PART VIII — INSTITUTIONS AND PROCESSES OF LAW

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8.1 Access to justice

1 *Disputes and their transformation*

Numerous factors determine whether a dispute will be recognised as such, and further variables influence whether it is brought before a court. An understanding of the emergence and transformation of disputes through these stages is essential to the effective allocation of court resources and the minimisation of barriers faced by certain claimants in seeking redress for their grievances.

According to Felstiner, Abel, and Sarat's transformative framework, the claimant goes through several stages between injury and trial, whereby an unperceived injurious experience is transformed into a perceived injurious experience:

- Naming
    - recognition that there has been an injury, articulation of harm
    - There are severe methodological difficulties in forming an explanative system to describe the process of naming. For example, researchers face difficulty in examining the recognition of injury by claimants, because the very process of investigation is likely to draw a subject's attention toward an unperceived injury, and so influence the process.
- Blaming
    - transforming injurious experience into a grievance by attributing responsibility to a person at fault
- Claiming
    - seeking a remedy for the harm suffered
    - not all disputes are claimed due to attrition (delay, waiting periods) and factors influencing a claimant's physical, psychological, and economic positions
- Disputing
    - formulating a legal claim for redress

2 *Further transformations*

The process of transformation is an undeniably social one, and central to the enquiry is the plaintiff or claimant. Felstiner's recognition of the role of citizenry in making law warrants further attention, as the claiming party is ultimately the impetus for common law change.

Even once a dispute is formulated, the transformative process continues to influence the way in which parties come to an agreement:

- Part of the nature of the process of conflict resolution may be understood by noting that disputes are reactive – a party makes a claim, and another responds to the claim
    - institutions of law must be 'mobilised by the claimant' (CM 269)
    - the conduct of the case rests with the parties
    - under-resourced
- A complex process made more uncertain by the unpredictable interactions between the parties to a dispute, the conflicting objectives of the parties, and the influence of legal institutions and processes (Felstiner et al)

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- Claimants bring 'a residuum of attitudes' (Abel) with them to the dispute – values and techniques learnt previous disputes, previous treatment in the judicial system, familiarity with law, and personality variables (such as risk preferences and rule-mindedness) – these attitudes are often a product of social structural variables, such as class, ethnicity, gender, age, and disability (Curran, 1977)
- The process of bringing an action may create new grievances, which may later become the central issue (eg, the outcome of a claim or a particular ruling in its course)
- Strategic interaction between parties during a dispute may also influence the process of transformation, sometimes ending the dispute (in the case of settlements) or otherwise modifying the attitudes and relations between the parties
- Certain interactive processes may heighten (eg, litigation) or lessen (eg, counselling) the claimants grievance, or transform it into a new form entirely; these further transformations shift and refocus blame

3 *Structural influences*

Yet only a very small proportion of injurious experiences are brought before a court (Burman, 1977). In order to adequately evaluate the accessibility of courts, it is necessary to understand why so many claims are abandoned.

- Unequal power distributions skew a claimant's transformative process prior to trial; traditional models of legal actions ignore pre-existing inequality between parties while focusing on the trial conditions themselves; this serves to amplify these structural barriers by advantaging those who have already transformed their injurious experiences into legal actions
- Institutional patterns place restrictions upon a plaintiff's cause of action and the availability or difficulty of seeking redress
- The perception of injury is an ultimately subjective process; what may be perceived as injurious harm by one person may be brushed aside as another
- Class stratification also influences the perceptions and actions of an injured party

Specific classes of claimants appear to be systemically disadvantaged:

- Galanter: whether the parties are repeat players or one-shot users of the courts
  - repeat players
    - greater resources, access to experts, better equipped
    - risk-taking encouraged
    - familiarity with the legal system
    - bargaining power/reputation
    - can practice attritional behaviour to reduce chance of loss
  - one-shot: relatively small, stakes are higher
  - there are relatively fewer cases where parties have equal resources, and far more where there is a discrepancy between the experience or resources of the two parties to a dispute
  - examples of OS v OS interactions: (less prominent)
    - parent v parent
    - family v family
    - neighbour v neighbour
  - examples of RP v RP interactions: (less prominent)
    - union v company
    - developer v council
    - purchaser v supplier
  - examples of RP v OS interactions: (very prominent)
    - prosecutor v accused
    - finance company v debtor
    - landlord v tenant
    - tax office v taxpayer
  - examples of OS v RP interactions: (very prominent)
    - welfare client v agency

        - injured v insurance company
        - tenant v landlord
        - bankrupt v creditors
        - defamed v publisher
- Galanter: whether the party has a lawyer – parties with lawyers do better (CM 267)
    - Lawyers have varying degrees of expertise – those serving RPs are generally better resourced and more specialised
    - Legal rules are complex, disadvantaging one-shot claimants and making legal aid of some form a near necessity
    - they protect the status quo and lessen the possibility of resource redistributions, thus favouring RPs
    - The implication for liberal conceptions of the rule of law is that it is not universal at all, but rather 'selectively applied' – in a sense – in that it has more coercive influence over the behaviour of poorer, structurally or legally weaker parties than it does over those with financial resources, education, and legal assistance

Factors determining whether a dispute will come before a court:

- The reason for the claimant's action will play a major role in determining whether the dispute is brought before a court
    - A claim may be brought for a number of reasons, of which legal redress is only one:
        - Mobilise political activity or effect social change (Handler, 1978)
        - Translate collective grievances into individual disputes (eg, a single couple seeking to change gay marriage law)
- The scope of the conflict between parties dictates the outcomes available to the claimant and the strategies used to remedy the claim
    - adversarial litigation may not be the most appropriate means for resolution
- A claim may be resolved using alternate means of dispute resolution
    - eg, administrative agency, mediator, arbitrator, psychotherapist
    - the method chosen determines the mode of transformation and manner of resolution
- The claimant may have particular objectives in mind in bringing their dispute
    - substantive legal change, test cases, publicity, consciousness-raising, politicising issues
- Parties may alter their objectives and needs so as to transform the manner of resolution
    - delay, frustration, despair, new information, legal rulings, interactions
    - the dispute may deter or otherwise alter the conduct of parties in the future, either so as to avoid similar disputes or to place themselves in a position to better be successful

Parties to a dispute face varying degrees of difficulty in succeeding within the adversarial system. The manner in which a party's injurious experiences are transformed is in part dependant upon social and structural features, such as their personality, attitudes, and resources. These factors influence their interactions with legal institutions, and affect the development and eventuation of the dispute.

The influences of cultural and personal factors in the processes of naming, blaming, and claiming point to the subjective nature of each of the transformative stages. Whether harm suffered is perceived as injurious, or even perceived at all, will depend upon what a particular individual perceives as constituting 'harm'. Their associations and experiences with this signifier will determine the meaning they assign to it, and how they apply it to label their experiences. This is a private (subjective) element, though it may be influenced by the views of and interactions with others.

The process of assigning blame for a perceived injurious experience is also highly subjective; there is no objective or universal method to construct fault and attribute responsibility. A victim will do so by reference to their own normative system and any social or religious hierarchies that inform it.

When it comes time to bring a claim, further transformations may occur. These too, are largely dependant upon the identity, attitudes, personality, and subjective influences of the claimant. Aspects of the legal system of that are transformative:

- The lawyer may ‘cool out’ clients to avoid litigation, for various purposes, or may amplify grievances – by rejecting requests for assistance or providing information or help the lawyer is able to exercise extensive control over whether a dispute is heard by a court and in what way resolution is to proceed
  - claimants are heavily influenced by legal advice, and many legitimate claims may be dismissed on various bases (Macaulay)
- Enforcement personnel may transform claims due to resource constraints or political interests (Wilson)
- Courts apply substantive legal norms to dispute, transforming them from the experiences of parties into principles and precedents, accommodating them to the established discursive framework
  - remedies are individualised to the plaintiff
  - Felstiner et al: for a plaintiff injured by a defective product, courts transform the claimant’s conception of an acceptable outcome from collective interest (product safety) into an individualised remedy (compensation) – lawyer aids in this transformation
  - attitude of disputants also altered – treatment in court, reliving grievances and facing the person whom they blame for their injuries
  - a judge assesses the disputants’ claims about the conflict according to legal standards (as compared to a psychotherapist bearing witness, non-judgmentally, to the feelings of a patient – perhaps adversarial litigation is not the most efficacious way in which to resolve disputes?)
- All forms of dispute resolution effect a transformation: the claimant’s dispute is resolved or in some sense refocused, particularly by litigation – this transformation does not always aid the claimant’s recovery process, though it may

4 *Reform possibilities*

There are several ways in which more universal access may be ensured to courts:

- It is necessary to have an appreciation of the factors which affect the antecedent transformations to a dispute
  - Why do grievances remain articulated, unassigned, and without legal action?
  - the number of these cases far outweighs the number actually heard
- An understanding of dispute antecedents reveals vast power, knowledge, and resource discrepancies between those able to bring claims, and those who remain silent or inarticulate
- The availability and quality of legal services needs to be improved so all claimants have access to accurate advice
- There needs to be fewer delays and hurdles between bringing a claim and having a decision handed down – legal institutions should be cheaper for both plaintiff and lawyer
- Parties with insufficient resources or knowledge to bring a claim should be represented in some way, whether via class actions or other representative bodies; the government could also play a role in voicing concerns of the lower classes, providing legal aid, education, and social security
- Engender perceptions of the legal processes which encourage disputants to claim
  - overcome the self-inhibitions that prevent victims from admitting they have been injured (Best and Andreasen)
    - the ‘anti-inferiority legal defence mechanism’
  - identify the values, attitudes, and structural influences that influence the stages of dispute transformation
- The adversarial resolution process should aim to be a viable ‘means of redistributive change’ (CM257), and an understanding of the parties and their transformative processes is essential to achieving this with any degree of efficacy and substantive equality

By understanding the factors that influence wronged persons to bring a legal action, jurists are able to evaluate the efficacy of the legal system in meeting the needs of injured persons. By making the individual claimant the focus of attention, structural discrepancies which mitigate against a claim reaching court are better able to be identified.

