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# Introduction

## Practical skills and legal theory

Judges undoubtedly bring immense practical skills to the practise of their craft. Practical skills are encouraged and developed in the service of clients by the practising lawyer in the law firm or the barrister at the bar, and finally elevated to an art form by those who ascend the bench and are required to make a final determination. That final determination must be reached in disputes where, as often as not, the evidence is conflicting, the issue or issues elusive, and the law to apply uncertain or vague. The judge's practical skills are utilised to resolve and stabilise the facts of the case, to analyse and identify the question in issue, to arrive at a decision on that issue and, then, to justify with reasons the decision that has been reached.

But practical skills alone are not enough. Those skills must be anchored in a conception of the judicial role. Legal theory is fundamental to that conception. Without a clearly thought out conception of the judicial role, a judge is in no better position than a mariner at sea without a compass or, perhaps, a mariner at sea with a defective compass. The practical skills are exercised with either an apparent indifference to any considered purpose for their exercise, or blindly or intuitively as if the purpose were self-evident or innate to those skills and need not be comprehended. Judges risk the charge that they are simply 'muddling along'.

I am not suggesting that judges should become philosophers, or worse, that philosophers should become judges, but merely contending that a basic understanding of legal theory is essential for the complete performance of the judicial function. Plumbers may plumb for a lifetime without perplexing themselves as to what their trade is all about. But the administration of justice in accordance with the law is far removed from plumbing. A judge cannot simply judge as a plumber may plumb. To fulfil their judicial function, and to be able to assess whether they are fulfilling that function, judges must explore, examine and know the theoretical framework for their judicial thinking.

Yet, judicial scepticism, if not distrust, of legal theory is commonplace. Andrew Halpin has identified the various strands of practitioners' scepticism towards theory.[1] These strands are encountered often enough in legal practice. Scepticism is first apparent in the belief that the law has no need of theory. Legal practice is regarded as being sufficiently rich to make theory redundant. The second strand of scepticism is that practice has only a limited need for theory. While it is acknowledged that theory can provide an ancillary role in limited areas of practical skills, those skills remain transcendent. Theory, in other words, may assist to manage the long-term strategy but it is not to be permitted to detract from the opportunities practitioners have to excel in performing their practical skills. The third strand of scepticism is that theory has overstepped the mark altogether. It fails to represent practice and often takes the form of an alien rhetoric. To which, one may add, all of the above.

While the language, relevance and remoteness of much legal theory undoubtedly contributes to this reaction, scepticism of theory in itself is misplaced and, indeed, dangerous. Intuition and unquestioned assumptions replace a personal theory of law or a conception of the judicial role. If the judge does have a personal theory, it may be largely unarticulated, or incomplete, or even unsound, or it may be no more than a felt approach reflecting a vaguely understood legal theory. Judges of this description are reluctant to abandon the mythology that clings to the judicial process because they have nothing articulate, complete or sound with which to replace it. More often than not they become wedded to a crude form of positivism that does not exhibit any of the refinements of reconstructed positivist theory; to a black letter approach that is sustained by some sort of lingering faith in the discredited declaratory theory of law; and to an impoverished formalism or quasi-formalism that is dismissive of the breadth of factors and societal demands external to the formal expression of the law.

A basic understanding of legal theory provides an antidote to these ill-informed preconceptions and perceptions of the legal process. It provides the judge with the concepts and vocabulary with which to describe the judicial decision-making process. More importantly, it enables the judge to formulate a conception of the judicial role, and it is that conception that will inform and influence the decisions that the judge will make in the course of carrying out the judicial task.

[1] *Reasoning with Law* (Hart Publishing Oxford and Portland Oregon, 2001), at 20–21.

The impact of the judge's underlying conception of the judicial role is apparent when reference is made to the breadth of the judicial function. Where the judicial duties are of a routine nature, theory may not matter greatly, if at all. But judges' tasks do not stop at the routine. Judges are regularly called upon to make law, and in the course of doing so, to formulate policy. It is these aspects of judicial activity that most require the benefaction of legal theory to obtain legitimacy.

