposes. First, so as to be able to use them for internal purposes in the case at hand.

This, however, is inadequate as a complete explanation for this type of behavior without considering the second reason. That is, they qualify rules so as to use them to achieve a certain purpose. It does not make sense merely to talk about the qualifying of a rule without indicating the reason, an external reason, for the qualification. To say that it is done in order to decide the case is to say nothing. It is done to decide the case in a particular way. In order to fully accommodate this point the law must be viewed as a goal oriented process in which decisions are reached not merely on the facts of the case, certain traditions and legislative dicta, but also in terms of certain practical considerations. These involve adequate functioning of the system.

(3) Lastly we turn to the central problem of the paper, the question of justification. In this case we are seeking a means of justifying the formulation of a rule by a judge. This is not the question of the right for the judge to make the rules, *i.e.*, his authority. That issue has already been settled. This is rather the question of his warrant for suggesting a given practise rather than an alternative. Consider a situation where a judge is forced to create a new rule to cover a case not previously handled. In these circumstances judges can only formulate new rules if they can support them by close analogy or in terms of some general principle. The general principle that permits the formulation of the new rule is the principle of utility.

To suggest that a system be based on the principle of utility is not, in my opinion, enough to justify the use of that principle. If, on the other hand, the system is characterized in this way, and it is argued further that its preservation is a crucial consideration in the rendering of decisions, a mark of rationality within the system, if you will, then it is not only easier to invoke the principle of utility as a justificatory principle, something very much like it is necessary. In this, for example, considerations of amending or rejecting established rules are governed by an appeal to the general consequences for the system.

I have invoked the principle of utility twice. First, as a prin-

ciple of justification for judges when they are formulating rules. Secondly, the principle is invoked where judges are determining either which rules to use or how to act on rules which are for some reason inadequate. This redundency, however, poses no problem. In determining which rules to use judges are guided by the goal of achieving the best consequences for both the system and the litigants in the case. Where there is no rule, or where a given rule seems inapplicable, then the judge is justified in formulating a new rule. But throughout the goals of the system are a key to consideration.

A system of justification using, but not based solely on the concept of a rule, such as described above, meets two crucial conditions for any adequate theory of law. First, it reintroduces the legal system into society as an institution which not only has a function to serve, but which recognizes that awareness of that function by the members of the system is crucial to its success. Along this line, based on the principle of utility, such a system can be both a force for stability and a medium for change by allowing for changes in rules used to regulate behavior, *i.e.*, by introducing new rules or reinterpreting old laws to meet new demands. Secondly, such a system captures the vitality of legal systems by not only providing for, but by insisting that practical rather than merely formal reasoning is the heart of the law. If the legal system is viewed as essentially an institution where practical reasoning is the basis for decisions, and furthermore, this form of practical reasoning is intimately involved with the values of the system and the society, then a case can be made for using the law as a means for instituting changes while retaining the stability society needs to function.

*The University of Western Ontario*
*London, Ontario, Canada*

NOTES

(1) O. W. HOLMES, Jr., "The Path of the Law", 10 *Harvard Law Review*, p. 460.

(2) There is a distinction worth noting here between what judges offer as a reason for making decision, and what turn out in fact to be the "real" reasons. For a well developed, essentially empirical theory of the "real" reasons for the behavior of judges, see G. SCHUBERT, *Judicial Policy-Making*, (Glenview, 1965).

(3) G. GOTTLIEB, *The Logic of Choice*, N.Y., 1968, p. 39.

(4) R. HODGSON, *The Limits of Utilitarianism*, p. 127.