"LAWYER IN THE SOCIAL SCIENCES"—GEOFFREY SAWER

BY ROSS CRANSTON*

In his inaugural lecture at the Australian National University in 1953, Geoffrey Sawer identified under four main heads the relationship of the lawyer to the social sciences.[1] First, law and legal administration constitute one of the major kinds of social control so that no study of society as a whole can ignore them. Secondly, law has a bearing on a wide range of social activities, such as those which are the focus of attention of political scientists, students of industrial relations, and so on. Thirdly, the lawyer has to develop legal theory and an important aspect of this is to draw on the findings of the other social sciences. The final point concerns keeping in touch with traditional legal studies and legal administration. It is the third point, or at least some aspects of it, which are the main focus of this essay.

Relatively few of Sawer's prolific writings are straightforward expositions of the law, and most touch upon, and in so doing cast important light on, aspects of legal theory. For instance, Sawer has written about the contribution of legal theory to law reform; the problem of making government subject to the very legal system which is in a sense its creation; the way particular groups use law as an instrument of control over other groups; how different legal institutions and norms are thrown up in different societies and in the same society in its different historical phases; and the ingredients of legal change, including economic and political factors, personal influences, and the work of those within the legal system.[2] It is impossible to do justice to these many issues in this brief essay. Thus the discussion proceeds as follows: the first part makes brief mention of Sawer's view of traditional legal theory and what he sees as its inadequacies; then attention is given to Sawer's account of legal reasoning and of the legal and social factors which he considers enter into this, and to his interpretation of the process in his own work; finally, there is some discussion of Sawer's general views of what those interested in law and the legal system can draw from the social sciences and whether it is possible to develop a sociology of law.

While acknowledging that analytical jurisprudence performs a useful function "by clearing away inherited superstitions and dogmatisms, and by making us aware that few, if any, of the concepts used by lawyers have *a priori* necessity",[3] Sawer believes that it over-emphasises the

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[1] Sawer, *The Place of a Lawyer in the Social Sciences* (1953).

[2] *E.g.* Sawer, "The Legal Theory of Law Reform" (1970) 20 University of Toronto Law Journal 183; *Law in Society* (1965); "The Western Conception of Law" in Zweigert (ed.), *International Encyclopedia of Comparative Law* (1973) ii, ch. 1, 'The Legal Systems of The World. Their Comparison and Unification' 14-48; "Nationalism in the Working of the Federal Constitution" (1969) 3 Teaching History 36.

[3] Sawer, "Government as Personalized Legal Entity" in Webb (ed.), *Legal*

abstract quality of legal rules and thus falls short of an adequate explanation of law and the legal system.

> Legal rules must have some degree of abstraction, but the degree varies with different branches of law, and also with the distance of a tribunal whose decision is under consideration from the facts with which it has to deal.[4]

A jurisprudence of concepts would be successful if the concepts fitted to reality, but normally this does not happen and no degree of conceptual manipulation can handle the social realities.[5] Legal academics, Sawer argues, often mistake the nature of concepts and think that they have a causal influence in decision-making. What is important is how people in practice come to grips with legal problems.

Sawer's dissatisfaction with analytical jurisprudence has no doubt been sustained by his early acquaintance with sociological jurisprudence and American legal realism.[6] The former he values because it destroys certain myths about law and the legal system although he believes that its propositions are sometimes

> incorrigible generalizations—either because so general, or because they amount only to generalized *descriptions*, or because they are so qualified with exceptions and escape clauses that no observation can invalidate them. Considered as natural-scientific propositions, they are at best tentative hypotheses. Their predictive power is apt to be small.[7]

The legal realists have had a greater impact on Sawer, but while deriving insights from their work he has never embraced the more extreme views sometimes attributed to them.[8] For instance, while recognising conceptual difficulties, vagueness and inconsistencies, and the problems of ascertaining facts, Sawer refuses to accept the full-blown rule scepticism and fact scepticism of Jerome Frank. Like the leading realists, however, Sawer appreciates that while rigorous analysis is essential to challenge existing legal concepts and doctrines, there is little profit in substituting a new set of abstract concepts which might have an arbitrary relationship with reality.

In *Law in Society* Sawer suggested a possible reconciliation of analytical jurisprudence and sociology in which the writings of those like Austin and Kelsen can be regarded as "models", similar to the sociological models of the grand theorists like Talcott Parsons:

> Even the most analytical and "normative" legal thinkers have always been aware that law, the "legal system", is an aspect of organized society, and in so far as an attempt is made to explain the system as a whole, to describe its structure or to indicate the relations of the system or its parts to society, this is in fact an effort at socio-

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Personality and Political Pluralism (1958) 158.

[4] *Ibid.*

[5] Sawer, *Law in Society* (1965) 1-2, 168-169, 190, 199-200.