## Judges make law – endlessly

The notion that judicial law-making is restricted to innovative or adventurous decisions and that judicial policy-making is an aberration that some judges only indulge in at the expense of proper interpretative principle needs to be dispelled at once. This notion does not reflect reality.

None, other than the uninitiated who seemingly lack an understanding of the dynamic of the common law, seriously question the fact that judges make law. The belief that judges do not make law is hopelessly out of date. As Lord Reid famously said as long ago as 1972: 'We do not believe in fairy-tales anymore.'[2]

What is not, perhaps, so widely appreciated is that judges make law, not only when they expand a legal doctrine or extend a legal principle to a new situation, but also when they confine a legal doctrine or restrict a legal principle. Whenever the question before the court could be called novel, and at the appellate level that is frequently the case, the law is made just as much when the judge's decision may be characterised as orthodox or 'negative' as when it may be described as creative or 'positive'. The idea that the law is only made when a decision is creative or positive presumes that there is a 'law' from which to depart. It is that presumption, of course, which is misplaced.

*Donoghue* v *Stevenson*[3] provides an example. Lord Bingham has observed that no-one could fail to recognise that the decision of the majority of three to two had made law.[4] Most would have little doubt that it made good law. The decision, Lord Bingham continues, would still have made law even if the majority's decision had been to the opposite effect. Such a decision, he observes, might not have stood the test of time and one might incline to see it as a bad decision. But the

[2] Lord Reid, 'The Judge as Lawmaker' (1972) 12 JSPTL 22. [3] [1932] AC 56.
[4] Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, Oxford, 2000), at 29.

critical point is that, until reversed or modified, it would have precluded a plaintiff bringing a successful proceeding in a similar situation. While a negative decision would have been less innovative than the decision actually made, it would have placed a highly authoritative roadblock in the path of the plaintiff, and so, Lord Bingham concludes, would have made law.

This perception follows inescapably from the fact that there is no 'law' to declare. Because there is no law to declare and the law is largely indeterminate, it is made, either conservatively or less conservatively, by the decision in the instant case. In their outstanding work, *Judicial Policy Making and the Modern State*,[5] Malcolm M. Feeley and Edward L. Rubin confirm that, if legal doctrine is largely indeterminate, judges are creating law perhaps as often as every time they reach a decision. Some judgments may be more creative than others, but this difference does not exclude the law-making property of the less creative decision. Judicial resistance to this analysis simply indicates that the declaratory theory of law still loiters in judicial chambers.

Appreciation of the fact that judicial law-making is not only restricted to the more progressive judges, but embraces the judiciary as a whole, emphasises the need for all judges to be directed by a judicial philosophy that is articulated and transparent. Judges, as regularly proclaimed, are not elected officials and they have no mandate to make law outside or beyond that which can be justified by sound legal theory. It is the underlying theory, and nothing else, which provides judicial law-making with its legitimacy.

## And judges also make policy – regularly

Equally inevitable is the fact that, in the process of making law, judges frequently formulate public policy. Legal theorists who condemn legal policy-making as an aberrant departure from the true judicial interpretative function also ignore this reality. To some extent, judges have always made policy. They have done so, for example, when having regard to the social impact of their decisions. Judges are influenced by their perception whether their decision will achieve a socially desirable end or bring in its train socially undesirable consequences. They seek,

[5] Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge University Press, Cambridge, 1998).

consciously or unconsciously, to reflect socially acceptable norms and to utilise social policy to inform their thinking. Admittedly, reference to policy considerations may not always be overt. Those considerations may be forced to fit the configuration of formalism. Judges will seek to show that the new policy somehow emerges from the existing body of law, or is implied in it, rather than to justify the policy on the basis of the socially desirable outcome it will achieve. Such terms as 'experience', 'reason', 'self-evident', and the like, often conceal – or reveal – the weight placed upon policy considerations.

