PART II —SCIENTIFIC OBJECTIVITY OF LAW

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2.1 History

There has been a strong association between law and science since the 17th century. Judges, lawyers, and academics have attempted to frame law in the context of an objective, scientific paradigm. They did this in the hope that a quantifiably 'correct' decision could be reached in a given set of circumstances if certain fundamental legal principles are applied consistently and rationally.

Science contributes two themes to law:

1 *Objectivity (unlike politics or morality)*
2 *Neutrality (the notion of a value-free legal system)*

These differ substantially to conventional conceptions of morality and politics.

2.1.1 Traditional model of legal education

In common law countries during the 19th century (1850s onwards), law began to be studied in a "textbook" fashion at universities.

Formalism: emphasises specifically the legal aspects of a problem.

Other parts of Europe (France, Germany, Italy) had their own versions of legal education many centuries earlier. Prevalent was the view that the common law could only be understood after lengthy study; up to this point in England, lawyers practiced along circuits, and needed to be versed in the local customs for many years to know the law of that jurisdiction.

The law was neither clear nor easy to comprehend; judges and lawyers could often employ it to achieve their own ends. The next century saw a systematic codification of the common law, aided by specific legislation introduced by parliament.

2.1.2 Textbook method

The common law was often incoherent and illogical, and to make it appear as a science academics had to convert an obscure and disorganised mass of rules into a systematised and consistent body of law. They needed law to appear more scientific so universities (largely sceptical of law) would teach it.

- Systematic classification was used to make the law appear more coherent

Early teachers selected particular cases which were concise, clear, and dogmatic about the law in that area (but discarded unclear or conflicting cases). They began to systematise the content of law and write textbooks expositing the 'paradigm cases' and drawing together geometric patterns between areas of the law. At this stage, there were still relatively few principles in the law. Textbook writes need to appear more masterful of their subject-matter.

The common law is subsequently reduced in scope in order to expose only the best law. The textbook writers concentrated on general principles which interlinked cases.

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Practitioner's texts differ substantially to textbooks: they show the dissenting/conflicting exceptions and are much more difficult to study from.

Writing texts based on general principles resulted in a simplification of the law. It made the law look coherent, and governed by principles of natural science such that the courtroom was viewed as 'science in action'. This was most important in the acceptance of law as a legitimate academic pursuit.

2.1.3 Casebook method

Instead of principles, Langdon suggests the primary meaning of the common law is to be found in cases. This method of analysis is characterised by its empirical nature, and contends that scientific understanding is obtained by detailed examination of the cases themselves. Consequently, students study law from the original sources.

Criticism:

- As with the textbook method, there is a necessary process of "ordering and exclusion"
- The writer selects relevant facts/cases and excludes others
- This is a subjective process that necessitates a conceptual framework (conception) of the law
- Consequently, these methods are actually lacking in objectivity (despite their claims)
- "Objectivity" may only be attained if all facts/cases were present

It also became necessary to monitor and update textbooks once complete, in order to stay abreast of minor developments.

2.1.4 Legal training

It took 7-10 years to train in an apprenticeship with a senior lawyer. Training proceeded as a series of increasingly independent placements with supervisory practicing barristers.

2.1.5 Characteristics of the common law

- The common law is a tradition based on fixed customs
- There is a tendency towards scientific rationalism
- Its geometry, regularity, and symmetry were emphasised
- Writers had to leave out certain historical elements with undermined law's systemic development
- Writers would almost never criticise courts, judges, and law in general
    - see, eg, *Deek v Perry*: criticised by one scholar, but was subsequently defended vehemently and near-unanimously by the legal community
- Natural law, rights, and morality were excluded from textbooks and case law
    - these aspects were seen as contrary to the two themes of the law: objectivity and neutrality

2.1.6 Black-letter law

- Law can be determined by some common principles
- Legal education and scholarship is all about uncovering these principles
- Having as a centralised focus these principles, the effect upon the legal system was to concentrate power on those identifying and applying these principles
- The ideological hegemony (dominance) of the black-letter legal tradition paved the way for a conservative democracy which became deeply-rooted in England through a fostering of liberal ideals
- It also permitted England to expand beyond its borders, fostering imperial colonialism

The black-letter tradition also embodied a deep respect for freedom and individual rights. Law replaced religion in many area of life.

Development of the law was becoming *passive* – only rules mattered (not their creators or social conditions). Legal scientists strove to construct a more effective system by which to make law. Society developed around the ideals of contract, property, and tort, keeping socialism and anarchy at bay.

In Australia, the predominating approaches are the casebook and textbook methods.

2.2 Economic analysis

There was very little economic analysis prior to 1940, after which the Chicago School (throughout the 1960s) emerged as a prominent figure in the movement. It gained a toe-hold in Australia during the 1980s.

Economics is derived from philosophy (Locke et al), but is now considered scientific (at least in a social sense) and a separate doctrine. It is now one of the most influential schools of the 20th century, and helps to grapple with two fundamental questions:

1 *What effects do legal rules have in society?*
2 *How do economic forces shape and determine the law?*

According to one school of economic analysis, economics has several aspects:

- analysis of commercial activity
- measurement; of
    - production
    - distribution
    - consumption; of
        - goods
        - services

Economics is defined as "the study of the allocation of resources in the face of scarcity." It is concerned with a) how individuals and societies choose to employ finite resources; and b) the most efficient distributive choices (those which maximise the wealth of society as a whole).