[6] Sawer, "Legal Realism" (1939) 2 Res Judicatae 68, a witty note on what examinations will look like if the realists are accepted.

[7] Sawer, "Introduction" in Sawer (ed.), *Studies in the Sociology of Law* (1961) vii-viii.

[8] *Cf.* Twining, *Karl Llewellyn and the Realist Movement* (1973) 35-36, 97.

> logical analysis, however misguided the result may seem to one or other contemporary school of sociologists. From this point of view, even Hans Kelsen was engaging in sociology when writing his *Pure Theory*, notwithstanding his indignant denials, because he was asserting that in any society where law exists it must have the formal structure which he sets out and no other.[9]

Sawer did not take this suggestion of using analytical jurisprudence for sociological analysis much further. There must be a grave doubt as to whether it would have been worth the effort; Sawer's task lay in more important directions. Certainly the complexities of any integration would have been enormous, as evidenced by the fact that there are few, if any, studies of the actual operation of law and the legal system which use analytical jurisprudence as the starting point.[10]

Sawer's view, then, is that law's structural quality derives partly from rules, which have a certain degree of abstractness, but more significantly from a constant reference to reality. The validity of this approach is demonstrated by Sawer's analysis of how legal reasoning operates in practice. In 1958 he wrote that in legal reasoning legal concepts might be abstracted from and applied to reality, but in nothing like the way used in symbolic logic:

> the abstractions themselves are constantly being restated and modified, and this process likewise is due more to the influence of observed brute fact than to considerations of logical structure.[11]

Sawer's task in this 1958 article was to examine how the courts handle the problem of whether government should be liable legally for the consequences of its actions: is it resolved by reference to notions of legal personality, by reference to parliamentary intention if there is legislation, or by considerations of public policy? The answer must be, as Sawer points out, that these and other factors *combine* to determine how courts decide an issue. In this process, legal concepts play but a part:

> One use of personality concepts is to provide the steps in reasoning by which such conclusions are reached; some of the criteria usually associated with individual legal competence are discovered, and there is a presumption that the other "normal" attributes of legal personality will follow. . . . If a court considers that a particular "entity" is intended to be subject only to a highly specific form of legal control, it will refuse to draw any inference of generalized capacity and responsibility.[12]

Sawer returned to the point in *Law in Society*, where he acknowledged that some conceptualism is essential to ensure uniform treatment, and also to make the legal system efficient since the job of vetting each

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[9] *Op. cit.* 4-5.

[10] In the writer's view studies like Dworkin, *Taking Rights Seriously* (1977) are too heavily normative to qualify. Non-analytical jurisprudence has spawned studies of the law in action; *e.g.* the use by the Berkeley school of Lon Fuller's writings: Selznick, "Jurisprudence and Social Policy: Aspirations and Perspectives" (1980) 68 California Law Review 206.

[11] Sawer, "Government as Personalized Legal Entity", *op. cit.* 159.

[12] *Id.* 167.

particular legal transaction on its merits would be impossible. Moreover, people need to know the consequences of their action and whether particular matters are lawful or otherwise. Nonetheless, Sawer again aligned himself with those who reject a jurisprudence of concepts, in which law is a closed system where particular problems are solved by deduction. Rather, he argued, law is constantly moulded to social needs both by parliament and the judiciary.[13]

If legal reasoning is based on a combination of conceptual analysis and social factors, the crucial issue is how this occurs. An early statement of Sawer's approach appeared in an article jointly authored with G. W. Paton, then Dean of the Law School at the University of Melbourne. The authors observed that law cannot be applied mechanically, given the complexity of the problems with which it deals, and this is certainly not the manner of the common law judges who take public policy and business needs into account. But if the judges take generally accepted principles of conduct and other social factors into account, they do so in a manner which broadens, rather than sacrifices, judicial method.

> The task of the courts, then, is to provide within the law itself a logically consistent system of propositions, but to depart from this system, and to build on the wider logic of life as a whole, when the narrower system would provide conclusions grossly at variance with the demands of the wider system.[14]

In *Law in Society*, Sawer was much more explicit about the extra-legal factors entering the judicial decision and mentioned personal values and decisions, although he added that these are not necessarily psychological, but include chance, stupidity, overwork and inadequate argument. In addition to personal values and decisions, Sawer pointed to the social policies and purposes which influence judicial decision-making although he observed that sometimes "the statement of a legal principle and of a social purpose . . . [are] almost identical in terms".[15] In this area Sawer draws to an extent on Roscoe Pound's analysis, that laws can best be understood by reference to the social purposes which they are intended to serve and that social purposes are identifiable in terms of the social interests behind a law. Sawer accepts that social interests are often invoked in argument before the courts, although he notes that the most effective social interest in this context

> is neither the claim peculiar to an individual or small group, nor the very diffuse social interest, but an intermediate range of group interests or aggregated individual interests which concern large numbers.[16]

Broadly speaking then, Sawer identifies social needs (including business needs), public policy and personal values as components in legal reasoning along with conceptual analysis. Can we go further in identifying the role of each and how it varies in different types of legal

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[13] *Op. cit.* 191, 195.