An analysis of these structural factors reveals that the liberal ideal of formal equality of the law remains largely unrealised in pre-trial proceedings, and is an aspect of the legal mechanism that demands our attention. Though much attention has been paid to the presence of formal equality between parties *during* an action, the

factors leading up to its hearing (and whether it is heard at all) jeopardise the operation of this ideal. In particular, structural barriers to bringing disputes must be diminished if accessible means of dispute resolution are to be available to all parties.

8.2 Law in the lower courts

McBarnet and Douglas argue that the criminal justice system is conducive to pleas of guilty.

Douglas – either those charged *are* usually guilty, or the courts are predisposed to find guilt:

- studied some 900 cases
  - 85% the accused confessed to the charge
  - most plead guilty
  - legal representation influences pleas and verdicts (by contested hearings)
- typically, the offender is seen offending, arrested, admits charge, pleads guilty
- justice is a 'relatively automatic process'; prosecution usually seen as right, and accused convicted
- defences are rarely run
- even where a defence case is put, legal argument is rare
- only 8% of cases where defendants were represented by lawyers was there any reference made to a statute or case
- unrepresented defendants made no reference to legal materials

Douglas poses two explanations for these trends:

- defendants are rarely charged unless they're guilty
  - assume you're only arrested for minor crime if strong evidence incriminating you
  - confession and guilty plea because you are guilty
- system believes police case even where evidence is suspect
  - confessions may be coerced, 'verballed'
  - innocent defendants may be being convicted
  - but: police aren't really neutral

Indeed, the statistics seem to indicate that pleas in lower criminal trials are indeed primarily 'guilty'; either the prosecution only seeks to try persons whom they are sure of being guilty, or the system is in some way predisposed against defendants.

McBarnet describes several factors which mitigate for this choice of plea:

- the circumstances in which the plea is made (accused persons are made to feel guilty)
  - processes of the criminal operate to favour the power of the State prosecution and to diminish the rights of the accused
  - criminal law is a 'conveyer belt' which almost inevitably leads to conviction
  - given vast majority of those pleading 'not guilty' are found guilty
  - given burden of proof, you'd expect more to be found not guilty
- the exchange of knowledge at the trial
  - courts are social institutions, personal relationships and interactions can work against the accused
  - cf Galanter's idea of RPs
  - much important is the fact that actual rules and procedures of criminal channel the accused towards a guilty plea, and eventual finding of guilt
- pre-trial procedures
  - filter out un-winnable cases, so strong presumption of guilty once case gets to trial
  - lawyers may encourage guilty plea, even for those innocent (interests may differ to clients)
  - helps accused to plead guilty; courts punish those who say not guilty and fail
    - hard for accused to change plea
  - intimidation (some unintended) by police

    - power imbalance – no legal advice until after charge
    - may make sense to accused to plead guilty
    - economic/family reasons
- assembling the case
    - say plead not guilty; then a question of whose version of reality stands up
    - extreme power imbalance in terms of legal knowledge, access to advice (limits on legal aid), authority to command resources and witnesses
    - 'Nothing matches the inequality of State v accused'
- conclusion
    - idea of fair trial wrong
    - 'The construction of conviction begins outside the courtroom in the filtering of knowledge before the trial.'
    - 'The legal system is weighted against the accused and towards conviction' not because of a gap between law and practice, but because the rules on criminal procedure are unjust (and vigorously applied)

Legal aid may rectify this, as may duty lawyer or *pro bono* schemes (similar to the Federal Court system). However, legal aid programmes are drastically under-funded – the majority of aid is put to legal matters, and to *males* between 16 and 34 years old.

Marxist: a system that encourages guilty pleas disempowers the proletariat and those unable to afford legal protection or advice; it entrenches the power of the bourgeoisie by enabling them the power to adjudicate who is guilty, and who is not guilty, thereby maintaining their domination

Feminist: the system discriminates against women by embodying patriarchal understandings of crime and punishment; the legal structures used to enforce laws are continuing structures of male domination used to oppress women and marginalise female value systems

Postmodernist: the constructs of 'guilty' and 'not guilty' are wholly arbitrary, and are meaningless without the system of plea bargaining and adjudication according to legal norms which determine their semantic contents; they are products of the dominant legal discourse, reflective of the attitudes and belief systems of those with the power to legislate and articulate legal wrongs

"The actual operation of the lower courts makes a mockery of the claims made abut the nature of our legal system by liberal legalists." Discuss.

8.3 Roles of lawyers

Galanter:
- Lawyers are gatekeepers to the legal system
- However, they may pursue their self-interests when dealing with clients
- Once a dispute is brought before a court, the involvement of lawyers is critical – control
- Intervention by lawyers may encourage naming or blaming (or removal from legal realm)
- RPs can use good lawyers for strategic ends – one key reason why they have advantage over OSs

Legal professionalism:
- Lawyers are viewed as 'professionals'
- Cotterrell uses a 'folk definition' of a profession
    - a community with common interests and values
    - has a particular service orientation
    - has specialised knowledge that justifies excluding others from doing the same tasks

Other conceptions of professionalism:

- A legal professional has control over the nature and boundaries of law, and interact with its institutions and other professionals
    - professionals attempt to define the legal knowledge
    - they have control over legal plausibility; are able to persuade and be persuaded by legal arguments
    - lawyers attempt to control discourse and exercise semiotic power of the definitions and constructions of the profession
- Is the legal profession really unified as a single community, with common interests and values?
- Legal ethics – overarching fiduciary duty to the court to act ethically and in the interests of justice

Weisbrot:
- Professionalism is about the control of a market
    - professionals attempt to exclude others, to gain hold of the market for their services
- Focuses on 'the relative autonomy of the occupational group and in particular on the attempt (indeed the compulsion) to obtain market control of services within capitalist societies'

McConvill:
- Legal profession is not simply about legal control and profit
    - 'One distinguishing feature of any profession…is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market'
- Lawyers have a fiduciary obligation to clients
    - But they are officers of the court and have a higher duty to the whole legal system than their clients
    - <u>a higher calling to justice than economics</u>
- There is a conflict between self goals and a duty to the system
    - Note Dawson's comment that the market is the main regulator

Examples:
- There is a conflict between economic gain/self-interest and the higher duty to justice
    - Post-modernism: what *is* justice? What exactly are lawyers striving to uphold? How is an ethical principle laid down by a court any less arbitrary than an ethical principle which places the lawyer's self-interest at the centre of attention?
- *McCabe v BAT*
    - 'The civil litigation system is an adversarial process, but it is a process governed by rules which the judges must administer. The formal rules of procedure complement and acknowledge the inherent powers of the Court which apply with the overriding objective of ensuring that parties to litigation receive a fair trial.'
    - 'For a fair trial to be assured [the] approach which the party must adopt may well conflict with its self-interest'
    - 'In my opinion, the process of discovery in this case was subverted by the defendant and its solicitor Clayton Utz, with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful… the only appropriate order is that the defence should be struck out and judgement entered for the plaintiff, with damages to be assessed.'

8.3.1 Analysis of legal professionalism

I THEORETICAL CONCEPTIONS OF LAWYERS

A *A profession in motion*

A traditional conception of the work of lawyers suggests that legal practice is a profession (as distinct from a trade or business) governed by particular traditions, standards, and ideals. Contemporary reality, however, is indicative of a shift away from the governing ideals of legal professionalism, towards an ethic of commercialism and self-interest. It is here argued that this shift represents a modern compromise between

the demands of economic efficiency and the legal meta-narratives of tradition and professionalism. Despite an increasingly business-like focus, legal work continues to be separated from other occupations by its overriding commitment to uphold justice, despite its continued erosion in practice.

