PART VII — POSTMODERNISM

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7.1   History

Modernism developed out of Enlightenment thought (the period of scientific and cultural flourishing in the 17th-18th centuries). Modernists were concerned with formulating abstract, transcendental truths.

Truth: a foundational meaning; something that expresses a fundamental aspect of the world or an experience and correlates affirmatively with that experience.

The relationship between modernity and law:

> 1   *Lays emphasis upon autonomous individual who is capable of discovering rational principles*
>
> 2   *Attempts to provide scientific explanations about sociological phenomena*
>
> 3   *Law protects the autonomy of individuals*
>
> 4   *Law is a self-contained system of rules*

Modernist and Enlightenment thought stems from Descartes' epistemological scepticism (questions everything except self-awareness), emphasising a unified and rational subject. A free and self-contained subject is the foundation of theories of social contract (Rousseau: 'man is born free but everywhere he is in chains'; Hume: 'tabula rasa' [blank slate] at birth).

Modernist and Enlightenment doctrines began with the abolition of slavery and subsequent colonisation. These gave way to a capitalist market economy (consumer ideology) and totalitarian regimes (Marxism).

Postmodernism questions the assumptions of universal abstract principles of legitimation, and rejects essential (basic) truths. The focus is upon the fragmenting nature of existence rather than trying to piece together meta-narratives that reduce it to a cohesive whole.

7.2   Law and language

Postmodernism defines itself in part against modernism. It is a general way of describing and evaluating traditional knowledge. In a legal context, one must examine law in terms of the intricate aspects that compose it.

Subjectifying language has the effect of increasing the complexity of the legal apparatus. In questioning the modernist view of language, postmodernism undermines liberal values and draws attention to their failure to adequately account for the complexities of meaning. The result is that the supposed totality and autonomy of legal rules and procedures are brought into question.

> 1   *Structuralism*

The main idea is that there is a system of meanings and processes which construct thought. Language is a means to describe this process.

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- Language reflects *our* perception of the world rather than existing aspects of *the* world ('a rose by any other name…').
- Meaning is generated by *differences* in language
  - Sounds take their meaning from differences in sound
  - Signifiers take their meaning relative and in opposition to one another
- A system of classifications will arise from these differences in the individual signifiers
- Systems of signification have no semantic limitations (in terms of the meaning they might encompass for the signified)

How does a particular subject function in relation to the systems of signification (society, law, language) around them?
- Subjects are, like their objects of interaction, defined relationally – in relation to other subjects and *concepts*
- Language constructs and defines subjects
- An individual signified thus has no meaning which transcends its immediate context and system of signification
  - but it may still have significance for either a) a subscriber to the system of signification, or b) at another, more holarchic (inclusive) system
- Products of discourse are products of power and language

Structuralism challenges the assumption that there is a difference between a system of language, the people who use it, and the meanings generated thereby.

- Meaning cannot be unqualified and absolute, universal
  - law encompasses more than the texts of cases and statutes themselves
  - emphasis in formalist legal reasoning, education, and jurisprudence is upon these texts as foundational rules and principles (eg, Kelsen's pure theory of law)
- Act of interpretation necessitates inclusion of subjective influences
  - yet law is supposedly objective, conceptually structured, stable, universal, and determinate
  - postmodern insights lead to a destabilisation of legal language and meanings
  - no absolute legal truths of foundational meanings
  - no one understanding of the world that is incontestable
- There are far-reaching implications for the way in which legal reasoning and education proceeds if we accept that many processes of law are influenced by external meanings and interpretations

Theory of difference

      A   *Meaning is constructed through a continual process of exclusion and setting up of differences*

      B   *All meanings refer to past or future meanings*

Language has to evolve constantly to maintain and identity new difference. One will never be able to have a complete meaning at any one time; meaning depends on the system of relations by which it was produced – it cannot be self-contained within a given set of propositions.

Understanding law thus requires the continual separation of one thing from another – distinguishing and application. The system is *dynamic* and continues to evolve. The common law is a good model of this process of legal semantic change.

