A Critique of Criticism

AN OCCASIONAL ADDRESS
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Now that the last formal links with the Privy Council have been severed and we perceive more clearly the distinctive character of Australian law, we are conscious that Australian parliaments and courts bear the responsibility for its development. You who are entering the legal profession come to it at a critical stage in the development of Australian law. You face the challenge and the excitement of moulding a legal system to serve a free and diverse Australian community. A University Law Review can perform a significant role in that development.

Tonight I should like to say something about the role of a University Law Review in the judicial development of the law. But, in order to do that, I must first say something about the judicial method of legal development. Some years ago, the accepted rhetoric of judicial method was based on Sir Owen Dixon's 'strict and complete legalism'. The method, as he explained it, proceeded 'upon the assumption that the law provides a body of doctrine which governs the decision of a given case'.[1] Sir Owen Dixon accepted the development of the law from a base of long-accepted legal principle but not the rejection of an accepted rule which was unjust in its operation. The assumption of a universally available body of legal doctrine buttressed the authority of the courts, for their judgments were taken to be the articulation by judicial oracles of principles which were already in existence though awaiting formal declaration. The assumption served the courts well. Respect for the law, as Lord Radcliffe pointed out, is 'the greater, the more imperceptible its development'.[2] But the assumption could not be sustained. Lord Reid said it was a fairytale that courts do not make law but only declare it.[3] The demonstrable fact was that there were cases where the existing body of legal principle provided little or no guidance to the solution of a justiciable issue.[4] And there were many other cases where the governing principle was ascertained by an uncertain analogy or treated as obsolete in order to avoid injustice. The rhetoric based on strict and complete legalism masked the truth of the judicial method.

Once the assumption of a universally available body of legal principle was

* AC, KBE, Justice of the High Court of Australia. This is the text of an address delivered on the occasion of the Annual Dinner of the *Monash University Law Review* in Melbourne on 30 August 1992.

1 'Concerning Judicial Method', address delivered at Yale University, 1955, reproduced in *Jesting Pilate*, (ed Judge Woinarski, Melbourne, LBC, 1965) 152, 155.

2 'The Law and its Compass', 1960 Rosenthal Lectures, 39.

3 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22. See also Lord Diplock, 'The Courts as Legislators' (1965), published in *The Lawyer and Justice* (ed Brian W Harvey, London, Sweet & Maxwell, 1978), 265, 266.

4 For stark modern examples, see the difficult bioethical cases *Secretary, Department of Health and Community Services* v *JWB and SMB [Marion's Case]* (1992) 175 CLR 218; and *Airedale NHS Trust* v *Bland* [1993] 2 WLR 316.

abandoned, the very existence of a disciplined judicial method came into question. Superficiality and cynicism, those twin purveyors of popular fallacies, combined to assert an even more unlikely theory than strict and complete legalism. They propounded the theory that judges applied their private values idiosyncratically, disguising them with a patina of legal reasoning. Law, far from being a normative guide to decision-making, was treated as a collection of empty formulae — shibboleths to be invoked by a judiciary bent on the implementation of their private value systems.

The truth is different. In ascertaining the rule by which to decide a case, a judge must start with the existing body of law. There is no other starting point. The existing body of law is the intellectual matrix in which judges have lived their professional lives. Their work in courts structured hierarchically requires the acceptance of the doctrine of precedent. Precedent shapes judicial thinking; it prescribes the frames of reference. It is nonsensical to speak of legal argument without reference to the existing body of law and it is by reference to that body of law that decisions must be not only made but justified. It would be impossible for a judge to implement private value systems while paying consistent lip-service, but no real obedience, to the existing body of law.

But that is not to say that, in the higher appellate courts, there is no room for choice of the relevant legal rule. The existing body of law may yield no relevant legal rule or, in rare cases, may yield a legal rule which is offensive to basic contemporary conceptions of justice. Then the existing body of law must be examined to discover the principles that underlie particular rules and, ultimately, the enduring community values that underlie the principles. This is no idiosyncratic exercise. Scholarship and experience must be employed in order to identify the principles and purpose of the law and the values which it implements. If an existing rule is to be modified or a new rule declared, analogy derived from existing principles is the primary source. Moreover, the modified or new rule must be articulated as an integer of the existing body of law, interlocking with related rules. The consistency of the law is achieved by developing rules consistent with the existing body of legal principles and, except in rare cases, with the values that underlie them.