[14] Paton and Sawer, "Ratio Decidendi and Obiter Dictum in Appellate Courts" (1947) 63 L.Q.R. 461, 482.

[15] *Op. cit.* 106.

[16] *Id.* 160.

decision? A full understanding is impossible, because judges and members of the legal profession have perpetuated the myth of mechanical jurisprudence, which they think is necessary to maintain public confidence, and thus have not engaged in self-examination or provided an account of what they think they are doing. Some light is cast on the judicial process, however, by contrasting it with the legislative and administrative processes:

> The difference between legislative decision, on the one hand, and judicial, on the other, is assuredly to be found along a continuum, with administrative discretion somewhere in between; the allocation of borderline cases can be quite arbitrary, but these boundary difficulties do not prevent us from recognizing the clear cases—making new law, explicitly recognized as such, at the one end, and applying existing law, explicitly recognized as such, at the other.[17]

In *Law in Society*, Sawer made his oft-quoted distinction between lawyers' law and social administrative law, a distinction which again enhances our understanding of the judicial process.

Social scientists and others have attempted to circumvent the deficiency in our understanding of the judicial process which Sawer identifies. Jurimetric analysis has been used to fathom the underlying personal values of judges, including members of the High Court, as revealed in their judicial decision-making.[18] Sawer has expressed doubt, quite properly, as to whether there are sufficient runs of comparable High Court cases for this approach to be sound. A point to be made here is that even if there were, jurimetrics does not tap the issue of how personal attitudes blend with conclusions derived from other legal factors like rules. Recently, Gibson has offered a model of judicial decision-making incorporating the linkages between a judge's attitudes and a judge's role orientation, where the latter includes whether a judge considers it legitimate to reason from rules or to use broader criteria as determinants.[19] Quite apart from other possible problems, there are limitations on the wide application of this approach because of the difficulties of obtaining information on judges' attitudes and role orientations—Gibson obtained his by interviews with Iowa trial judges—and even on judicial behaviour—Gibson looked at sentencing where a researcher can draw upon a volume of comparable cases.

In the light of the defects in social scientism of this nature, Sawer's own approach to understanding judicial reasoning has been to explore the interaction of legal rules and other factors by an analysis of actual decisions in their historical and political context. Australian constitutional law is where Sawer has done this most effectively.[20] He derives a number of penetrating insights, for example, that the policy underlying

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[17] Sawer, "Political Questions" (1963) 15 University of Toronto Law Journal 49, 50.

[18] *E.g.* Blackshield, "Judges and the Court System" in Evans (ed.), *Labor and the Constitution 1972-1975* (1977) 121-126.

[19] Gibson, "Judges' Role Orientations, Attitudes and Decisions: An Interactive Model" (1978) 72 American Political Science Review 911.

[20] *E.g.* Sawer, *Australian Federalism in the Courts* (1967).

a judicial decision might be related to judicial decision-making itself.[21] Thus Sawer argues that contained within Sir Owen Dixon's approach to section 92 was the desire for legal simplicity whereby judges would not have to assess legislative motives and purposes. A discussion of this aspect of Sawer's work is beyond the scope of the present essay.

That Sawer avoids jurimetrics and brands of scientism for examining legal reasoning leads to a discussion of how he conceives of the relationship between law and the social sciences. Sawer is sceptical about the possibility of the social sciences attaining the status of the natural sciences not simply because of the complexity of their subject matter, but also because of free will. What social scientists can do, he thinks, is to draw out principles of human behaviour, values and attitudes by observation and measurement. Some of these will be relevant for law and the legal system but they will exist independently of them. But what of a specific sociology of law? Following Partridge, Sawer thinks that the heterogeneous character of law, and its reach into nearly all social activities, but only as a part of each such activity, means that it is unlikely that there will ever be a sociology of society within the scope of which law will come:

> certainly in the present state of our knowledge all very general propositions presuming to deal with law as a whole, or with "the legal system", must be regarded with scepticism.[22]

Here Sawer foresees the objections which would meet Donald Black's attempt to formulate precisely such a general sociology of law. Black's approach is to focus on behaviour—in the particular case, of legal actors—and to attempt to formulate general propositions which explain and predict. Starting with the definition of law as governmental social control, Black explains the increase and decrease of law through a number of propositions, two of which, relating to stratification, are: "law varies directly with stratification", that is, the more stratified a society, the more law; and "downward law is greater than upward law", that is, law is more likely to have a downward direction, for instance, with upper class people invoking it more often than lower class people.[23] Sawer's objections to a general sociology of law are apposite in Black's case: it shears off the intention of individuals and thus detracts from explanatory power (Sawer's free will); and it ignores the heterogeneous character of the subject matter and thus trivialises and misleads. Sawer's points are equally apposite in relation to the proponents of law and economics who explain the judicial process in terms of one factor—economic efficiency (or for some, wealth maximisation).[24]