Deconstruction sheds light upon the nature of the legal system. It can never be self-contained:
- Note laws of 'genre': so-called *grund norms* impossible (Kelsen – eg, constitution)
  - officials recognise the rule of recognition, but who recognises the rule that the rule of recognition must be recognised? (Circular)
- A basic norm has both internal and external components

7.2   Law as judgment

- Judging creates meaning and is itself an interpretive exercise
  - legal disputes require the authoritative evaluation of competing truths according to fixed standards; too little emphasis is placed upon the process of evaluation, as distinct from the standards and rules themselves
- In judging, language in authoritative texts, cases, and statutes must be interpreted to produce interrogatory meaning – whether the stated rule of law corresponds to the given facts, for example
  - a traditional understanding of legal concepts (eg, negligence) would describe the process as one of objective, determinate application
  - however, structuralist and poststructuralist thought suggest that language and other systems of signification act to effect constructions of meaning, rather than describe pre-existing truths
  - concepts such as negligence may only be applied and conceived relative to other legal concepts and terms
  - meaning necessitates reference to the discursive system of which it forms a constant part
  - the western legal paradigm creates and embodies its conceptual meanings and the signifiers in which to express and apply them

7.3   Law as author

- Legal texts (cases and statutes) are said to be authoritative meanings; the structures and truths expressed within are accorded significance by those who interpret and apply them
  - the positivist would posit that they gain their authority due to the process by which they were constructed; namely, by persons and processes of authority
  - natural law theorists would contend that their authority lies in a coercive moral force that coincides with principles of natural justice
  - the postmodern critic, such as Barthes, may claim instead that 'the author is dead' – that the texts draw their meaning (and thus authority) from their readers and from no single semantic foundation
- If legal meaning is devoid of original authority, why should law be afforded coercive power? From where does it derive its legitimacy?
  - moral value (God)
  - social cohesive value (society)
  - individual value (common good)
  - sovereignty (antipodean positivism)
  - language (essentialism)
  - authoritative texts (collective experience, common law evolutionism)
- Davies (337-9): in order to understand law's foundation of authority, one need understand the conceptual and linguistic structures upon which it is built, and the ways in which they act upon legal subjects

Barthes:
- To give a text an author is to impose a limitation upon it
- The complexities of a text can be unravelled by removing it from the confines of authorial intention
- This has serious implications for legal interpretation:
  - cases: to what extent a precedent is applicable/valid depends upon the person interpreting; thus, the identity of the judge may be important and the original judge's intention is irrelevant
  - statute: intention of legislature of no importance in judicial adjudication
  - given the largely male identities of legal interpreters, this renders legal institutions and rules the products of largely male perceptions of the world
  - also: witnesses, litigants' argument, legal community, lecturer
- Words themselves are meaningless labels without a social context to impart meaning
- The reader imposes meaning upon layers of discourse within a text
- It is futile to try to ascertain authorial intention
  - instead, the text should be situated within its appropriate (reader-centred) context

<u>Further implications for law</u>

- Instead of reproducing the original meaning in cases and statutes, the interpreter should look at it in its present context; this is a functional approach to statutory interpretation
- The subject's interpretation is to some extent constructed by its environment, and is not, as such, a free line of enquiry – bounded by more inclusive holons/frameworks

7.4   Law as narrator

- Legal narratives are commonly seen as taking two forms
  - Internal (within the legal system – eg, laws, principles, legal history)
  - Meta-narrative (external to the system – eg, liberalism, science, economics, deontology, teleology)
- Law's interpretative method is a combination of scientific and narrative modes; the struggle between black-letter formalism and subjective story-telling pervades all legal adjudication

7.5   Law and identity

- Postmodernism denies that there are essential meanings to signifiers
  - as a corollary, much of the legal system's reliance upon categorisation and hierarchy breaks down, because the identification of dividing characteristics is biased
  - the process of ascribing identity to laws and subjects is relative; meaning emerges through contrast (eg, man/woman – binary oppositions/dichotomies)
  - eg, us/them (illegal immigrants example)

7.6   Law and the subject

- Foucault: the subject has no essential identity, and is rather a product of power
  - dominant meanings shape the individual subject and produce both their knowledge of their world and themselves
- Theories of law which include a sovereign acting upon fixed subjects are limited to the extent that individuals are actually discrete, fixed entities
  - a more realistic examination of the legal subject is necessary if law is to retain is coercive effect in a pluralist society

7.7   Law and power

Power is not simply a commodity or authority; it arises within society and is related to language and meaning. Power is not about a hierarchy of persons (judiciary, legislature, executive, etc); it Is a complicated system of layered meanings which constructs a person or institution.