Neoclassical economics is similar to Laissez-faire liberalism:

- All individuals are assumed to be formally equal, free, autonomous and responsible economic actors
- Individuals are in the best position to make choices about what is best for them and what is required to satisfy their needs and preferences

2.2.1 Types of economic analysis

1 Positive economics
    - the prediction of future behaviour based on the past
    - employs inductive and deductive reasoning
    - formulates a hypothesis of future events based on the observation and collection of data
    - concerned with "allocative assessment" (the pattern of economic effects from action)
        - engages in a distributive assessment of who is advantaged or disadvantaged by an action *within* a group
2 Normative economics
    - attempts to determine a future state for the world based on an economic theory
    - the most efficient law governing distribution is the one which *ought* to be adopted
        - looks at groups as *wholes* (ie, sectors of the community)
    -
3 Descriptive economics
    - uses economic concepts to describe aspects of the legal system

- legal doctrines are examined through the filter of economics
    - eg, Poster

2.2.2 Assumptions of economic theory

1 *People are rational and respond to incentives*

What is rationality?
- predictability of behaviour
- is all rational thought universal?

Incentives
- law is simple a system for altering incentives (discouraging acts by reducing their appeal; eg speeding fines)
- an ideal market is one which minimises costs and maximises outcome: this is efficiency
- individuals *are* able to choose what is best suited to them and their preferences
    - do individuals *really* know what's best for them?

2 *People are utility maximisers (want to derive the maximum utility)*

Some definitions
- opportunity costs
    - sacrifices that need to be made in order to pursue a given outcome
        - eg, cost of being a student: lost chance of full-time employment during study as well as the costs of education
- transaction cost
    i. includes all the costs relevant to an undertaking
        - eg, time, resources, research

Economists assess the viability of a new law in terms of the relative position of persons in society; to benefit people, the law should improve efficiency by reducing costs and/or increasing benefit.

There are several different models of efficiency:

Parito efficiency
- a policy or rule increases welfare (efficiency) is:
    - there is at least 1 person who *believes* that s/he benefits from the rule
    - no-one else believes that they are worse off
- problems:
    - prevents welfare economists from sacrificing minority interest for majority benefit
    - it is impossible to increase the welfare of 1 individual without reducing that of another (since resources are finite)

Calder-Hicks efficiency
- even if some people are better off, if you *could* (in theory, but not necessary to actually do so) compensate those who are worse off, then the rule is efficient
- after a time, those disadvantaged will become indifferent to the rule, and compensation is unnecessary
- the winners under a new rule are in theory to compensate the losers, but this does not prove necessary in practice

Supply and demand
- as the price of a good or service increases, there is more incentive for suppliers to enter the market
- as the price of a good or service decreases, consumers enter the market

- demand is roughly inversely proportional to price

Substitution effect

- as costs increase, consumers *substitute* products or services to find a cheaper alternative
  - eg, if rice becomes expensive, consumers will utilise pasta as a cheaper food source

3 *There are no differences in preferences between rich and poor people*

4 *Further critiques*
- not everything is a commodity
- lack of moral perspective
- real world doesn't work like the economist model
- too much focus on individual, inattention to human behaviour
- does not address issues of redistribution
- contracting between individuals does not always occur freely
- "disguises important choices and obscures value judgments about how people should be treated" – Johnstone

2.2.3 Applications of economics

Economists can:
- assist lawyers with the technical questions of economic analysis in complex cases
  - eg, damages assessment in torts
- assist legal practitioners to structure the legal system in the most efficient way in order to achieve specific objectives
- re-examine legal problems from an economic perspective and offer alternate explanations
  - eg, economic loss as a result of car accidents: eliminate accidents rather than build more hospitals
- look forward (*ex ante*) rather than backward (*ex post*) like a lawyer does
  - lawyers seek to place liability for accidents, etc, which occurred in the past
  - economists focus on the consequences of legal rules: prevention of future losses (by providing incentives for individuals to reduce harm)

2.2.4 Further principles of economic analysis

Economists claim that the legal system is an economic system.
- both Parliament and the judiciary act under the assumption that people will modify their behaviour to avoid sanctions
- the aim of the state is to minimise enforcement costs due to budgetary constrains
  - discretionary prosecution of criminal cases (<50% chance of success isn't prosecuted)
- the common law rules have survived *because* of their economic efficiency
  - eg, contract
  - is this a pragmatic "Darwinian" form of legal analysis?

Hand Formula

If the cost of preventing an accident is less than the expected cost of the accident, then D is liable for damage. The cost of an accident is modelled as its probability of occurring * the cost of the damage it causes.

Criticisms of the Hand Formula:
- Disregards "human" factor
- Doesn't take into account particular mitigating circumstances

- Not necessarily justiciable, only efficient
- Encourages people to take risks
- Assumes accidents are preventable
- Assumes that a choice facing a potential D is only between not taking precautions and preventing an accident

For an application of the Hand Formula, see ***Wyong Shire Council v Shirt***. The standard of care in tort law is related to the Hand Formula.

Coase Theorem

Where there are no transaction costs, efficiency will prevail independent of whether a legal rule applies as between individual parties. This rests on the notion that rights may be bought and sold.

That is, if X carries out an activity which injures Y:

- Y may pay X not to do it (Y values this activity more than X)
- X may pay Y compensation for doing it (X values the activity more than Y)

The Coase Theorem is used to argue against over-regulation by governments, which adds to transaction costs (eg, mining rights). It is better to let *individuals* negotiate their own efficient outcome rather than go through the state.

However, where power differentials exist, unfair outcomes may results from autonomous negations between individuals (since people are not in equal bargaining positions; eg, individual consumers and corporate manufacturers). The government may wish to intervene to raise revenue through taxation.

Likely topic: "Should there be a market for babies? Explain your answer in economic terms."