DIXONIAN STRICT LEGALISM

John Gava

The following extracts are intended to give a flavour and context to my remarks to be made in my seminar at the ANU College of Law.

1. Dixon's strict legalism

"Sir Owen Dixon's is most often remembered (and derided) for his call for a "strict and complete legalism" made in his address given upon taking the oath of office as Chief Justice of the High Court of Australia.[1] In his essay "Concerning Judicial Method" Sir Owen outlined in a comprehensive fashion his understanding of the common law method and in doing so refuted claims that the traditional common law method was a fairytale. He did, however, acknowledge it was under threat and that, indeed, even in his own time it was unfashionable to argue that common law rules and techniques were real and bound judges.[2] Instead, these rules and principles were more often seen as starting points for judicial elaboration on what ought to be. In other words, rather than being a constraint on judges these rules and principles were seen as catalysts driving judicial decision-making in essentially unbounded ways. For Sir Owen, this attitude was foreign to the common law method. He saw the rules and principles of the common law as binding and constituting an external constraint on judges by imposing an external standard of legal correctness.

Sir Owen openly accepted that the answers to legal problems before the courts were not as certain as mathematical proofs. The common law method of interpreting and applying cases and the principles to be derived from them helped judges to find and develop the law but they could not always provide clear answers. Opposing counsel helped the judges through their attempts to

---

[1] Sir Owen Dixon, 'Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952' in Woinarski, above n 2, 245 at 247.
[2] Sir Owen Dixon, "Concerning Judicial Method", in Woinarski, above n 2, 152 at 154.

show that their particular side's understanding of the law provided the best fit with the existing rules and principles. But the common law method was not an exact science and this meant that not every judge would or could come to the same answer. This also meant that the answers given by any one judge could and should be analysed to see if they did, indeed, comport best with the existing materials.

> It is no doubt unsafe to generalize about judicial process. . . But it is a safe generalization that courts proceed upon the basis that the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard. The standard is found in a body of positive knowledge which he regards himself as having acquired, more or less imperfectly, no doubt, but still as having acquired.[3]

Once common law legal reasoning is understood in this fashion it becomes apparent that it is also inevitably provisional. There can be no absolutely right answer to contested legal issues because reasonable practitioners of that method can and do vary in attempting to apply their understanding of a vast and unruly body of legal rules and principles to an essentially infinite set of fact situations. Indeed, given the immensity of the legal materials it is unrealistic to expect judges to have a mastery of the law. There are just too many rules and doctrines with too many competing lines of authority (as well as inconsistencies) for the law to be reduced to the equivalent of an algorithm. Nevertheless, within these inescapable constraints the judges are expected, as far as is humanly possible, to be faithful to the common law tradition, and their reasoning and decision-making should not be understood as giving licence to freewheeling choice and innovation.

> It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category

[3] Dixon, "Concerning Judicial Method", above, n 7 at 157-8.

> is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change.[4]

Sir Owen accepted, indeed embraced, the fact that change, or development, to use another term, was inevitable in the law. But it was change that was cautious. The caution was not caution for its own sake. Judges would tread cautiously because the nature of the law required many years of study and practice to achieve some comman with the details and problems with any area of the law. Changes in the law could have unintended consequences and repercussions in other areas of the law that might only come to light some time afterwards. In these circumstances caution in making change was not a sign of timidity but, rather, of wisdom in light of the limited capacity of any one judge or even bench of judges to foresee the implications of change in the law. Further, any change was limited to what was necessary to decide the legal issue before the court. Again, limiting change to the smallest amount necessary was not driven by an abstract belief that minimal changes provided a constraint on otherwise unbounded judges.[5] Rather, it was consistent with a general belief that judges should decide only what was necessary because this way they could minimize the risks of unintended consequences while attempting to do justice to the particular case before them, in accordance with their best understanding of the applicable law."

---

[4] Dixon, "Concerning Judicial Method", above n 7 at 158.

[5] I think that Cass Sunstein's call for minimalism in judging can be so characterised. See, for example, C Sunstein, "Testing Minimalism: A Reply" (2005-2006) 104 *Michigan Law Review* 123.

(Taken from John Gava, “A Study in Judging: Sir Owen Dixon and *McDonald v Dennys Lascelles***”,** forthcoming somewhere, I hope)

2. Practice and Theory in the Common Law

“In his celebrated article, “Dennis Martinez and the Uses of Theory”, Stanley Fish makes the following comparison between thinking *within* a practice and thinking *with* a practice – or the difference between doing and thinking about doing.