B *Traditional ideas of professionalism*

According to Wigmore, however, the notion of professionalism is implicit in all legal procedure. Lawyers are set apart from other occupations by their overriding commitment to the administration of justice and their dependence upon specialised training. Cotterrell summarises these perceived differentiating factors under the headings of community (a group of professionals linked via common values and interests), service orientation (towards serving justice, rather than the client's interests), and knowledge (the emphasis upon legal science and training) This conception of legal professionalism appears to have merit, but it is important to note that service orientation is the principle differentiator between law and other occupations, which may also form business communities (eg, a union) and have specialised knowledge and skills (eg, real-estate agents).

C *Economic theories of professionalism*

Other theorists, such as Johnson, suggest that professionalism encompasses 'a peculiar type of occupational control'. In this way, the legal profession – if it is to be viewed as such – must be a means to control the practice of law and the autonomy of legal agents. Though this is certainly true of the legal community, the same could also be said of many other businesses who have market control and are relatively autonomous, but would not usually be considered 'professionals'; for example, bankers and business executives. If the legal profession is to be regarded as somehow "different" from other enterprises, regard must be had for its unique service ideals and their practical outcomes.

It is here argued that although the legal profession is internally fragmented and stratified, its service ideals unify it through common goals and methodologies. However, recent shifts from a court-centred legal profession to a client (and firm)-centred one suggest that the legal community is becoming decreasingly separable from other businesses and trades.

II PRACTICAL ANALYSIS OF LEGAL OCCUPATIONS

Though the differentiating theoretical ideals of Weisbrot and Cotterrell may hold true to some extent, the reality of legal practice is – for the most part – radically divergent from its traditional underpinnings, and closer to what Sir Darryl Dawson termed 'the play of market forces' in the supply of legal services.

A *Analysis of legal solidarity*

Major divisions exist between different areas of legal practice, limiting the extent to which legal practitioners may fairly be described as belonging to a single, identifiable body. For example, the distinction between solicitors and barristers, which remains in most common law jurisdictions, leads to internal competition, jealousies, and professional isolation. Each side of the profession has its own traditions, training, certifications, and privileges, further dividing legal practice. Further occupational sub-divisions may be observed, such as the separation of clerks, judges, prosecutors, and counsel specialising in various fields. The rigidity of these categories and their functional definitions makes horizontal movement difficult for members of any particular part of the profession (Merryman).

However, though Cotterrell seeks to further stratify the legal profession into firms and even departments, his analysis ignores the unity and sense of community that is instilled by work within a single firm towards common goals and interests. To the extent that sole practitioners are 'a species in rapid decline' (Abel), this points towards increasing communalisation of legal work. In this sense, it seems more accurate to describe

the legal profession as consisting of clusters of legal communities, interacting (in court and other proceedings) and competing for work and success. Despite Galanter's vision of 'mega-lawyering', it seems shallow to dismiss all firm competition as alienating; in fact, rivalry serves to unify the legal community into a community of individuals striving for similar successful outcomes, paradoxical though that may seem.

B *Analysis of service orientation*

Despite a multiplicity of legal communities and diversity of practice methodologies, common aims and strategies may have the effect of integrating the various arms into a single professional legal apparatus. In theory, all arms are devoted to the provision of legal aid and the furtherance of the administration of justice. The interests of the court are placed before those of the client, which are in turn primary to those of the lawyer or firm. Barristers are obliged to accept all cases in their area of expertise and not to prejudice particular claims on the basis of their difficulty or the likely quantum of their fee (and solvency of the client, given they cannot sue for payment). A hallmark of professionalism is the placing of a client's interests before the practitioner's.

In practice, the situation is somewhat different. The cab-rank rule is essentially nullified by discretionary practices and exemptions, skewing the distribution of legal assistance towards those more financially equipped to remunerate the provider. Increasingly, lawyers are advertising for business and actively promoting their services, rather than passively accepting clients. In the context of firm practice, employees are under pressure to meet a case load quota.

These additional pressures mean that the freedom of legal practitioners to serve public interests is severely undermined. The demands of business enterprise interfere with the conduct of legal professionals, limiting their independence and professional autonomy, and rendering their conduct subject to non-professional influences. An example of this shift in focus from the professional to the industrial may be seen in the conduct of the Clayton Utz partner involved in the Rolah McCabe tobacco litigation. In this case, counsel for the defendant advised the client to engage in what was essentially a systematic destruction of evidence, making it difficult for the plaintiff to succeed. This advice was strictly motivated by the client's interests, and represented an *obscuring* of justice, rather than its furtherance. If the increasingly disillusioned public perception of the legal community is to be believed, this is by no means an isolated incident.

More aggressive modes of self-promotion and increased self-interest in the acceptance and administration of cases all signal a move away from legal professionalism and service to a client and court, and towards a more business-oriented practice of law – one in which pecuniary gain, and not justice, is the prime motivation. It is arguable that this has always been the service orientation of those in the legal profession, and that the guise of justiciability has only existed to remove concerns that advice would be biased. Whatever the reason, it seems unrealistic to continue to describe the legal occupation as one whose primary orientation is toward the serving of justice.

C *Duties to the court*

Given the shift in service orientation from professionalism to pragmatic industrialism, one might be inclined to dismiss the theoretical values of legal practice as mere rhetoric. However, to do so would be to ignore an important factor that continues, though perhaps to a lesser extent than it once did, to separate lawyers from other professions.

This factor is simply that lawyers remain bound by certain fiduciary obligations; firstly, a duty is owed to their client, to uphold certain ethical obligations and act in the interests of the client. Secondly, a duty is owed to the court to uphold justice. The fact that – at least in theory – the latter duty overrides the former (eg, as in *Rondel v Worsley*) is what separates the legal profession from other occupations.

Whilst businesses are client-oriented and self-serving, the lawyer's principal obligation is to uphold the administration of justice. Where commercial enterprises are accountable only to legal standards of care and

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diligence, the lawyer is subject to largely unenforceable professional norms. It is this overarching ethical commitment that distinguishes the practice of law from that of business, at least in theory.

These ethical obligations are often inconsistent with the demands of business and self-interest. Consequently, the best measure of professionalism (as compared with commercialism) is the extent to which the ethical obligations prevail. However, the actuality of legal practice suggests that the client's interests increasingly outweigh the Court's. Even so, the mere presence of these service ideals, however farcical, is perhaps enough to render legal occupations sufficiently distinct from others.

III CRITICISM OF LEGAL PROFESSIONALISM

- Post-modernism: what *is* justice? What exactly are lawyers striving to uphold? How is an ethical principle laid down by a court any less arbitrary than an ethical principle which places the lawyer's self-interest at the centre of attention?
- Law and economics: the regulation of the conduct of legal practitioners will result in less efficient outcomes than if they were to be guided by market regulation – see §2.2
    - Profession is a means of controlling an occupation
    - Professions organise themselves to gain market power
    - Professions translate one type of scarcity (their special knowledge and skills) into another scarce commodity which they need (economic remuneration)
    - Maintaining scarcity in the market of legal knowledge perpetuates the monopoly of the legal profession in providing that knowledge

IV THE FUTURE OF LEGAL "PROFESSIONALISM"

Perhaps, as Fitzgerald notes, the comparison of lawyers' actual performance with their profession's ideal standards is intrinsically limited. Indeed, more detailed studies into the client-lawyer and lawyer-court relationships will be necessary to examine the changing role and image of the legal occupation. However, to the extent that the reality of legal practice diverges from its theoretical ideals, the classical approach reveals the need for a re-examination of these service ideals, and a consideration of how they might better be achieved in practice.

External influences also figure into the way in which legal professionals conduct their work, and should not be overlooked in determining the nature of their occupation. For example, the potential changes in NSW would subject firms to commercial law and render them accountable to consumer agencies – such a change would be initiated not by legal practitioners, but by the legislature or other regulatory or political bodies. In part, then, the drive towards commercialisation is spurned on by factors other than the profession itself.

The service ideals of the classical legal "profession" are, however rhetorical, necessary for another reason: it is essential that lawyers exude an aura of detached professionalism to their clients, lest they lose faith in the neutrality of legal advice. The legal community must strive to maintain the professional norms so foundational to legal practice if it hopes to counteract a degenerating public perception of the legal community. This necessitates finding a balance between a legal professional's overarching duties to the court and the demands of commercial enterprise and remuneration.

8.4 Judicial adjudication

I ADJUDICATION INTERPRETED

A *Introduction*

An understanding of the processes involved in interpreting facts, rules, and precedent is of prime importance in fostering a judicial climate sensitive to competing narratives and issues of adjudicatory legitimacy. The

approaches of conventionalism, intentionalism, and constructivism will here be described and critiqued, with the aim of formulating an approach to adjudication that transcends and includes the problems of each extreme.

B *Motivations for a theory of adjudication*

Central to adjudicatory theory is the desire to legitimate the role of the unelected judge in a modern democracy. If it is accepted that judges are unable to neutrally apply fixed, objectively ascertainable rules, then this has significant implications for the way in which adjudication proceeds. Judges are unaccountable and independent, their verdicts are retrospective, and overtly 'political' decisions (eg, *Mabo*) are seen as violating the rule of law and other tenets of western liberalism. Because the process of judicial appointment is far from transparent (and arguably encompasses hidden political agendas), an unchecked judge who 'strikes out on his own' threatens to have a profound impact upon the operation of modern liberal democracy.