There is room for divergence of opinion in this exercise, but not for unstructured idiosyncrasy. Divergence of opinion may come in the identification of the principles and purpose of the law and, infrequently, in the identification of enduring community values. If the judicial method were idiosyncratic, ephemeral political, social and economic values would predominate — as they do in the political branches of government — and legal development would depend on its pragmatic acceptability to the majority. Judges do not approach their function in that way.

The judicial method is rigorous and, with the acknowledgment that the courts make law, I venture to suggest that it has become more patently rigorous. The reasons for judgment in the higher appellate courts increasingly look behind the legal rule to discover the informing legal principle and behind the informing legal principle to discover the basic value. Legal development then proceeds in the reverse order: provided the basic value is consistent with

the enduring values of the contemporary community, the informing legal principle is stated in terms which are consistent with other legal principles and the legal rule is stated in terms interlocking with related legal rules. If you ask, from what does a judge discover the enduring values of the contemporary community, the answer, given by Justice Cardozo, is 'from experience and study and reflection; in brief, from life itself'.[5] But the judge's legislative power is hedged about with restrictions. In modifying a rule or declaring a new rule, the judge is not free to innovate at pleasure. Cardozo said, in a well-known description of the judicial method, that the judge is 'to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains.'[6]

It is the function of the academic profession and, in particular, of University Law Reviews to supervise the modern development of Australian law. But that must be done with an understanding of what is involved in judicial development of the law.

In the first place, the reviewer must put a newly-propounded legal rule in its context. As judicial development of the law would fail if novel rules were derived simply from a judge's private set of social values, the reviewer must enquire whether a particular legal development is an organic growth, deriving its sustaining sap from the vine of existing law to which it must be grafted. Attached to that vine, a new growth in the law can be developed and sustained; detached from that vine, a new growth has no support save the opinion of the judge who called it forth. And so the first evaluation of a novel legal development calls for an appreciation of the way in which it fits into the existing body of the law and reacts with other legal rules.

Next, the newly-propounded legal rule must be assessed for its utility or convenience. How does it operate? Is it generally conducive to justice and efficiency in the cases to which it is expressed to be applicable? This enquiry admits of differing answers if the underlying principle is controversial. Regrettably, this criterion of assessment is frequently misunderstood. A new legal rule is often assessed simply according to the reviewer's opinion of the merits of the case. The result of a case is of critical importance to the litigants but, to the reviewer, it is the legal rule, stated in universal terms, that is the proper focus of attention. The question must be whether that rule has the tendency to do *justice* and to do it efficiently. Of course the result in the particular case is one illustration of the operation of the rule, but it is the operation of the rule, not the merits of the particular case, which is of importance to the legal critic. A review which fails to identify the ratio decidendi but criticises the merits is not worthy of consideration.

A third criterion of assessment is whether the newly-propounded legal rule has been so articulated that it can be applied without unduly invoking a judicial discretion. Freedom under the law is maximized by legal rules which

[5] Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921) 113–14.
[6] Id 141.

reduce judicial discretion to a minimum. Of course there is room for judicial discretion in some instances but, to the extent that the application of a rule depends on judicial discretion, power is reposed in the judge to determine the rights and liabilities of the parties. Where there is a choice between enforceable rights and discretionary relief, the former is generally to be preferred.

If University Law Reviews, in their published analyses of judgments and their articles propounding new legal rules for consideration, subject their material to the rigour of the judicial method, their influence on the judicial development of Australian law will be substantial. One of the chief reasons why judges write judgments is to give a public account of the manner in which they exercise their enormous powers. Criticism, informed and impartial, of those judgments and the scholarly propounding of new rules suitable for the Australian community will provide powerful stimuli for the work of the higher appellate courts. As the *Monash University Law Review* provides that kind of stimulus, it gives me great pleasure to be with you this evening as you celebrate your efforts.