- Lyotard: people are like signal posts through which cultural messages flow
- Foucault: power is everywhere and is intricately connected with the production of knowledge and truth
- Truth is no more than a product of discourse – an expression of dominant meanings
  - the meanings of law are transient products of judicial and political authority
  - legal meanings are several steps behind contemporary truths, due to the retrospectively-oriented nature of the system
    - eg, the 'whiteness' of the Australian legal system is a product of past (and, to a certain extent, continuing) prejudices and presumptions about the nature of the legal subject and colonialist supremacy
- Law enforces certain patterns of power relations in society

- o it cannot, by definition, be isolated from political or moral values – it is dependant upon its politicised nature for the adjudication of disputes and deductive application of principle
  - o by recognising only certain truths while repudiating others, certain power relations are reinforced, while others are diminished
    - ▪ this can lead to the perpetuation of particular value hierarchies, to the benefit of existing 'winners' and the continued marginalisation of other social strata (eg, refugees – immigration law, the homeless – property law)

7.8   Criticism

- Can be used for nihilistic ends
  - o parading the relativistic nature of meaning has the effect of disenfranchising faith in the system and diminishing the significance of any semantic construction, whether beneficial or not
  - o leads to problems of cultural and epistemological relativism; so-called 'boomeritis' – infected postmodernism

- Though postmodernism itself does not negate the possibility of ethical choice, it makes any moral defence difficult to justify, leaving judges and jurists grasping at alternative justifications for their belief systems

- The concept of law reform is diluted somewhat by the knowledge that, at least in absolutist terms, an objective, universally applicable legal system is an impossibility
  - o this realisation need not be destructive, however
  - o mature and reasoned legal changes can lead to positive outcomes for many, regardless of whether a theoretical case may be made for 'progress'
  - o reform doesn't necessitate knowledge of the ultimate goal; it isn't necessarily a step forward or backward; frequent change, however, ensures law keeps step with community values and maintains relevance to social and technological change

What postmodern critics demonstrate, if anything, is that *any meaning* may be deconstructed. The only way to write a waterproof essay in the eyes of postmodern critics is to submit a blank sheet of paper (the thought had crossed this author's mind) – though even that specific *lack* of meaning may be deconstructed.

The ultimate result of postmodern techniques of critique is a nihilistic void of meaning, despite claims to the contrary. They may be useful to the extent that they reveal and question assumptions implicit in theory, but it is pointless to deconstruct to the point of invalidation.

As a demonstration of the futility of this destructive tactic of 'delegitimative' deconstruction, one may note that what I am now doing is in fact deconstructing the process of deconstruction. If it can be shown that there is a unifying meta-narrative behind the deconstructing process, does this somehow invalidate the tactic?

Liberalism cannot be negated in practice by minor (though undeniably important) semantic differences. These critiques *do* help explain many of liberalism's failures in practice (eg, the difficulty of affording protection through civil rights, the ambiguity of statutory interpretation) but they offer little in the way of constructive improvements (other than a destructive process of 'self-awareness').

Bearing in mind the similar critiques which may be made of almost anything else (be it a legal system, this essay, or a blank sheet of paper), it would seem folly to dismiss liberal ideology purely on the basis of indeterminate or problematic epistemological quandaries. Even so, to blindly (and rather imperialistically) assume that processes of signification, meaning, and legal application are universal and fully articulate would be equally to ignore the complexities of meaning in legal discourse.

7.9   Poststructural analysis of law

Post-structuralism accepts the structuralist insight that language and other systems of signification construct human subjects. Post-structuralism does not accept that language (and other signifying environments) is a static semantic structure.

> *Systems of signification do not contain within themselves a limitation on the possible meanings which they may generate. Or, language, texts, and other cultural phenomena are, of themselves, capable of yielding infinite meanings* (Sarmas at 14).

If systems of signification construct meaning, then they also construct the individual subject: Individuals have 'no essential identity that transcends context' (Sarmas at 21).

This challenges the structuralist distinction between a supposedly external system of language and its interpretation by a speaker. The subject is at once a part of and is influenced by the system of signification they produce and with which they interact.

7.10   Refugees

Meaning may be constructed within images, text (laws, parliamentary debates, cases, judgments), and, eg, in the context of 'refugees'.

Refugees, in the context of immigration discourse, are subjects largely defined by the media, politicians, and relevant legal institutions. Meaning is produced by the interaction of state apparatuses, which is viewed as authoritative by third parties without direction perception of alleged events and persons.