II THEORIES OF ADJUDICATION

A *Conventionalism*

It is out of a climate of judicial conservatism and desire to achieve self-legitimation that formalist theories of adjudication arose. In response to these fears, and in part to legitimise the role of the judiciary, conventionalist theorists argued – half analytically, half subjunctively – that the judicial role is and must be limited to matters of law. Adjudication was seen as the neutral application of determinate rules within an ostensibly static, closed system of law.

Formalist conceptions of adjudication aspire to the ideals of legal continuity, objectivity, and incontrovertibility, but the extent to which these goals are actually achieved is limited. Legal continuity was seen as paramount to the administration of justice, and this was to be guaranteed by the consistency and certainty of judicial pronouncements. Universality and neutrality were supposedly assured by the closed and rational internal structure of law, and the resulting decision was objectively 'Correct', because it was reached without recourse to extra-legal factors, such as policy or morality, and as a result of pure, deductive reasoning.

B *Constructivism*

However, these aspirations have proved unattainable with the realisation of the realist movement that judges cannot separate legal adjudication from external factors. By interpreting existing precedent and statute and selectively applying them to the facts or distinguishing from other cases, political and moral considerations are inescapable consequences of the adjudicatory process.

Further criticism from the Critical Legal Studies movement reveals gaping holes in conventionalist theories of adjudication: rules are not fixed or determinate, but wholly composed of political factors and personal predilections. Law is viewed as nothing *but* what might be termed external considerations, and any attempt to conceal the subjective and indeterminate processes leading to legal decision-making is merely an attempt to parade a subjective determination as neutral and universal.

The insights of radical CLS and postmodernism suggest that legal truth is wholly constructed by subjective hermeneutic processes, and legal interpretation – far from neutral or even objective – consists of little more than private linguistic structures, upon which it is dependant for semantic value. Further, all law – indeed, all meaning – is seen as a construction premised by the epistemological and sociological milieux of the actor or interpreter, leading to widespread scepticism of legal rules and other semiotic structures.

C *Intentionalism*

Intentionalists seek to strike a balance between conventionalist and constructivist theories of adjudication, and focus upon the author's state of mind. Judges are undeniably human, political actors, but they are (or should be) constrained by the authorial intention of the document, statute, or case under their consideration. In this way, the intention of Parliament (in the case of statutes) or the motivations of a predecessor judge (in the case of common law precedent) should guide the interpretative process and elucidate the meaning of the text.

Searching for 'authorial intention' certainly helps reconcile the values of liberal democracy with the need for judicial independence and the inevitability of judicial creativity and other influences. The identification and use of an identifiable intention leads to greater consistency in the use of legislation and application of precedent, diminishing concerns of legitimacy and indeterminacy.

However, as Dworkin notes, intentionalist theories of adjudication fail to address how exactly intention is to be interpreted. Intention cannot be magically imparted to the interpreting party (after all, if it was 'just there', what is to say the meaning itself couldn't be?), and must itself be interpreted in accordance with the value system of the interpreter. In this way, a judge must decide what level of abstraction to adopt in discerning (interpreting) intention; as, for example, in cases where a decision is made to achieve a wider outcome seemingly contrary to the localised result. Collective decisions also pose problems for later judges, especially where the earlier judges deliver separate judgments. Further, intentions can change over time, so that *ex post facto*, a judge changes his or her mind and regards their own judgment differently.

D *Dworkin's Right Answer thesis*

These criticisms of intentionalist adjudication have led to a radical reconceptualisation of legal interpretation. <TOPIC> Instead of treating prior statements of law as purely descriptive, neutral declarations (conventionalist), or as purely evaluative, biased constructions (constructivist), Dworkin proposes that <> (legal facts) contain elements of both, but are defined by neither. It seems instinctively correct to reject both the conventional and post-conventional extremities, since a judge *must* to some extent interpret what has gone before him or her, but they must (to the disdain of many Marxist critics) advance the enterprise at hand rather than 'strike out in some new direction of his [sic] own'.

Instead, the act of legal interpretation (whether by judge, jury, academic, or lawyer) should be viewed as a specific mode of acquiring knowledge by which the interpreter both ascertains existing propositions of law *and* creates new ones. Drawing attention to the creative process inherent to all interpretative modes, Dworkin posits a new adjudicatory method based upon interpretation in literature. He conceives of law as a 'chain enterprise' to which all judges are successive contributors: when deciding cases, each 'novelist' must read (and interpret) the relevant doctrinal history, ascertain what is meant by the substantive claims made by each of his or her predecessors (ie, structural features), and deduce the theme or overriding structure of the developing rule or principle. These three stages he calls pre-interpretative, interpretative, and post-interpretative.

However, later writers/judges must continue the story so as to generate a cohesive narrative that fits with the others. The obligation is on later writers to develop the text/law in accordance with the best interpretation of the preceding tradition – they must maintain the 'integrity' of the text. In order to maintain the integrity of law, any reform must be constrained by the preceding story, ensuring judicial restraint.

Even where two competing but mutually exclusive propositions are supported by the existing case law, Dworkin argues that there is only a single Right answer to all legal questions (Dworkin, *Law's Empire*). '[S]ubstantive political theory' gives rise to general principles by which the legal system is constructed (eg, equality, fairness). These principles allow judges to construe the Right answer in accordance with this framework.

Were Dworkin's claim true, it would certainly solve the problem of judges undemocratically and retrospectively deciding new laws, because any resolution of ambiguity would be performed safely within the boundaries of accepted legal doctrines and the general principles to which it gives rise, and judges – when they interpret – would not be creating new law, but rather formulating constructions within existing precepts. To the extent

that it re-legitimates the judicial role and simplifies the judicial quest for legal truth to the search for a single, objective Doctrinal Reality, what Dworkin is proposing is essentially a more stylish version of conventionalist declaratory theory.

Dworkin's attempt to draw an analogy between law and literature is admirable, but – like conventionalist models – fundamentally flawed. I here describe three such defects. Firstly, in drawing a distinction between the act of interpretation as part of creation (the artist, or law-maker) and creation as part of interpretation (the critic, or interpreter), Dworkin

Secondly, Dworkin maintains that even where more than one proposition 'fits' within the established framework, the correct interpretation is the one that puts the political practices of the community in their best light (makes of them the best that they can be). However, this claim ignores a further interpretative aspects that threatens to undermine the determinacy of Dworkin's legal adjudication; namely, the need to interpret what is meant by 'coherency' and 'fit'. An understanding of existing doctrine is all very well, but the particular approach used to assemble and induce a common element is highly subjective, and – as Dworkin himself admits – subject to a judge's political convictions and own 'interpretative style'. This being the case, it hardly seems fair to describe 'fit' as being an adequate guard boundary for judicial creativity, since the very determination of what does and does not fit itself necessitates recourse to considerations wholly unconstrained by any fixed legal parameters.

In this sense, Dworkin's approach simply provides a new, judicially fashionable rationalisation for judicial subjectivism, brushing under the proverbial jurisprudential rug any fears of indeterminacy and offering no certain way to differentiate rule from predilection.

Thirdly, the right answer thesis fails to convince with regard to retrospectivity. If the correct answer is clearly known and ascertainable, thereby allowing individual persons to organise their affairs around fixed and determinate rules (a founding tenet of Western liberalism), then there is no need for an interpretative theory! But if, as Dworkin suggests, finding the Right answer to legal questions is a complex process requiring near 'super-human' feats of judicial candour, then the law might as well be made retrospectively if participants are not themselves aware of it until the judicial pronouncement is made.

E *Fish's approach*

In claiming that judges are both free *and* constrained, Dworkin seeks to address challenges to judicial legitimacy, but he really only limits their scope. However, the analogy of literary interpretation proves to be a useful model of legal interpretation, which is clearly neither a *sui generis* historical examination nor a *tabula rasa* construction.

Fish's thesis is a step towards a workable theory of judicial adjudication. He rejects the idea that subsequent authors are any more constrained than the first, noting that what is demanded of the first author is – though unconstrained in the sense that he or she has no prior legal framework in which to manoeuvre – limited by a tacit awareness of what is and is not possible in the context of writing a novel (or, in a legal sense, deciding matters of law). Subsequent authors/judges are also constrained by what the finite possibilities associated with authorship within an established interpretative skeleton, but no more so than the original author (since there is still a highly creative element to subsequent additions, one whose scope is arguably increased).

This seems a more realistic account of the judicial process than Dworkin's conception of 'fit'. By Fish's thesis, a single judge in the chain will never be presented with such an accumulation of rules and evidence as to render inescapable one particular outcome – there is always a decision required, and this depends upon the actor's individual interpretation of the plot (law) thus far. Such an explanation accounts for both the occurrence of doctrinal development within fixed parameters and the necessity of judicial involvement.