A number of judges, of course, have acknowledged the presence of policy considerations in judicial decision-making. Who, other than Lord Denning, could be expected to be at the forefront in doing so? In *Dutton* v *Bognor Regis UDC*,[6] Lord Denning confirmed that the question, what is the best policy for the law to adopt, may not have been openly asked, but has always been there in the background. It has, he said, been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable or not? Was it too remote? And so forth. Lord Denning concluded emphatically, 'Now-a-days, we direct ourselves to considerations of policy . . .'[7] Many judges today, and certainly many more than in his day, would not be at all abashed at acknowledging the truth of Lord Denning's observations. Indeed, and by way of example, in *Fairchild* v *Glenhoven Funeral Services Ltd*,[8] the House of Lords in 2003 openly referred to policy considerations in determining the question of causation where the plaintiffs were unable to prove which of two employers had caused the disease arising from inhalation of asbestos dust from which the deceased had died.

Any residual doubts that judicial policy-making is exceptional, or incoherent, or avoidable by better legal reasoning have been put to rest by the study reported in the book I have already described as

[6] [1972] 1 QB 373, at 397.

[7] See also Bingham, *The Business of Judging*, at 28. Lord Cooke has spoken in similar vein; 'The New Zealand National Legal Identity' (1987) 3 Cant. LR 171.

[8] [2003] 1 AC 32. See, e.g., Lord Bingham at para. 33 and Lord Nicholls at paras. 40–43 for admirable treatment of the policy issues. The policy considerations and accompanying value judgements undoubtedly determined the outcome of the appeal. Why, then, in this case as in many others, is it seen to be necessary for the judgment writers to expand upon the case law (with often conflicting interpretations) at such inordinate length? (But see the case note by Jonathan Morgan in (2003) 66 MLR at 277–284, in which their Lordship's acknowledgement of the influence of policy is approved but their analysis of the policy reasons for their decision is said to be disappointing!)

outstanding.[9] Professors Feeley and Rubin carried out an exhaustive study of how Federal Judges in most of the States of the United States of America, acting largely independently of each other, overturned rules and precedents to reform the prison system throughout the country. Having described this judicial enterprise, the authors enter upon a remarkable exercise in jurisprudential analysis, and extract from the study a perception of the decision-making process that closely accords with my own. Central to their work is the argument that judges are not passive adjudicators of conflicts but active policy-makers. They point out that judges treat the text of the applicable law as a grant of jurisdiction, and then fashion a decision that they believe will yield the most socially desirable results. Judges will initiate a policy-making effort when motivated by strong moral sentiments in the community. But the authors are at pains to point out that policy-making is not unconstrained. They assert that the constraints that are intrinsic to the judicial policy-making process yield decisions that are just as principled and legitimate as decisions that purport to interpret the legal texts.

Feeley and Rubin's conclusions cannot be dismissed on the basis that they are peculiar to the United States or to jurisdictions having a written constitution. Their description of the legal process is too close to my own experience in a jurisdiction where there is no supreme law for me to permit of that escape route. In examining the judges' motivations, their departure from previous rules and precedents, their formulation of policy, and the constraints that operate within the discipline and methodology of the law, Feeley and Rubin entered upon an examination of a process of judicial reasoning that is generic to all common law jurisdictions. Jurisprudentially speaking, the judicial process is highly ecumenical.

## The interpretative approach is wanting

In disclosing the full extent of policy-making in judicial decision-making, Feeley and Rubin explode the interpretivist theories of law, that is, the notion that the legal process is a matter of interpreting a constitution (where there is a constitution) or the text of statute law or the common law. This demolition of the interpretivist theory is to be welcomed for the theory is but one or two steps up from the discredited declaratory theory of law. It necessarily suggests that there is a law to interpret or that interpretation will provide a decision whenever the law is

[9] Feeley and Rubin, *Judicial Policy Making*.

indeterminate. Timothy Endicott has pointed out the hollowness of this view. In cases where there is a rule to be applied there is no need for interpretation. In cases where it is necessary to invent a new rule, either there is nothing to interpret or a rule that might have been applied without interpretation is overturned, or derogated from, or ignored.[10]

Interpretivist theory nevertheless remains dear to many legal theorists. I believe that this affection is due, in part at least, to the focus many North American theorists give to decisions of the Supreme Court of the United States relating to the Constitution of that country. But as a general theory, the interpretivist theory must founder on a number of realities. The first reality is the indeterminacy of the law. That which is indeterminate cannot be interpreted, at least not in any sensible sense. What is there may be extended or restricted, but that is not a process of interpretation. In either case it is a process of creativity. As Feeley and Rubin have commented,[11] at some point the law or legal text is so vague, and the law which the judge then makes so comprehensive and precise, that the term 'interpretation' seems like more of a conceit than a description.

