REPLY TO GALLIGAN*

JEFFREY GOLDSWORTHY

Brian Galligan says that I have misread or misunderstood the whole thrust of his argument. I suggest that the shoe is on the other foot. Readers will have to decide who has misunderstood whom.

1 HAVE I MISUNDERSTOOD GALLIGAN?

Galligan's restatement of what he takes judges such as Sir Owen Dixon to have meant by 'legalism' confirms my original description of it. He takes them to have meant literalism ("the natural sense or plain meaning of . . . provisions") and conceptualism ("abstract categories and technical distinctions" to the exclusion of "contextual and consequential factors of a political, economic and social nature"). Galligan could deny this — he could attribute to them something less blinkered and cramped — only by undermining his claim that the Court in its actual work has departed from its professed method.

In what respect, then, did I misunderstand the whole thrust of his argument? I am genuinely puzzled. It cannot be that I failed to see that he attributes legalism, thus defined, to the 'public rhetoric' of these judges but not to the actual method they used. After all, this was one of his claims which I criticised at length, on the ground that by 'legalism' judges such as Sir Owen Dixon probably did not mean what Galligan takes them to have meant.[1] Is it that I failed to appreciate that he does not condemn outright their profession of legalism, but acknowledges its genuine virtues as — in its time — very effective 'political speech' which shored up the Court's legitimacy? Surely not: I quoted him extensively on this in my original article.[2] Incidentally, it seems to me that in his book Galligan *does* imply that Sir Owen Dixon was a liar, albeit a noble one.[3]

2 HAS GALLIGAN MISUNDERSTOOD ME?

Galligan depicts me as a kind of Rip van Winkle, still persuaded by Sir Owen Dixon's anachronistic account of the judicial function, unaware that "the debate has moved beyond the legalistic boundaries that Goldsworthy tries to retain". At the cutting edge of today's debate, according to Galligan, are judges such as Michael Kirby, Sir Anthony Mason and Michael McHugh, who "affirm the law-making function of courts in a robust and critical way."

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* Senior Lecturer, Faculty of Law, Monash University.

[1] Nor do I take them to have meant what I term 'interpretivism' or 'sensible legalism'. I impliedly criticise these judges for adhering to a conception of constitutional interpretation which was excessively narrow and technical, but not to the extent attributed to it by Galligan. In short, I prefer Zines' account of the High Court's legalism to Galligan's: L Zines, *The High Court and the Constitution* (2nd ed 1987), ch 16.

[2] Galligan says at one point: "In other words the championing of legalism by leading judicial spokesmen was politically astute rather than silly." But this is exactly the view I attributed to him, in virtually identical words: see p.28 supra.

[3] He says, for example, that Sir Owen Dixon was the paragon of legalism (B Galligan, *Politics of the High Court, A Study of the Judicial Branch of Government in Australia* (1987), 202-203); was one of those judges who appreciated legalism's "strategic implications" (*ibid* 40); and that legalism was a "noble lie" (*ibid* 41).

In fact the relevant views he attributes to these judges — that there is sometimes no objectively 'right' answer, and that therefore judging has a 'discretionary policy character' and judges a law-making role — are, in academic legal circles, old hat. They have been circulating since at least the 1940s, and are now uncontroversial. By this I mean no disrespect to those judges. They have provided us with further insights. And it is important for distinguished judges to publicly endorse these views because for many among the general public they are still novel and rather startling, and for many older or more conservative judges they are still too radical. It is probably premature of Galligan to announce a 'sea-change' in the judiciary's conception of its role: in opposing such a development, more conservative judges can enlist Ronald Dworkin's complex and subtle theory.[4] Dworkin has notoriously claimed that in an important sense judges do not make law, but in all cases attempt to ascertain the correct legal answer.[5] However, in academic legal circles he has attracted many critics but few converts. In these circles, it has long been acknowledged, and indeed it has become a cliche, that — at least in relation to these views — 'we are (almost) all realists now'.

The debate has indeed moved on. Today's question is not whether or not judges must necessarily, on at least some occasions, make moral or political value judgments, exercise discretion, 'make law', and so on, but *to what extent* they must do so. As Galligan himself acknowledges in his book,[6] judges do not and should not enjoy unfettered discretion to determine cases according to their moral and political beliefs. The problem is to identify the constraints to which judges are properly subject, and their scope and limits, so that the *legitimate* role of discretion — of judicial policy-making — can be determined. As Galligan says, these 'consequent issues of principled decision-making and legitimacy' must be tackled.