In this way, constraints are not objective, but exist as products of the interpretative community. This is a model sensitive to the insights of postmodern jurisprudence, recognising that considerations of 'fit' are in fact interpretive in themselves, and dependant upon the dominant discourse and a wide milieu of other influential factors: all themselves products of doctrinal hegemony. Only certain enterprises are considered legitimate

examples of legal adjudication, so in order to be a legitimate interpretation a judge's decision must be justifiable to 'competent members of the legal community'.

Certainly, there is constraint upon judicial decision-making, but not in the sense that judges are positively directed towards particular results – after all, while it is plainly obvious that a judge cannot dismiss an accusation of murder lightly, she is entitled to return a verdict of 'not guilty' if her reasons for doing so are legally justifiable in light of established law. Indeed, the very nature of interpretation results in a particular structure of constraints and hierarchy of values – these constraints.

So while judicial decision-making is constrained, it is *neither* that the 'text' dictates a particular meaning, *nor* that an interpreter is free to read into a text whatever they like. Instead, the constraint upon interpretation is implicit in the act itself: it must be persuasive to the legal community and so considered justifiably 'interpretative' (CM370). Thus, the distinction between conventionalist and constructivist approaches is the same as that between a persuasive interpretation (ie, the Correct answer) and one that has failed to convince (ie, an illegitimate construction).

This explanation seems plausible, because it accounts for both stability and change in legal rules. Stability occurs when one mode of interpretation remains undisputed by the interpretative community, while change results from the transition of a particular interpretive context from disputed to undisputed, or vice versa.

Fish's model of adjudication is also justifiable according to liberal doctrine. Because the values of a community *as a whole* are what dictate the boundaries of possible interpretations, no single judge or legislator has complete discretion over legal meaning, thereby allowing the rule of law to operate independent of judicial interference. Any resulting decision – though interpreted retrospectively – is confined to set limits of acceptability, imparting a sufficient degree of predictability and stability to the law as to discount the possibility of retrospective law-making. Importantly, though these limits are dynamic and themselves interpretive, change is gradual and incremental (similar in many ways to Popper's conception of scientific paradigms).

III CONCLUSION

Formulating a consistent yet epistemologically sound interpretive methodology (if indeed there is one) is crucial to the legitimacy of the contemporary judiciary. Adjudicatory theories attempt to resolve the tensions between the conventionalist and constructionist extremes, providing guides to interpretation that render results harmonious with the liberal rule of law and its ideals of prospective and determinate laws, but do not completely resolve the problem of indeterminacy.

Dworkin's theory has merit, but – as Fish notes – his analogy of chain enterprise makes several indefensible assumptions about interpretation, and his explanation of 'fit' and value is arguably as indeterminate as the process of interpretation he describes. Instead, we should look towards Fish's idea of interpretive community while recognising the large extent to which evaluative factors influence interpretation. Not only is the analysis of prior law evaluative, but also the identification of community values, the awareness of constraint, and – arguably – the recognition of all legal meaning. Both legal rules and the constraints upon their interpretation are themselves interpretative enterprises.

Though these processes are ultimately dependant upon private, semiotic structures and their complex relationships with governing systems of signification, the articulation of these influences aids in finding an approach to legal analysis that places sufficient emphasis upon past authority and the semantic boundaries demanded by law and politics.

8.4.5 Dworkin summary

Dworkin proposed a new adjudicatory method based upon interpretation in literature:

- Rejected both conventionalism and intentionalism as judicial guides
    - needed to strike a balance between declaration of rules *just there* and invention of new ones *tabula rasa*

    - problems with judicial law-making
        - judges are not democratically elected, so they do not have a legitimate role in law-making
        - judicial law-making is retrospective and unfair to the parties in court
- Judges neither 'find the plain meaning of the law "just there" or, alternatively, … make up the meaning "wholesale" in accordance with personal preference or whim'
    - Judging is interpretative, which means that judges are at once free to decide and constrained by the past
    - Their conception of political theory will influence their choices, therefore the outcome will be 'deeply and thoroughly political'
- Draws upon interpretive theories from literature, such as the 'aesthetic hypothesis'
    - the 'interpretation of a piece of literature attempts to show which way of reading… the text reveals it as the best work of art' (CM360)
    - in a legal context, prior law must be interpreted so as to show the best, most cohesive reading of the applicable rule
    - a judge must not 'strike out on a direction of his [sic] own'
- A judge must be aware of both 'fit' and value of previous law
    - a judge '*must* interpret what has gone before him because he has a responsibility to advance the enterprise at hand rather than strike out in some new direction of his own' (CM366)
    - 'fit' is the sense of constraint that judges have as a result of the words of a statute/precedent
- Fit alone is insufficient – there will always be hard cases where the answer is not clear (otherwise formalism would work)
    - interpretation should therefore proceed in a manner that 'show[s] the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to server' (CM367)
    - interpretation is essentially political
    - judges rely upon their value system, normative ideals, and life experience to make decisions

Identifies 3 stages by which jjs interpret the text of the pre-existing law:

1. *'Pre-interpretative' stage*
   Rules and standards taken to provide the tentative content of the practice are identified

2. *'Interpretative' stage*
   The interpreter settles on some general justification for the main elements of the practice identified at previous stage

3. *'Post-interpretative' or reforming stage*
   The judge adjusts her or his sense of what the practice 'really' requires so as to better serve the justification he or she accepts at the interpretative stage

8.4.6 Judicial appointment

The executive nominates judges, and the Governor-General's assent of approval is superfluous. A judge's appointment to the HCA may only be made after consultation with the states, though this is a broad and unspecified requirement. There is also consultation with senior members of the bar, and the current High Court bench.

Problems:
- Perception that judges are appointed to maintain the views of government
- Violates separation of power – political appointments blur the nexus between politics and law
- Not transparent – there are hidden agendas
- No criteria – is it merit-based, or are the personal views of the judge (eg, conservative, radical, liberal, labour, feminist) more important?

- If we accept that personal views influence judging, the homogeneity of the bench's composition becomes a concern – a limited spectrum of viewpoints affords only limited possibilities for common knowledge and full understanding of the issues before the court
    - diversification or homogeneity?

Reform options:
- Nominating committees: either full selection of preselection of a list of candidates to Parliament
- Inviting applications from candidates
- Bipartisan selection
- Subcommittee, independent group, or other elected body
- Public elections

Yet most judges *are* meritorious: all the current members of the High Court bench attended university on scholarships, none of their parents were tertiary educated. They are primarily white, Christian, males.

8.5 Legal storytelling

Assumptions implicit in factual interpretation were examined by commentators following the case of *Louth v Diprose*:

- Stock stories about women, men, and social class which determine the specific outcome and also the development of doctrine on unconscionable dealing
    - Louth: presented as calculating, hysterical, depressed, incredible as a witness, powerful despite her unstable financial situation, a whore, lies and is from lower class, mendacity
    - Diprose: presented as hopeless romantic, foolish but well-intentioned, lacking in financial resources despite his assets & well-paid job, powerless, credible despite his lying to Court and misrepresentation of the circumstances in which the house was purchased, showers her with gifts, loving father
    - Juxtaposition of these 2 portrayals
- Minority view also deploys stereotypes: Louth is the victim, single mother, damsel in distress etc
    - just reverses the stereotypes
    - construction of L as more powerful by majority, and portrayal of their relationship as equal by the minority ignores the structural inequalities in their relationship especially those of an economic nature
    - both narratives render gender and social class irrelevant while at the same time reproducing stereotypes based on those categories
- Judges are central to process of perpetuating stock stories (recall: doctrine of interspousal immunity and judicial notice – ie, common sense understandings may be introduced as evidence)
    - no mention of physical violence, considered not relevant
    - power disparity is ignored yet doctrine of unconscionable dealing is based on powerless circumstance/special disability of plaintiff. ie Louth is impoverished single mother, while Diprose is white, middle class lawyer. Her the power relationship is inverted.
- Reservations about the ability of Judges to empathise with outsider groups because they don't have same experiences or understandings
    - dominant narratives have power of truth, counter narratives may therefore create resistance rather than change
    - evidence presented at trial is structured by a restrictive process of selection and construction determined by way legal issue is framed, rules of evidence, and legal 'relevance'
- Collusion within the dominant stereotypes for short-term success may reinforce negative self-image and be counterproductive in the long-term

However, note Heerey's response:

- 'The litigation story presents as truth and not fiction. Literally truth, the whole truth, and nothing but the truth.'