While eschewing a general sociology of law, Sawer envisages the possibilities for sociology of law in particular legal situations or in

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[21] Sawer, *Law in Society, op. cit.* 165, 186-191. *Cf.* Sawer, "Legal Profession" in *Encyclopedia Britannica* (15th ed. 1974) x, 779, 782-783.

[22] Sawer, *Law in Society, op. cit.* 13.

[23] Black, *The Behaviour of Law* (1976).

[24] *E.g.* Posner, *Economic Analysis of Law* (2nd ed. 1977). *Cf.* Michelman, "Norms and Normativity in the Economic Theory of Law" (1978) 62 Minnesota Law Review 1015, 1040-1041.

particular aspects of social relations with a legal component. Small group studies rate particular mention. Since Sawer wrote, their potential has been recognised in studies of the jury and of judicial decision-making. Sawer gives this example from company law of the way broad sociological propositions, as he defines them, together with propositions from particular studies, can be brought to bear to understand legal phenomena:

> For example, in a study of the sociology of modern business corporations, the operation of company law is certain to be an important feature. Much of this study would be concerned with the face-to-face type of situation, the mutual relations of shareholders, directors, officers, employees, debenture holders and their trustees, creditors, & c. However, supposing it was desired to concentrate on the particular question of the company prospectus—the conditions under which such a document is likely to be honest or misleading, what part it plays in inducing persons to subscribe for shares or debentures, whether legal requirements in detail produce different results from legal requirements in terms of a general standard of honesty and what the difference is, and similar queries. The general sociology of business corporations will be relevant to such an inquiry, but so will an inquiry into the sociology of many situations, not necessarily connected with companies at all, in which there are legal requirements concerning commercial inducement; for example, compulsory warranties and requirements that financial details be specified in relation to hire-purchase (instalment purchase) of goods, and regulation of money-lending and especially security transactions.[25]

Sawer's own writings combine shrewd social insights, extensive legal learning, a very real cleverness and a knowledge of the world relevant to legal phenomena. One is struck with Sawer's breadth of knowledge ranging from primitive societies, through ancient Greece and Rome, to modern day Europe (especially the United Kingdom, Germany and France), North America, and of course Australia. Personal observation also contributes to Sawer's impact, broadened in his case by practice at the bar, experience as a trial magistrate, and wide contacts in legal and political life. His use of simple arithmetic is sometimes devastatingly effective to lend weight to or establish an argument. For instance, Sawer has a compilation of the number of reported cases in which "amalgams" appeared after Victoria attempted fusion of the legal profession in 1891, to show what a failure it was;[26] a statistical analysis of the results in a number of reported decisions demonstrating that there is a strong presumption in applying a section of the Acts interpretation legislation;[27] and a calculation of the proportion of constitutional business before the High Court to show that the tone of its reasoning is set by the dominance of private law cases.[28] Sawer's approach, of bringing to bear whatever

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[25] Sawer, *Law in Society, op. cit.* 14.

[26] Sawer, "Division of a Fused Legal Profession: The Australasian Experience" (1966) 16 University of Toronto Law Journal 245, 253.

[27] Sawer, "Singulars, Plurals and Section 57 of the Constitution" (1976) 8 F.L. Rev. 45, 49.

[28] Sawer, *Australian Federalism in the Courts, op. cit.* 53-54.

can contribute to our understanding of legal phenomena, is in the best traditions of the social sciences.[29]

What comes before is but a brief conspectus of some of Sawer's major ideas on legal theory and the relationship between law and the social sciences. Sawer does not set great store by traditional jurisprudence for understanding the actual operation of law and the legal system, although he acknowledges that it can further rigorous thinking and has an important normative role. He rightly challenges the contribution of traditional conceptual analysis to a full understanding of legal reasoning and points to the input of social needs, public policy and personal values. In explaining the hold of conceptual analysis Sawer touches upon the nice sociological point that it is in the self-interest of lawyers to perpetuate what only the initiated can understand. The social sciences have some role in explaining how legal reasoning actually operates, says Sawer, but there is still much to be learned about law and the legal system from historical and comparative studies and from observing, as best one can, what happens in practice. Sawer's own writings, especially in Australian constitutional law, show how much can be achieved by an approach which, although law-based, draws on whatever knowledge furthers understanding.

[29] *Cf.* MacRae, *Weber* (1974) 45-51.