It seems to me that Galligan and I basically agree as to the method of reasoning judges should use in constitutional cases. We both advocate 'interpretivism', defined by him as requiring decisions to be made 'by reference to the constitution, either its actual language and structure or the values and intentions of the founders which it embodies', and as requiring 'that constitutional inferences and rules be drawn out from the constitution, not read back into it'.[7] (This is however misleading insofar as it might suggest that the interpretivist can eschew moral and political value judgments, a suggestion we both disclaim.[8]) I made it clear that this is what I mean by 'sensible legalism'. It is therefore puzzling that Galligan takes me to be defending an outdated and discredited theory of judging. It is also puzzling that he chides me for trying to retain "legalistic boundaries": by rejecting non-interpretivism he has conceded that such boundaries exist. Of course, neither of us has attempted to give a detailed account of the interpretivist

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[4] See, *e.g.*, the book review by the English judge L H Hoffmann, in (1989) 105 Law Quarterly Review 140.

[5] See R Dworkin, *Taking Rights Seriously* (1977), esp ch 13, and R Dworkin *A Matter of Principle* (1986), esp ch 5.

[6] B Galligan, *supra* n 3, 232-233, 259-260.

[7] *Ibid* 258.

[8] I said in my original article that the interpretivist possesses "no value-free mechanical procedure", and later that it is true that interpretivism "requires value judgments, or "choices", which are "intrinsically political", in that "they concern the proper functions of the Constitution and the Court."

method of judging we favour, and no doubt we would disagree at that level of detail.[9] To do so would be to attempt to describe the "legalistic boundaries" which distinguish legal from purely political reasoning. This is just the problem which, as I have said, is posed by the debate as it presently stands. Its resolution will be difficult and protracted.[10]

If I agree with Galligan to this considerable extent, with what do I disagree? To quote from my original conclusion, I disagree with his claims "that the distinction between law and politics is artificial, that for the most part the Court's decisions have been political in a sense which the judges have believed it important to conceal, and that they have cleverly done so by disguising them in legalistic garb." Furthermore, I there suggest that these claims may be harmful. This is particularly true of the claim that there is no important distinction between law and politics. If this sort of claim is made (as I believe it is in Galligan's book[11]) without very carefully distinguishing between the four different senses of 'political' which I have identified, then it is likely to mislead. Someone who believes that there is no such distinction may ignore or dismiss arguments that judicial reasoning is subject to "legalistic boundaries" on the erroneous ground that they depend on outdated or naive theories of judging. By doing just this is in his reply, Galligan has vindicated my concern.[12]

In his reply Galligan simply reasserts these claims, and ignores my criticisms of them.

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[9] For example, I am far from convinced that Lane and Zines are right in criticising the connotation/denotation distinction as (respectively) "unsound epistemologically" and "an outdated philosophical distinction": P H Lane, *Lane's Commentary on the Australian Constitution* (1986), 684-685; L Zines, *The High Court and the Constitution* (2nd ed., 1987), 16. This distinction is, or at least distinctions functionally equivalent to it are, still popular in contemporary philosophy of language, although drawn more precisely and with newer terminology (sense/reference, and intension/extension). See, e.g., T J Richards, *The Language of Reason* (1978), 75 and 133-137, and M Devitt and K Sterelny, *Language and Reality* (1987) 30-33 and 67-68.

[10] For example, even Galligan's very broad formulation of interpretivism (see n.7) may have to be qualified; many (and I imagine he himself) would not agree that the values and intentions of the founders, rather than "contemporary values", should necessarily be decisive when the constitutional text is silent or unclear.

[11] In his reply Galligan emphasises that by "political" he is using "not . . . the partisan or party sense, but . . . the more fundamental systemic or constitutional sense", in which the judiciary is "profoundly political . . . [as] the interpreter and enforcer of the system." This seems to be the first of the four senses I identified. But Galligan *must* be claiming that the Court's role is political in one of the other senses as well, because in the first sense the claim is trivial: it is perfectly consistent with even the narrowest conception of legalism. I take him to be claiming that the Court has been and should be political in the second and third senses as well, but not (at least as a rule) in the fourth sense. The problem is that he does not clearly distinguish between these three other senses, which is why I fear that, contrary to his own intentions, his claims may appear to enhance the credibility of non-interpretivism.

[12] I find the prospect of courts being radically restructured "along truly representative lines and [made] . . . democratically accountable" quite frightening, if (as is likely) the new 'judges' were to believe their authority to be constrained by very few "legalistic boundaries".