- Denial of reality of economic power or simplistic analysis
- 'Forensic constraints' applied to the case
    - eg, procedural rules, western cultural assumptions
- The assessment of facts will always be an interpretive and reconstructive process

8.5.1 Examination of the role of storytelling

I INTRODUCTION: FACTS AND VALUES

A *Law as storytelling*

An understanding of the processes involved in interpreting facts, rules, and precedent is of prime importance in fostering a judicial climate sensitive to competing narratives and issues of adjudicatory legitimacy. An understanding of how storytelling influences legal interpretation is thus essential to the development of an adjudicatory theory sensitive to the substantive roles of discourse in legal proceedings. The case is here argued that stories play a fundamental hermeneutic role in litigation, both in their influence upon factual interpretation and their role as stereotyping devices. For this reason, a tacit awareness of the power of storytelling should be maintained by judges and lawyers, lest injustice arise as a result of the marginalisation of minority voices and perpetuation of entrenched prejudices.

B *Motivations for a theory of adjudication*

With the decreasing use of juries in civil cases, judges are increasingly called upon in their capacities as fact finders. As cases like *Louth v Diprose* indicate, the factual determinations of a trial judge are accorded a great deal of significance in appellate courts, but little substantive framework exists to guide judges in their assessment of parties, witnesses, and the presentation of evidence. These factors, though minor, will often be influential in a judge's decision, though they are rarely questioned.

The question then arises, how are 'facts' – as presented in a trial – to be interpreted by the judge? Various theories of adjudication have been posited – ranging from the conventionalist to constructivist – but most fail to account for the influence of narratives in interpretation. Most descendants of the realist movement of jurisprudence offer at least some avenue for political and sociological influences in judicial evaluations, but – with perhaps the exception of constructivism – insufficient credence is given to the significant role that dominant meanings play in semantic constructions. Desirable or not, it is important for any judicial account of interpretation to have regard for narrative influences.

More central to adjudicatory theory is the desire to legitimate the role of the unelected judge in a modern democracy. If it is accepted that judges are unable to neutrally apply fixed, objectively ascertainable rules, then this has significant implications for the way in which adjudication proceeds. Judges are unaccountable and independent, their verdicts are retrospective, and overtly 'political' decisions (eg, *Mabo*) are seen as violating the rule of law and other tenets of western liberalism. Because the process of judicial appointment is far from transparent (and arguably encompasses hidden political agendas), an unchecked judge who 'strikes out on his [sic] own' (Dworkin) threatens to have a profound impact upon the operation of modern liberal democracy.

II STOCK STORIES AND JUDICIAL INTERPRETATION

According to Sarmas, 'stock stories' are used implicitly by judges when evaluating competing explanations. These stories are indicative of dominant meanings that pervade judicial interpretations of evidence and facts, and oppress other marginalised stories and ways of thinking about law.

The act of storytelling can also be a vehicle to challenge dominant legal conceptions and their influencing of facts and decision-making. Telling outsiders' stories can achieve progressive legal change by altering the

perceptions of the protagonists and infusing new values into an existing construction of, for example, gender or social class.

Similar to the narrative-based approach of postmodern jurists, legal storytelling is a mode of analysis with which to challenge established ways of thinking about the law. Narratives are indeed central to interpretation of all kinds, and significantly influence legal decision-making by importing semantic constructions and normative systems into the dispute at bar. Ultimately, all abstract rules and principles are subsumed into the stories of the case, because they are selected, interpreted, and applied in relation to the dispute itself. In this sense, rules and facts are inseparable, and any attempt to portray rules as being distinct from circumstantial factors and narratives must be questioned.

A storytelling approach thus denies the validity of the conventionalist approach and its objective application of neutral and determinate rules to neutral and determinate facts, instead viewing the process of adjudication of the adoption of a particular story in order to successfully resolve a dispute.

One aspect of storytelling commonly overlooked is its tendency to ignore gender and social class while at the same time relying upon gender and class-based stereotypes. This is an important recognition, similar to the CRT idea of race-consciousness and the feminist recognition of implicit and structural discrimination. If these aspects are to be better accounted for in the facts, then judicial interpretations must be more sensitive to issues of gender, race, class, and the operation of structural barriers and influences.

However, because legal narratives encompass dominant values and meanings, they often ignore marginalised groups and their own semiotic roles and values. In this way, 'stock' stories have the potential to operate in such a way as to structurally exclude oppressed by dominant culture (ie, Eurocentric liberalism), ignoring their voice. Care must be taken not to use to stock stories as a way to exclude women, black persons, the financially disadvantaged (and other traditionally marginalised groups).

III THE POSSIBILITY OF LEGAL TRANSCENDENCE

A *The role of storytelling*

Both legal rules and facts/evidence are interpreted in deference to these stock stories, highlighting the need to transcend (or at least improve) the assumptions on which interpretation proceeds. Telling the stories of marginalised or oppressed groups is one way to subvert, and thus progress, such perceptions.

Sarmas suggests that, in the same way stories reinforce dominant meanings and marginalise the oppressed, the telling of counter-stories can overturn or at least pose a challenge to hegemonic semantic structures. Counter-stories open the path to progressive legal change, changing conceptions and emphasising different aspects of the 'facts'.

If stock stories are used to interpret and – in many cases – to alter facts, but are in fact products of dominant discourse, then this renders the distinction between fact and law rather murky. The facts themselves become mere instances of wider cultural and epistemological meta-narratives, and their specific content is overshadowed by the context in which they appear and the semiotic processes which govern it. In this way, Sarmas' analysis would suggest that legal interpretation is less about discovering an ostensibly 'Correct' story than it is about reinforcing and perpetuating existing stereotypes.

However, many disagree with Sarmas' account of legal storytelling. Some, like Heerey, think it is overly instrumentalist to use a case at bar for the purposes of achieving non-legal change, such as a change in attitudes or stereotypes. This is a criticism with which this author would wholeheartedly agree. The primary consideration ought to be the parties before the court, not any external factors. The mere presence of wider sociological issues should not determine the outcome of the case, nor should it result in the parties being used instrumentally to achieve a wider distributive or long-term outcome. Such a decision would contravene the liberal rule of law and only replace one class or gender inequality with another.

B *Postmodern analysis of fact*

The emphasis upon using storytelling to construe a particular version of events as accurate assumes that there *can be* such a thing as an accurate, objective fact. Each party attempts to persuade a judge that their particular version of events is true, but the premise that either of them is, in fact, correct, remains unexamined.

Certainly, some basic facts are – like cases that clearly fall within established legal doctrines – easy to decide. For example, in the case of a car accident, the fact that the plaintiff's car has been damaged may be very easy to discern. However, there are also uncertain, indeterminate contentions that arise at the penumbra of what can be plainly inferred from experience and common sense. The fact is, that in the vast majority of disputes the facts will be contested by parties, in part or in whole; this is, after all, the very nature of a dispute. It is these contested, controversial facts that prove problematic, as was the case in *Louth v Diprose*.

There are several possibilities that must be considered by a judge when evaluating two competing stories or fact interpretations. First, both parties may genuinely believe that their side of the story is the correct or truthful one. In such a case, difficulty arises in evaluating these competing truths, and recourse to evaluative mechanisms external to the facts themselves must be made. Commonly, a judge will employ his or her own experiences in evaluating an account of events, or (whether consciously or subconsciously) refer to common conceptions or stereotypes about the parties or the events they describe.

Central to the evaluative process is the persuasiveness of each party's story. Ultimately, it is the story that most *persuades* the court which will be accepted as true.

An important corollary of this is that what is accepted as legal truth does not necessarily correspond with the actual or absolute truth, if such a thing is even possible. In the case where one party is lying or fabricating parts of their story, it would be naïve to assume that it is always possible to discern which is the truthful party and which is manipulating the facts to their advantage. Consequently, legal determinations of fact simply expressions of the dominant interpretation – the more convincing story that managed to marginalise the other.

Stock stories will often play a part in determining the persuasiveness of one account as compared with another. Persuasion calls upon all the personal and politicised predilections of the parties, using them to the advantage of the persuader. Particular judges are thus likely to be influenced slightly differently by the same sets of facts, or respond more vehemently to individual contentions or arguments.

C *The conclusion of this narrative*

In the sense that persuasion relies upon subjective semiotic processes, stock stories (and other prevailing meta-narratives) undoubtedly influence the outcome of adjudication. As such, care should be taken by judges to recognise and articulate the assumptions implicit in the 'facts', and accord credence to the role these assumptions play when formulating their legal response.

However, though caution is encouraged in the consideration of dominant narratives, their effect is not absolute, and will influence different judges in different ways and to varying extents. The effect of these influences is to persuade one way or another, a process that is intrinsically linked to dynamic hermeneutic structures and is thus fundamentally political. To regard certain types of stories or factual conflicts as universally important would be equally insensitive to the variations of culture and meaning as to disregard them entirely. As such, great care should be exercised in the consideration of narrative, though an acknowledgement of its role in adjudication would be a positive step towards the elimination of interpretive stereotyping and the subdialectic discrimination it harbours.

8.6 Reform

Institutional processes of Australian legal system:

- Legislation (parliamentary institutions)
- Adjudication (courts)
- Regulation (administrative institutions eg police, prosecutorial agencies etc)

The above processes are distributed between different institutions (separation of powers doctrine).

