

REVIEW

Statutory Interpretation in Australia

P C Pearce and R S Geddes
Butterworths, 1988, Sydney (3rd edition)

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Book reviews are normally written to inform readers about newly published works. Often they are reasonably short, summarising the contents and giving a brief reaction of the reviewer to the work. Sometimes they are much more substantial, especially where the book is long awaited or it is by a prominent figure. Occasionally reviewers will look again at a classic work to see how the passage of time affects the work (or the reviewer). This review adopts a slightly unusual strategy which does not fit into any of the categories listed above. The book being reviewed was first published in 1974, is now into its third edition which itself was published some five years ago. It is probably too recent to be labelled a classic and it certainly has not been controversial. Nevertheless, because it is a typical example of competent, non contentious scholarship published by Australian legal academics, it provides a good vehicle to investigate some issues surrounding the notion of scholarship.

One could imagine two different reviews being written about this book - one praising the authors for their achievement, the other full of criticism for their

failures. The reason this book could attract such opposed reactions tells us much about the nature of legal scholarship in Australia today. This, in turn, raises important questions about the future of legal scholarship in this country.

The positive review would be easy to write. It is clearly set out, easy to follow and the authors have avoided the temptation to include hundreds (or thousands) of particular examples of interpretation in the courts and have, instead, selected illustrative decisions which show the "principle" which is being discussed. This book must be a boon to all judges, barristers and other lawyers and lay persons who have to deal with issues of interpretation of statutes. It should be easy from this book to find the relevant "rules" of statutory interpretation to support any argument before a court, any judgment given from a court or any advice to a client on the meaning of a piece of legislation. Although I am not a practising lawyer in any of the guises mentioned above I am quite confident that this would be considered an extremely useful book by the profession.

The negative review would be equally easy to write. The major flaw of this book is that it tells us practically nothing about interpretation. One reads in vain for any evidence that the authors know about, let alone have read, the voluminous philosophical, linguistic, literary and jurisprudential debates about interpretation. Are the authors aware of the Fish/Dworkin debate, for example?¹

Although the authors rely almost exclusively on case law for their discussion they do not claim that the common law has an iron clad, objective method of interpretation. They are quite open about this.²

In an endeavour to facilitate the discovery of the meaning of legislation, the courts have evolved, over a long period, a number of approaches and presumptions - and this book discusses these. It is important to stress at the outset that these are nothing more than approaches and presumptions. To elevate them to the level of "rules" is but to mislead as it invites the assumption that they will be strictly applied by the courts. If one could be sure that every writer of legislation knew all the approaches and presumptions of the courts

¹ S Fish, "Working on the Chain Gang: Interpretation in Law and Literature" (1982) 60 *Texas LR* 551; R Dworkin, "Law as Interpretation" (1982) 60 *Texas LR* 527.

² Pearce, D and Geddes, R, *Statutory Interpretation in Australia* (1988) at 3.

and rigidly adhered to them - **if indeed that were possible** - it would be permissible to talk in terms of rules. But this is not the case and the so-called rules can only be regarded as aids to interpretation. (Emphasis added)

Their discussion of ambiguity and the literal and purposive approaches to interpretation is equally frank.³

In reality, whether or not the words of an Act are ambiguous depends upon whether the court declares them to be so.

Given this utter flexibility a number of questions arise. Are judges constrained in their interpretation? If so, how are they bound because, to quote from an earlier edition of *Statutory Interpretation*,⁴

Every one of the "rules" that has been mentioned may be held to be inapplicable in the context of a particular case.

The debate between Ronald Dworkin and Stanley Fish revolves around this central question. Dworkin acknowledges the constraint on judges comes not from some notion of determinacy in the meaning of words. He sees the judges being bound by the restraints imposed by the traditions of the common law and fidelity to the work of those who precede us. For Dworkin, this tradition bound perspective provides a limitation on an otherwise unbounded choice given to the judges by the inherent flexibility of language. Fish argues even this argument is contingent, open itself to the very sort of choices which Dworkin tries to constrain for language. He accepts at any given time it is possible to predict with some degree of certainty how judges will interpret legislation. This is so because the judges see themselves as constrained by the tradition they are working in. What he denies is the belief this tradition itself is not open to challenge, it provides some sort of objective fence containing the choices open to the judges.

Pearce and Geddes have nothing to say on this question.

Nor is there any response to the claims of conventionalism - the belief that the shared understandings of the legal profession are the source of constraint

³ Pearce and Geddes, above, n 2 at 3.

⁴ Pearce, D, *Statutory Interpretation in Australia* (1981) at 179.

in legal interpretation.⁵ Whilst this school of thought became important in the 1980s its pedigree goes back some way. For example, classical apologists for the common law like Llewellyn and, more recently, Eisenberg are best understood as defending the common law method as a *means of practice* which gives tolerably predictable results and which fits into the ethos, experience and expectations of the legal profession.⁶ Once the implications of this view are appreciated, the criticisms made by Legal Realism, Critical Legal Studies and the Law and Economics scholars that the common law is not a closed, logical system, are easily sidestepped. Clearly that system does reflect predominant views in our society and the legal profession. The more perceptive defenders of the common law method not only accept this, they see the openness of the common law as a strength which allows for the predictable and orderly development of the law.