Secondly, the interpretivist theory is inconsistent with the measure of judicial autonomy enjoyed by judges in practice. As I will press in argument further, choice is endemic to judicial decision-making. Certainly, interpretation itself allows for choice. A legal rule or principle may be interpreted differently by different judges. But what is defective in this limited view is the implication that there was an applicable law in existence for the judges to interpret differently. More often than not, the judges have made law or formulated policy simply because there was no applicable law or, certainly, no applicable law beyond a starting point. Essentially, the interpretivist theory denies the role of creativity in the judicial process and, therefore, the true extent of judicial autonomy.

## Judges and legal theory

Once it is recognised that in the course of making law judges move beyond any sensible concept of interpretation and formulate policy, it becomes important that they have some familiarity with legal theory in order to define their judicial role. A conception of the judicial role that does not acknowledge the extent of judicial law-making or policy-making cannot be

[10] Timothy A. O. Endicott, *Vagueness in Law* (Oxford University Press, Oxford, 2000), at 182.
[11] Feeley and Rubin, *Judicial Policy Making*, at 205–206.

conducive to sound judicial reasoning. Indeed, there is no logical reason to believe that policy-making without an underlying conception of the judicial role will be other than random, incoherent or irrelevant. Nor, without a basic understanding of legal theory, will the judges be able to enter into any sensible discourse about judicial policy-making. Discourse will also proceed among legal theorists and academics without the benefit of the direct experience that judges can provide. The task of defining the legitimate metes and bounds of adjudication becomes that much more difficult.

Further, law is not an end in itself but exists to serve the needs of society. Society will not be served or its needs met by judges who make law or policy for that society without the guidance legal theory can provide. Not just the metes and bounds of policy-making in adjudication, but the purpose and substance of the policy made, will be shaped by the judge's conception of the judicial role. It is surely an oxymoron to speak of law as being an instrument of social policy and yet have judges administer the law and make policy ill-informed or indifferent to the theoretical foundations of their task. A sound conception is likely to deliver sound policy; a poor conception is likely to deliver poor policy.

As already intimated, the immediate value of a basic knowledge of legal theory is that it serves as an antidote to intuitive, ill-informed and ill-considered perceptions of legal theory and the preconceptions that those intuitive, ill-informed and ill-considered perceptions engender. Familiarity with legal theory will in itself encourage a judge consciously to disregard any sort of lingering faith in the discredited declaratory theory of law; inhibit judges from determinedly adopting a positivist bent; and disabuse judges of any tendency to adhere to the formalism of the past or any more modern mutation of it.

At the same time, the preconceptions that these intuitive, ill-informed and ill-considered judicial attitudes generate will be shed. They cannot coexist with a more realistic and comprehensive theory of the judicial function. Of course, it would be unrealistic to expect that a judge's preconceptions will be entirely eliminated by such enlightenment. What would be shed will be those preconceptions that survive, or thrive, simply because the judge nurtures an inadequate or outdated theory of law and the legal process. In short, the blind, intuitive approach to adjudication would be annulled, the charm of legalism would be wasted, and the simplicity of mechanical reasoning would be spurned.

Of course, it can be said that judges who are or become familiar with legal theory will be likely to adopt different theories of law and the legal process and will develop different conceptions of the judicial role as a

result. That is so, and is for the good. Indeed, it would detract from the vitality of the law if this were not the case. Any theory and resulting conception of the judicial role is almost certain to be an advance on an unconscious adherence to the notion that the law is there to be declared, a committed positivist dogma, or a self-satisfied formalistic bent. Whatever the theory, judges would naturally express their reasoning in the context of their conception of the judicial role and overtly seek to make their decision accord with that conception. Judicial reasoning would be more sincere and transparent as a result. Further, because judges' greater familiarity with legal theory would permit them to enter into a discourse about the proper conception of the judicial role, differences in judgments will tend to be directed to the basic beliefs of the judges as to the proper conception and why that conception directs the outcome which they favour. More open appeal to the judges' true motivation and reasoning, and much less rationalisation, can be expected in judgment writing.