Hunter and Johnstone:

- Law reform: broad term referring to any effort to improve the law via the legislative process
- For example:
    - introduction of equal opportunity legislation
    - changes to taxation and social security regimes
    - introduction of new enforcement procedures in a particular area
    - removal of statutory constraints on a particular area

8.6.1 Models of law reform

<u>Positivist</u>

- Law viewed as closed and autonomous system of rules
- Less interested in whether a particular legal rule is good or bad, rather whether reform meets the requirements of the rule of recognition
    - no particular philosophical stance vis-à-vis law reform
- Main interest in legal change is how new law meets the system's rule of recognition
    - focus upon the process by which the change acquires status as a legal rule
    - eg, focus on formal stages of a Bill's passage through parliament
- Little concern with reasons for introduction of a particular law, so long as the requirements of the rule of recognition fulfilled

<u>Liberal views</u>

- Focus on utilitarian outcomes
    - ie, implementation of legal rules/ legislative change based on notions of the common good
- Pluralist model of change
    - understands legal change by reference to activities of range of interest groups within society
- Liberal society permits individuals to pursue self-interested enterprise
    - these interests are expressed via pressure groups in order to influence political outcomes and effect legal change through reform
    - eg, Unions, consumer groups, environmental lobbies, employer groups, women's groups

<u>Pluralist model – No I</u>

- Pluralist structure ensures power is relatively equally divided among various interest groups
    - prevents emergence of ruling elite or centralisation of power
- State is envisaged as the neutral arbiter of competing interests: provides structure for hearing and resolution of rival interests in society
    - but: interest groups are not necessarily equally powerful
    - some are more powerful, harbour greater resources, and are therefore better able to exert pressure to have their agenda heard and achieve their reform goals

<u>Pluralist model – No II</u>

- Recognises the disproportionate level of power exercised by some interest groups to influence legal change to detriment of other less vocal groups
- State is not envisaged as entirely neutral arbiter
    - some groups may have links to the state which may be utilised to effect legal change
- State is viewed rather as itself a kind of interest group which negotiates the demands of social groups while maintaining its own agenda
    - liberal ideals of political and legal neutrality prevail: an individual's economic status does not directly translate into political power

<u>Marxist model</u>

- Emphasis upon the exercise and effect of class power
    - the ruling elite is able to influence decisions of the state
- Legislative reform is analysed from perspective of instrumental, formal, or ideological contribution to maintenance of the capitalist system
- Decisions regarding law reform in Australia are legitimised by reference to the demands of interest groups but are really decisions based on the interests of capital
    - appearance of consultation with various interest groups serves to legitimise measures which inevitably benefit the ruling elite
    - emphasis on influence of economic power within process of law reform

<u>Feminist model</u>

- Law reform process is a basis for political action and social change
- Adoption of pluralist model of law reform: liberal feminists as interest group
    - the feminist model of reform emphasises the involvement in and use of law reform processes to meet political demands

<u>Critical legal studies model</u>

- Greater emphasis on legal doctrine and adjudicatory role rather than legislative reform
- Challenges pluralist models
    - examination of which law reform proposals become subject to community consultation
    - focus on why some matters are identified as potentially controversial and thereby subject to community consultation

<u>Postmodernist model</u>

- Emphasis less on ultimate outcome of reform efforts and more on the process of legislative reform
- Foucauldian conceptualisations of power:
    - law reform may be treated as a 'site of cultural intervention'
    - the reform process may permit oppressed or marginalised groups to voice concerns, challenge dominant popular and institutional discourses, and thereby dispute the law's claim to speak the 'truth' about them
    - there is the potential for the excavation of subcultural discourses, and a challenge to dominant stereotypes and social attitudes
    - law reform processes are vehicles for attitudinal change
- Examination of various discourses which develop and intersect with particular issues of reform
    - identification of the particular values that are implicit to the notion of reform
    - examines the assumptions underlying law reform proposals

8.6.2 Relationships recognition

- Same sex relationships recognition in Victoria
    - note the use of legislative process to change legal status of same sex relationships, and the subsequent legislation passed by Victorian Parliament

8.7 Regulation

Regulation: a process involving enforcement, implementation or execution of laws (as made by Parliament and interpreted by the courts).

Processes of regulation are heavily informed by the doctrine of the separation of powers:
- Regulatory processes are included in the third branch of power: the executive
- Regulatory inevitably exercise *discretion* in carrying out their regulatory functions
- Key issue: the discrepancies between legal theory and law in action
- Regulatory function performed by a range of state officials including the police, workplace safety inspectors, environmental protection officers, parking inspectors, etc
- Important to examine the proposition that regulatory officials exercise substantial discretion in carrying out their regulatory functions
    - ie, gap between the legal rules and their implementation by regulatory officials
- The legal rules may appear to require, proscribe or allow certain activities but their mode of enforcement may influence them in such a way as to render them substantially changed from their initial form
    - distinction between ‘law in the books' and law in action

The rise of the regulatory state:
- laws made by Parliament now predominate because of increased complexity of public policy, need to ensure democratic legitimacy
- but laws are limited in detail and may not work without help
- plethora of government agencies have been established to implement legislation, even to ‘fill in' standards where necessary

Interaction between regulatory agencies and courts:
- regulatory agencies and courts may interact
    - eg members of the ‘regulated community' might try to restrain regulator, or seek compensation; agencies do prosecute from time to time
- but these interactions tend to be exceptions
- on day-day basis, meaning of law is determined by exercise of regulatory **discretion**

8.7.1 Discretion

The exercise of discretion might amount to creation of law (cf judicial decision-making):
- conflict with elements of Rule of Law
    - consistency, certainty, equal treatment
- infringement separation of powers
    - need to ensure laws of parliament are ‘controlled' by democratically empowered electorate
- source of great ‘private' power created in regulators and infringement of individual liberties

There is, however, a **need** for discretion:
- law is indeterminate
- facts do not speak for themselves
    - interpretation is inevitable, and socially constructed
- reality is complex and unknowable
    - situations not envisaged by parliament will always arise

- things change all the time and legislature may not be keeping up with current issues

8.7.2 Occupational health and safety

Bridget Hutter:

- 'Compliance is best conceptualised as a process. It involves a **negotiated, reflexive, serial and incremental relationship between regulatory officials and the regulated**. Typically this is a long-term, on-going relationship which is well encapsulated in the concept of an enforcement career.'
    - changes with time
- The Enforcement Career
    - 'Regulatory objectives are never achieved nor are they achievable, for the standards keep increasing. Full compliance is a concept which has short-term meaning. Enforcement careers are a series of ever more stringent deadlines, whatever the starting point to an enforcement career.'
- Enforcement Pyramids
    - Health and safety regulators do not use the full force of the law available to them
    - instead their actions can be seen as fitting into an 'enforcement pyramid'
    - 'Their purpose is to encourage regulation which is responsive to the behaviour of the regulated.'
- The Enforcement Pyramid
    - an enforcement career may start at any level
    - Level 1: Persuasion, education advice
        - inc dramatic techniques, deadlines, negotiated work programmes, shaming, appeals to higher authority
    - Level 2: Warnings
        - inc notices, bluffing, written warnings
    - Level 3: Notices
        - inc improvement, prohibition – least coercive legal sanctions
    - Level 4: Prosecution
- Regulatory Prosecutions
    - seen as last resort, still used to achieve compliance rather than punish law-breaking
    - reasons for not prosecuting
        - paperwork, low fines
    - reasons for prosecuting
        - maintaining agency integrity, fixing problems, asserting authority, symbolic result
    - prosecution more common where moral blameworthiness perceived
    - Marxist critique:
        - courts pro-business, upper class protects itself
- Regulatory strategies pyramid
    - enforced self-regulation
        - good for large, well-informed and resourced companies
    - persuasive
        - accommodative approach, good for smaller companies
    - insistent
        - broadly accommodative, may be used where resources limited
    - command
        - sanctioning approach involving prosecution, reserved for risky industries or offenders of bad character
- Victorian law reform
    - prosecution of manslaughter at work are rare, and not very successful (problem is that have to attribute acts of those responsible to company itself)
    - new laws introduced into VIC parliament to introduce crime of corporate manslaughter
    - did not pass upper house

Theoretical Approaches to health and safety regulation:

- Marxists:
  - health and safety regulators regulatory cultures serve the purposes of the ruling class
  - workers are maimed and killed everyday in Australia, and no one is really brought to book over it
- Law and Economics:
  - very important here
  - how to get the cost/benefit balance right
  - what incentives might make inspectors more efficient
  - what might make businesses more inclined to do the right thing
  - how do we educate workers about safe practices, and to empower them to stand up to bad workplace owners
- Postmodernism:
  - Foucault disciplinary power exists in many places
    - eg in conversation between inspector and factory owner, in absence of conversation between inspector and brothel owner
  - regulators re-enforce dominant meanings
    - 'work' is what is done in factory, not in brothel
  - social construction of reality
    - 'unsafe' is subject to negotiation
- Feminism/Critical Race Theory:
  - actions/policies/cultures of regulatory agencies are not historical accident, but part of systemic discrimination against women and non-whites