Unlike the theoretical constraints argued by Dworkin, conventionalism is based on practical and contingent restraints imposed by the *interpretive community* of the legal profession. This claim raises serious questions for anyone interested in law and interpretation. Is it an accurate description of the forces acting on judges? If it is, are important issues of democracy raised?⁷ After all, it does seem to give tremendous political power to a relatively small and elite group of people. Can this be met by a constitutional response? If the profession does act to control common law judging should this right be matched by the responsibility of electing the judges and exposing the choices made to the public?⁸

It may be this book was written as a guide for practitioners. If so, it can be evaluated on its merits on how useful it is for that purpose. It appears likely the authors believe a practitioners' book is an appropriate way to further an intellectual understanding of law. It is the second possibility which raises questions about the nature of legal scholarship in Australia. Can a practitioners' book be considered a work of scholarship?

⁵ See, for example, Millon, D, "Objectivity and Democracy" (1992) 67 *NYULR* 1; O Fiss, "The Death of the Law?" (1986) 72 *Cornell LR* 1; O Fiss, "Conventionalism" (1985) 58 *Southern Calif LR* 177.

⁶ K Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960); M Eisenberg, *The Nature of the Common Law* (1989).

⁷ Millon, above, n 5.

⁸ Fraser, A, "Beyond the Charter Debate; Republicanism, Rights and Civic Virtues in the Civil Constitution of Canadian Society" (1993) 1 *Rev of Constitutional Studies* 1.

An answer to this question, of course, will depend on one's notion of scholarship. It is clear, traditionally, the production of books for the profession has been the major concern of legal academics in Australia - apart from teaching. Student texts and casebooks are merely variants of this type, designed to inculcate and train apprentices into the ways of practising lawyers. If we examine the history of common law teaching in the universities the reason for this becomes clear. The common law legal profession enlisted the universities in its drive to become a profession. A degree gave lawyers the status and sophistication necessary for a profession. In order to achieve this legitimacy a law degree required a minimum amount of intellectual credibility. In other words it could not be seen to be a fraud. Thus, for example, a concentration on the clerical and administrative aspects of legal practice, which make up the bulk of most lawyers' work, would have lacked the credibility to confer the necessary academic status to a law degree. On the other hand, an immersion into case law was bookish enough to appear genuinely academic, yet at the same time was 'practical' enough to satisfy perceived needs about the knowledge necessary for legal practice. This understanding of a law degree also catered for legal academics. University tradition required scholarship and this could not have been satisfied by learned treatises on the clerical and administrative duties of practicing lawyers. Lengthy tomes analysing and categorising (and occasionally criticising) judgments could be claimed to be contributions to learning.⁹

It is clear I do not believe the production of practitioners' books constitutes scholarship. This conclusion should not be taken to mean a call will be made for the exclusion from law schools of those who write them. I want to start a debate and convince others of the validity of my arguments. I do not want to exclude anyone from the academy. I do expect those who believe that scholarship includes the writing of practitioners' books should have to argue for this position.

As indicated above persuasive defenders of the common law like Llewellyn and Eisenberg acknowledge the analytical development of case law is a method, a rhetoric used in the courts which allows for the orderly and predictable development of the law. If we understand cases in light of this, scholarly concentration on the logical deficiencies or otherwise of a series of cases or even the cataloguing of them into areas and themes is misplaced. Common law judging and argumentation are arts or skills, and not logically

⁹ See generally, J Gava "Introductory Essay" (1988-89) 5 *Australian Journal of Law and Society* 1.

based scientific methods. They are means of resolving disputes in a way which seems consistent, as the judges and practitioners see it, with the traditions and the changes within society. While this calls for investigation by scholars - after all, the received wisdom of the judges and practitioners might not be everyone's cup of tea - it does not mean we need a comprehensive catalogue and analysis of every judgment handed down.

The study of law should not be constrained to follow the working practice of the profession. The law is a far wider phenomenon than is described in law reports and the methods needed to study it more numerous than the rhetorical practice of the profession. While this rhetorical practice is an interesting and worthwhile area of study it should not be the *method* used by academics. Legal scholarship must reflect this broad understanding of law. If it does not and we remain servants of the profession we will never become scholars.

Pearce and Geddes have produced a practitioners' book which can also be used by anyone who is interested in the rhetoric and tools used by the legal profession to justify the meanings attributed to statutes. As long as it is seen in this way it can be described as a fine book. If the authors intended it to be a serious addition to scholarship on interpretation they have missed the mark completely. It has nothing at all to say on this topic.