## Theorists and legal practice

If judges' practical skills are to be harnessed to a sound conception of the judicial role based on legal theory, it follows that legal theory should be readily accessible to judges. Regrettably, that is not always the case.[12] Many legal theorists seem to write to and for each other. In the result, jurisprudential theory has become burdened with a surfeit of theories and sub-theories. These theories and sub-theories attract numerous counter-theories, some of which misrepresent and distort the subject theory, which in turn provokes further critical comment.

Unpalatable though it may be, it has to be said that there have been too many rather than too few contributions to legal theory, to the point

[12] In referring to legal theory, I am effectively referring to jurisprudence or legal philosophy. I acknowledge that there are vast areas of legal theory that bear directly on the substantive law, such as the law of contract, torts, equity, or administrative law, which are of immense assistance to judges in the application and development of the law. No-one could complain that contributions of this kind are expressed in anything other than plain and readable language. See, for example, the work of the late John Fleming, who was described in *Hunter* v *Canary Wharf Ltd* [1997] AC 655 by Lord Cooke of Thorndon as 'the doyen of living tort writers' (at 717). Fleming saw the prime function of the academic commentator as being to counteract the inherent conservatism of the law by measuring it against 'modern' conditions. See Peter Cane, 'Fleming on Torts: A Short Intellectual History' (1998) 6 Torts LJ 216, at 216. Cane points out that Fleming engaged in a forty-year conversation with the higher judiciary of the common law world.

where the subject has generated its own somewhat self-conscious and introspective industry. Within this industry, legal terms are defined and redefined and inspire theories that may be perceived to have both their footing and their reach in the given definition; legal concepts are classified and reclassified until the classification or reclassification seems to become the end of the discourse in itself; and hypotheses are advanced and readvanced until they break down under the weight of their own linguistic genesis. Jurisprudence has come to possess the variety of a giant supermarket. Small wonder that the practitioner is bemused as to what to take from the shelf.

Hand in hand with this jurisprudential rampage is the development of a jargon that may be helpful to the initiated, but which is bewildering to the novice. Legal positivism, for example, may be 'analytical positivism', 'imperative positivism', 'classical positivism', 'linguistic positivism', 'positive legal positivism', 'presumptive positivism', 'soft positivism', 'modern positivism', 'normative positivism', 'ethical positivism', 'democratic positivism', 'exclusive positivism', 'inclusive positivism', 'negative positivism' and, no doubt, as many other positivisms as there are colours in Joseph's spectacular multicoloured coat.

Built into this heady promiscuity of concepts is the phenomenon of naming rights. After explaining the concept, insight or phenomenon advanced the theorist will add, 'I will call this . . .', and will then insert the brand name. Having one's name associated with an accepted concept identified by other theorists is no doubt appealing, but if the theory advanced will not hold up in its own right, coining a phrase for it will be to no avail. I fell foul of this temptation myself when I invented the term 'substantialism' in an effort to express the opposite of formalism.[13] Today, that term does not seem particularly apt to describe the work of those judges who, in their judicial approach, have a penchant for justice and modernity in the law and who prefer substance over form.

Nor can there be any excuse for the legal theorist writing in obscure and obtuse language that cannot be reasonably understood. It is disturbing that, in seeking to understand some jurisprudential work, it is at times necessary to read a sentence or paragraph two or three times over to understand it, and even more disturbing to find that one still cannot understand what the author is trying to say. Judges and lawyers are intelligent people, well equipped to handle and evaluate concepts and

[13] 'Fairness and Certainty in Adjudication: Formalism v Substantialism' (1999) Vol. 9, No. 3, Otago LR 459.