Law breaking does not always lead to sanctioning behaviour, eg prosecution:
- reasons for response depend on many factors (naming, blaming, claiming and McBarnet's work) including attitudes of regulators themselves
- regulation in health and safety is based around compliance as a process – the pyramid

Critique of the enforcement pyramid:
- permits flexibility
- aimed at compliance rather than punishment
- allows a relationship to develop between regulator and regulatee
- encourages good health and safety standards

But:
- permits flexibility in ways which undermine intent of legislation
- avoids parliament's intended punishment regime
- permits and encourages bad health and safety standards

Haines:
- prosecution only serve two purposes
  - deterrence
  - symbolic
- better to have two prosecution regimes
  - where people are dead or injured
  - other situations where no harm occurs
- symbolic importance of prosecution in case of injury or death
  - shows everyone law is important
  - human life is valued
  - breaches are taken seriously (even if little negligence involved)

Johnstone:
- no such thing as enforcement pyramid, if it is taken to mean an orderly progression up a scale of sanctions

    - rarely get to the top level (prosecution) unless there is a serious event
    - then we leap to the top level without going through the rest
- instead, regulatory agencies must tailor sanctions so meaningful for firms
    - integrate prosecution into the whole system
    - must change approach to prosecution, including cases where 'no body'

8.7.3 Anti-terrorism measures

Liberalism and Terrorism

- **Rule of law**, not rule of men
    - society is governed by a set of rules, not by despot
    - legal order adheres to certain rules
    - law is properly promulgated
    - it is clear
    - it is not retrospective
    - not unreasonable
    - of general character
    - doesn't oppress individuals
- Rule of Law – **law and order**
    - law is cornerstone of civilised society
    - central to our way of life and peaceful co-existence in society
- **General principle of equality**
    - liberalism is based on the notion of the equal value of each individual
    - equality before the law (no one is above the law)
    - officials are to act without bias
    - fair hearing for all
    - adversarial system in legal procedures
    - formal equality v substantive equality
    - deontological v teleological
- **Supremacy of parliament**
    - no person has the right to set aside legislation
- **Separation of powers**
    - legislature, executive, judiciary
    - checks and balances to ensure that law is not political
    - but potentially blurred by idea of delegated legislation
        - eg where minister can determine matters on case by case basis
- **Doctrine of responsible government**
    - executive is responsible to legislature, which is directly elected
    - but potentially blurred by bureaucratic or regulatory power

Liberal Paradox

- Liberalism does not advocate complete, unbounded freedom for all
- Mill's harm principle
    - you are free to do whatever you want within your 'circle'
    - but when your circle bumps into someone else's, the state may step in to limit your freedom – Bottomley article
    - ie, rights are limited to ensure we can live together peacefully
- Important role of inter-connected 'liberal system':
    - to protect the state itself
- Traditionally, domestic offences threatening public order or rule-making or rule-enforcing arms of state are treated very seriously
    - idea of treason: often punishable by death penalty
    - misuse of parliamentary position: lengthy jail term

- Traditionally, external threats to the state may be dealt with by military response according to the 'rules of war'
    - in liberal tradition, the military in war-time is not bound to treat the enemy as equal or to uphold their human rights under the domestic legal order
    - army is usually permitted to use maximum force
        - with aim of killing those who threaten the state

Terrorism – UN Definition:
- Declaration on Measures to Eliminate Terrorism
    - criminal acts intended or calculated to provoke a state of terror in the general public or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them

Responses to September 11, 2001 terrorist attack

- Most western states moved quickly to tighten security laws (including Australia)
- Thousands of people (generally Muslim) were detained in the US
    - some remain in detention
- UK: built on its terrorism laws
    - in place since 1970s to deal with IRA
- USA: *USA Patriot Act 2001*
- Canada: *Anti-Terrorism Act 2002*
- Australia's response:
    - October 2001: steps taken to limit financing of terrorism
    - March 2002: legislative package introduced into House of Reps; Bills referred to parliamentary committees
    - June-July 2002: Bills amended in response to committee reports, and all but one passed
    - New Laws
        - *Security Legislation Amendment (Terrorism) Act 2002*
        - *Suppression of Financing of Terrorism Act 2002*
        - *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*
        - *Border Security Legislation Amendment Act 2002*
        - *Telecommunication Interception Legislation Amendment Act 2002*
        - *Australian Security Intelligence Organisation (ASIO) Legislation Amendment*
    - creation of offence of committing a 'terrorist act' as defined
        - action or threat of action
            - to advance a political, religious etc cause
            - to coerce or intimidate a government or to intimidate public or part of it
            - causing serious harm, damage to property, death etc
            - endangerment of a person's life
            - serious threat to public health and safety
            - interruption to an electronic system
        - excludes advocacy, protest, dissent or industrial action not intended to cause serious harm etc
    - power to Attorney General to proscribe organisations for committing offences in relation to terrorism
        - Attorney General is satisfied that UN Security Council has decided to identify a terrorist body
        - criminal sanctions for person or organisation which is involved in a 'terrorist organisation'
            - one directly or indirectly engaged in preparing, planning, assisting a terrorist act
    - power to ASIO to detain and question people with significant limitations on the usual rights of people who are detained for investigation and questioning (NOT passed)

        - originally proposed that children and adults could be detained for rolling 2 day periods, extendable indefinitely
        - detainees not to contact any person
        - people could be detained if they could 'substantially assist the collection of intelligence' important to an investigation into terrorism (ie don't have to be charged)
        - no right to silence to avoid self-incrimination
    - Rejection of ASIO Bill
        - parliamentary committee unanimously found that the Bill 'would undermine key legal rights and erode the civil liberties that make Australia a leading democracy'
        - Recommended:
            - Bill not apply to children, max 7 days detention, detainees to have access to lawyers with security clearance, 3 year sunset clause
    - New ASIO proposal
        - detention to be limited to 7 days
        - detainees to have access to legal advice after 48 hours
            - in presence of ASIO officer, lawyer must be approved and has limited rights to advise and assist
        - warrants must be approved by AG (orig proposal AAT)
        - still applies to those as young as 14
        - if warrant issued, it is an offence not to appear for questioning or not to give available information
- Post-Bali: Government Response
    - would seek to reintroduce some of the powers that were removed from original Bill
    - would seek to reintroduce the power to proscribe organisations (not just follow UN)
    - opposition has said it will oppose

<u>Ramifications of Legislation upon Liberal Tradition</u>

- increased discretionary powers for law enforcement agencies which could lead to illegitimate discrimination against certain groups or could stop legitimate social protest
    - proposed that ASIO get new powers to detain
    - McCulloch says this is a new role for ASIO, and extends beyond role currently played by any law enforcement agency in Australia
- potential loss of individual civil liberties and freedom for 'civil society' – McCulloch
    - ASIO proposals and similar provisions in other countries are based on 'the wholesale abrogation of the presumption of innocence'
    - idea of detaining without charge, without legal advice, without right to silence is 'a fundamental violation of the rule of law'
- loss of freedom in civil society
    - pluralism
        - liberal ideal has it that in society we are free to join interest groups, and these are free to act and seek to influence rule-makers through legitimate channels
        - groups in society, in liberal theory, are bound at act according to their own rules and norms – c/f definition of legal profession
        - some groups see it as their responsibility to defend certain liberties from state encroachment – c/f gun control
    - <u>but when does social protest become 'terrorism'</u>
    - how might regulatory discretion be exercised
        - eg police when policing a demonstration against the arrest of a terrorist suspect
        - McCulloch- the UK definition of terrorism is broad enough to include Greenpeace and anti-globalisation protest
        - McCulloch- 'Terrorism provides a pretext for spying on, harassing and detaining people engaged in doing things that many take for granted as rights available to citizens in a democracy.'
        - McCulloch- the counter-terrorism discourse 'readily confuses a practical expression of democratic politics with 'subversion'

- possibility of 'State Terror'
    - legislation assumes benefits outweigh the risks
    - McCulloch argues 'state terrorism is far more prevalent and significant than that of non-state actors'
        - eg: UK agencies' in the notorious case of the Guilford Four
        - 'After enduring psychological and physical violence (accused) and three others confessed and were convicted of bombings they didn't commit. They spent a total of 60 years in prison before being released.'
- possibility of unintended consequences leading to more violence and less security
    - legislation assumes it will be effective against terrorism
    - McCulloch argues impact will be contrary to assumption
    - could 'inspire terrorism' by turning people away from social activism and peaceful protest to more violent dissent
    - UK/Irish history suggests anti-terrorism laws were a significant reason for shift to violence by nationalists
    - can get a cycle of revenge and counter-attack, leading to an escalating spiral of violence
        - eg, Oklahoma bombing: McVeigh said he was avenging Waco
- Under CT legislation, decision-making is taking place by unelected officials
    - 'the law' as made by parliament could be altered in practice
    - implementing onerous regulations may undermine liberal rights

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