In defining the object of our knowledge, individuals are influenced by the images circulated in the mainstream media, which was portrayed as 'truth':
- The media produces 'refugees', who are defined against citizens
- Construing 'threats' to Australia – deconstructing the notion that refugees threaten national sovereignty and the existing immigration programme reveals fear and ignorance
    - ethnocentricity coupled with politics, protectionism, and xenophobia
    - statistics show Australia's relatively tiny refugee programme, but large numbers in detention
    - construction of children overboard subjects in contravention to *Refugee Convention 1951*: 'owing to a well-founded fear of being persecuted… is… unable or… unwilling to avail himself of the protection of [their] country'
        - alternate constructions of 'refugee' exist (HRC, ICCPR) – the dominant one appears to be that of the Australian government, however (what about female mutilation in Africa – is that considered 'persecution'?
        - these competing meanings demonstrate that law is, to a large extent, about reconciling or, in many cases, overruling particular constructions in a way that is authoritative
        - so, eg, if the HCA altered the legal definition of 'refugee' for the purposes of Australia's obligations at international law, the reaction of the government, the media and its viewers to children overboard may have been different
- Constructing identity clearly has social and legal consequences
    - eg, being constructed as a citizen confers various rights and privileges, whereas refugee status encompasses very few
    - bills seek to 'streamline' (eliminate) the rights of due process and appeal for asylum-seekers
- If some meanings are plural, it becomes apparent that some meanings are *dominant*, rather than *essential*, objective, or universal
- The assertion that there are multiple meanings does not mean that all meanings are valid, or equally worthwhile, but it does reduce claims that there is only one meaning to a political strategy which reinforces the oppression of those who do not share the dominant view (Davies, 325)

This portrayal formed the foundation of many individuals' responses, and highlights the importance of complete information when constructing meanings which have the potential to affect a many people in significant ways. Similarly, judges and politicians must embark upon carefully considered fact-finding prior to making a legal adjudication.

7.11   Freudian analysis of the law

It is tempting to conceive of the western idea of law in Freudian terms – as a product of the relations between its various social structures – incapable of complete comprehension and comprised of essentially separate elements with different legal and epistemological objectives (Silverman). Yet to do so would be to ignore the complex (and, unlike the unconscious/conscious dichotomy, generally observable) interplay between the various aspects of the liberal hierarchy. It is not a linear structure of discrete partitions, but a complex set of interactions.

In this way, the common law is not purely a product of judicial decision-making, but an interwoven tapestry of social and cultural norms, precedent, and legislative interaction. Similarly, legislation is not created in isolation from the other arms of government, but is often a reaction to case-law or external political factors (see, eg *Mabo* and the subsequent *Native Title Act 1993*).

7.12   Rape law

Young: explores the ways in which women are portrayed and influenced by the law of rape. She outlines three techniques of figuration:

1   *Women as abject – surfaces and mouths*

- 'Woman exists as a sign' (CM 203)
- Women cannot control the interpretation of the sign

2   *Narratives of responsibility*

- Legal trials are a contest between competing narratives; another story is located in the verdict
- The 'right to question is authorised at the expense of the right to answer' (CM 211)
- The process of eliciting the tales silences the plaintiff's voice and exacerbates her pain

3   *Silence of the female voice*

- 'Law is deaf to the accusations of rape, and silences women' (CM 213)

However, note Gava's critique:
- Young assumes, without proof, that all Ds are guilty – that all women are victims
- Young uses language meaninglessly and asserts without proof (eg, women exist as signs)
- Scholarship needs evidence, argument, and comprehensibility

Young explored the construction of meaning within images, text, and a victim's narrative. However, disagreement over the validity of her account is testament to the contestability, indeterminacy of meaning, and political and legal consequences of dominant meanings.

7.13   The case of the Speluncean explorers

Fuller (based on *R v Dudley and Stephens* [1884]):
- Contrast between
    - Western liberal legalism
    - Realism
- Determinacy
    - Formalism
        - open and transparent laws to be objectively applied
        - clear legal meaning to rules
        - certainty
        - objectivity
        - faith in the administration of justice
    - Realism
        - judges have to interpret laws, correcting legislative omissions
        - intention cannot be considered in isolation from social context
        - legal rules indeterminate; dependant upon meanings outside the authoritative text
- Application
    - Formalism
        - law distinct from other disciplines; executive separate
        - respect for separation of powers; parliamentary supremacy
        - no discretionary exceptions to the law, which must be applied as it is
    - Realism
        - look to purpose of laws
        - self-defence aims to deter loss of life – utilitarian argument
        - judges have to interpret laws, correcting legislative omissions
        - intention cannot be considered in isolation from social context
        - indeterminacy of legal rules
        - law is about practical common sense and real life – lawyers and legislators abstract from life to generalise rules
        - law should be guided by public perceptions of what is right
- Jurisdiction
    - issue as to whether law of murder applies to persons within its geographical domain, but outside its social contexts
    - question of what constitutes the legal subject
    - Formalists: may be a justification for a discretionary exception on the facts