> To think *within* a practice is to have one’s very perception and sense of possible and appropriate action issue “naturally” – without further reflection – from one’s position as a deeply situated agent. Someone who looks with practice-informed eyes sees a field already organised in terms of conspicuous obligations, self-evidently authorized procedures, and obviously relevant pieces of evidence. To think *with* a practice – by self-consciously wielding some extrapolated model of its working - is to be ever calculating just what one’s obligations are, what procedures are “really” legitimate, what evidence is in fact evidence, and so on. It is to be a theoretician.[6] (Emphasis in original, footnote omitted)

The craft-based tradition of common law judging clearly constitutes such a practice within an interpretative community of deeply situated individuals with a common store of knowledge, (the cases in olden days and today a mixture of cases and statutes), a common method, (the ramshackle, analogy-based form of reasoning peculiar to the common law), and broadly accepted notions of what is right and acceptable and what isn’t. In Fish’s terms, theory plays a role within this tradition as the representational means of communicating reasons for decision. Judges give reasons and those reasons “work” within the accepted notions of the common law. They do not convince when examined from a philosophical or, indeed, from any scholarly perspectives that reject the standards and beliefs of the common law. Thus, for example, Legal Realists, Critical Legal Studies proponents, Feminists, Law and Economics scholars, Postmodernists and the like have berated the common law judges for their unstated assumptions, the contingency of their reasoning

[6] Stanley Fish, “Dennis Martinez and the Uses of Theory” (1987) 96 *Yale Law Journal* 1773 at 1788.

and the generally untidy appearance of doctrines. But, as Fish argues, any practice will display such features when evaluated by another interpretative community whose standards are underpinned by a different set of both stated and unstated assumptions.

What of the inconsistencies and sometimes garbled reasoning that define the common law's reasoning. Doesn't this matter? Doesn't it matter that lack of theoretical rigour leaves us with a practice that is ramshackle and inconsistent? Fish denies that this is a problem. He makes this clear in response to Roberto Unger's claim that the lack of theoretical underpinnings in the common law means that the law is simply "an endless series of ad hoc adjustments" and a collection of makeshift apologies"[7].

> The question I would ask is "makeshift in relation to what?" Surely not in relation to the pressures and urgencies that make a solution satisfying or an adjustment helpful. The answer, as we have already seen, is makeshift in relation to a description of our several and various actions which would show them to follow from a single set of abstract principles, from a theory. But what that means is that "makeshift" and "ad hoc" are accusations not of our practices as they pursue their several goals, but of our practices as if it were their single goal to be available to a philosophical description. But if our practices had that goal, they wouldn't be our practices. They would be philosophy. . . It is hard to imagine why agents genuinely committed to a practice would hand over responsibility for judging it to some other practice, especially to a practice that takes place almost exclusively in college classrooms.[8]

It is not surprising then that Fish criticises calls for philosopher kings and philosopher judges.

> Philosophers, after all, are like anyone else; they want people who don't do what they do to believe that what they do is universally enabling. They want us to believe that the only good king is a philosopher-king, and that the only good judge is a philosopher-judge. . . I don't know about you, but I hope that my kings, if I should ever have any, are good at being kings, and that my judges are good at being judges. . .[9]

[7] *Ibid*, 1799, quoting Roberto Unger, "The Critical Legal Studies Movement" (1983) 96 *Harvard Law Review* 561 at 572-3.
[8] *Ibid*, at 1799.
[9] *Ibid*, at 1800.

Of course, one could add that Fish's position need not be as abstract as he seems to imply. He is too much the postmodernist (or cynic, or both) to attach much importance to history and the lessons it offers. All interpretative communities are not alike; they may differ in utility to society, they may embody values and beliefs that are more or less attractive and they may have differing heritages and trajectories of development. There are historical and constitutional reasons for seeing the interpretative community that makes up the common law as more than just another community with its own particular practice, beliefs, standards, and so on. The common law has a historical heritage of many centuries' duration through its role as the established and accepted mechanism for state resolution of private disputes and vindication of rights. Such an historical justification for being is unusual and gives the traditions, practices and beliefs of the common law a link to the here and now which a purely abstract or theoretical interpretative community can never have. Similarly, the fact that the common law is and has been the state's tool for the resolution of disputes and vindication of legal rights confers constitutional status on the common law and the interpretative community that inhabits its world. History and popular acceptance have made the common law part of our constitutional structure.

Fish's analysis of interpretative communities is so abstract he ends up ignoring history and constitutionalism. One can agree with Fish that theory and practice differ and that criticism of a practice of one interpretative community by the theory or practice of another misses the point. But our history is contingent. The common law that we have inherited has attached us to a tradition of western and, particularly, British constitutional and legal thought. This history means that we cannot choose, or discard, the common law as one might a pair of shoes. In trying to understand the role of common law judges the lessons to be learned from Fish are not abstract; rather, they apply to an interpretative community with longstanding historical and constitutional claims to its existence and importance."

(Taken and adapted from John Gava, "The Audience for Rick Bigwood's *Exploitative Contracts*" (2007) 32 *Australian Journal of Legal Philosophy* 140)

3. A case study – the dissenting judgments in the *Work Choices Case*

John Gava, "Can Judges Resuscitate Federalism", Proceedings of the 19th Conference of the Samuel Griffith Society.

http://www.samuelgriffith.org.au/papers/pdf/vol19.pdf (go to Chapter 2) or

http://www.samuelgriffith.org.au/papers/html/volume19/v19chap2.html